

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

***Pro-Competitive Industrial Policy***

June 12, 2024

*Business at OECD* (BIAC) appreciates the opportunity to make this written contribution at the OECD Competition Committee’s roundtable on pro-competitive industrial policy.

## **I. Introduction**

1. The term “industrial policy” is broad, encompassing pro-competitive, non-discriminatory policies as well as those that have the intention or effect of seeking a particular market outcome, often promoting special national interests.

2. BIAC agrees with the position adopted by the OECD Secretariat in the Background Note on Pro-competitive Industrial Policy that “well-designed government programmes or strategies, can be supportive and respectful of competition, or even create or facilitate it. Moreover, competition policy (through advocacy and enforcement) can support industrial policy by ensuring markets are as competitive as possible.”<sup>1</sup> The Background Note does however stress that, in recent years, views on industrial policy and its effects on competition policy have shifted, and there may be instances in which potential negative (intended or unintended) consequences may result.<sup>2</sup> BIAC’s contribution will focus on two principal issues: (a) industrial policies that are discriminatory and distort market dynamics; and (b) possible mechanisms to address the impact of anti-competitive policies.<sup>3</sup>

3. BIAC’s main submission, set out in this paper, emphasizes the need for objectivity and transparency in industrial policies that have the aim or effect of influencing competition dynamics or competition policy, and to preserve legal certainty as a critical rule-of-law element for business confidence and incentives to invest.

## **II. Preliminary Observations**

4. It is often stated that competition policy and industrial policy both seek similar goals, but that they achieve these goals through different means. In BIAC’s view, however, this is not strictly correct as there are national industrial policies that have specific protectionist goals or effects.<sup>4</sup> Laws or policies that are

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<sup>1</sup> OECD, Pro-competitive Industrial Policy – Background Note, DAF/COMP(2024)3, ¶¶ 3, 50 (May 14, 2024), [https://one.oecd.org/document/DAF/COMP\(2024\)3/en/pdf](https://one.oecd.org/document/DAF/COMP(2024)3/en/pdf) [hereinafter OECD Industrial Policy 2024 Background Note].

<sup>2</sup> *Id.* ¶ 4.

<sup>3</sup> Pro-competitive or competitively neutral industrial policies will not be discussed in this contribution.

<sup>4</sup> See OECD Industrial Policy 2024 Background Note, *supra* note 1, ¶ 32.

intended to achieve a particular outcome may ignore allocative efficiency long-run consumer or welfare considerations for different goals.<sup>5</sup>

5. Yet, defining the boundaries of when an industrial policy becomes pro- or anti-competitive can be complex, subjective, and vague.<sup>6</sup> Some key questions in this regard are (1) to what extent competition authorities should be willing to challenge (and have the tools to withstand) industrial policies that have the goal or effect of creating anti-competitive market distortions and (2) whether competition authorities have the appropriate tools to exclude industrial policy elements from their competition assessments. In other words, which has primacy over the other?

6. It is also important to recognize at the outset, that the industrial and competition policy tension is rarely clear cut. After all, the decision to establish a competition policy framework is an industrial policy choice in itself. Accordingly, particular national competition laws will often reflect not only the underlying industrial policy priorities particular to that jurisdiction but also the role of competition law will be influenced by the social, political, and legal traditions of that country.

7. BIAC has previously noted that: “Around the globe competition and merger control laws have never developed in a political vacuum but were introduced to contribute to attaining public interest goals such as a competitive market economy or the promotion of scientific and technological advancement for the benefit of the population.”<sup>7</sup>

8. Competition laws will also reflect the particular stage of a jurisdiction’s economic development. For example, in order to foster an open market economy, emerging economies should prioritize anti-bid-rigging, regulating state-owned enterprises and liberalizing key sectors.<sup>8</sup> As BIAC noted in its December 2017 contribution on competition and democracy, in emerging economies, “the overarching competition policy priority may be socio-economic development itself and support for competition authorities in such countries may depend on how they are seen as contributing to such sustainable development objectives, that are critical conditions for democracy to take hold.”<sup>9</sup>

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<sup>5</sup> In its past submission, BIAC noted, in seeking to repair the consequences of economic crisis, that “governments must be extremely careful about overemphasising short-term considerations, which may lead to well-intended, but ultimately wrong decisions in an effort to protect employment, or other, sometimes ill-defined, public interest considerations.” OECD, Competition Policy, Industrial Policy and National Champions, DAF/COMP/GF(2009)9, at 208 (Oct. 19, 2009), <https://www.oecd.org/daf/competition/44548025.pdf>. See, e.g., Scott Lincicome, *America’s Ports Problem Is Decades in the Making*, CATO INST. (Sept. 22, 2021), <https://www.cato.org/commentary/americas-ports-problem-decades-making> (showing the high U.S. antidumping and countervailing measures (221%) on imports of Chinese truck chassis did not address the underlying issues and therefore exacerbated endemic issues in that value chain) (“we see that much of the current mess in the United States was decades in the making, reflecting systemic labor and trade policies that decrease the efficiency and flexibility that U.S. ports — and the economy reliant on them—enjoy in the best of times and desperately need in the worst”).

<sup>6</sup> Generally, pro-competitive industrial policies are horizontal (non-discriminatory) in nature, that increase the ability of firms to innovate (rather than directing innovation) and protect the rights of innovators, fostering capital investment. Competition policy is an important component of industrial strategies, favoring an efficient allocation of production factors between firms, and thereby contributing to aggregate productivity and structural change. See Chiara Criscuolo, Nicolas Gonne, Kohei Kitazawa & Guy Lalanne, *Are Industrial Policy Instruments Effective? A Review of the Evidence in OECD Countries*, DSTI/CIIE(2022)10/FINAL (OECD Sci., Tech. & Indus. Policy Paper No. 128, May 2022), <https://www.oecd-ilibrary.org/docserver/57b3dae2-en.pdf?expires=1712246823&id=id&accname=guest&checksum=49BCBAF9A648358B569565EC74866B7F>.

<sup>7</sup> See OECD, Public Interest Considerations in Merger Control – Note by BIAC, DAF/COMP/WP3/WD(2016)33, ¶ 2 (June 6, 2016), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2016\)33/En/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2016)33/En/pdf) [hereinafter BIAC Public Interest Considerations Note].

<sup>8</sup> See Hilary Jennings, *Prioritisation in Antitrust Enforcement – a Finger in Many Pies*, 11 COMPETITION L. INT’L 29 (2015).

<sup>9</sup> OECD, Competition and Democracy – Contribution from BIAC, DAF/COMP/GF/WD(2017)1, ¶ 4 (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).

9. For these reasons, BIAC believes that it is important to fall back to basic principles, such as rule of law, objectivity, and transparency as pillars of a functioning competition system that fosters growth, investment, competitiveness and innovation.

### III. Industrial Policy as a Competitive Lever?

10. In times of economic downturn, governments will be tempted to seek to protect their economy or particular sectors in order to wrestle some control back from these uncertainties, through discriminatory or asymmetric policies.<sup>10</sup> Increasing geo-political tensions and repeated exogenous shocks have resulted in governments demanding greater control of their economies. This has led to a move away from globalization and interdependence (open borders, lower trade barriers, mutual recognition etc.) to a world of strategic autonomy and the use of trade and competition tools applied in a geo-political context.

11. Governments may seek to protect and promote certain national players or sectors from international “competition,” supporting local companies in order to boost their international competitive advantages.<sup>11</sup> This has led some jurisdictions to grant their competition authorities the ability to review the anti-competitive effect of foreign subsidies or foreign direct investment to ensure that foreign firms active in these jurisdictions and that have access to foreign subsidies do not distort competition a result of such subsidies.<sup>12</sup>

12. However, the danger is that even “legitimate” industrial policies may clash with policies that have traditionally been recognized as promoting free and fair competition among independent firms and level playing field. In addition, industrial policies aimed at affecting change in market dynamics or structures could involve a certain level of governmental discretion, which in these instances may make such discretion vulnerable rent-seeking by special interests. Even well-meaning domestic economic policies, for example supporting ailing industries, may quickly translate into creating unfair competitive advantages in other countries.<sup>13</sup> This is especially true if, over time, supporting policies become entrenched and industries become reliant on such support merely to be able to compete.

### IV. Competition Policy as an Industrial Policy Lever?

13. BIAC has noted that the international business community recognizes that the market cannot do everything by itself, not only in times of crisis (when governments are called to the rescue in response to systemic failures) but also in “normal” times when business requires infrastructure and innovation requires education.<sup>14</sup> While recognizing that BIAC represents a broad range of views on the topic, BIAC has

<sup>10</sup> Where obligations relating to industrial policy are unnecessarily placed on private sector firms, this may amount, in the view of BIAC, to a shifting of government’s responsibilities onto the private sector. Such an outcome is onerous and capricious and will discourage private sector investment, undermining economic growth and recovery. See OECD, *The Role of Competition Policy in Promoting Economic Recovery – Note by BIAC*, DAF/COMP/WD(2020)88 (Nov. 16, 2017), [https://one.oecd.org/document/DAF/COMP/WD\(2020\)88/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)88/en/pdf) [hereinafter BIAC 2020 Economic Recovery Note]

<sup>11</sup> For a recent example of directed industrial policy may aim to increase the competitive position of companies overseas, see *Commission Staff Working Document on Significant Distortions in the Economy of the People’s Republic of China for the Purposes of Trade Defence Investigations*, SWD(2024) 91 final (Apr. 10, 2024), [https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2024\)91&lang=en%2F](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2024)91&lang=en%2F).

<sup>12</sup> See OECD, *Subsidies, Competition and Trade – Contribution from Business at OECD (BIAC)*, DAF/COMP/GF/WD(2022)65 (Nov. 23, 2022), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2022\)65/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2022)65/en/pdf); OECD, *The Relationship between FDI Screening and Merger Control Reviews – Note by BIAC*, DAF/COMP/WD(2022)115 (Nov. 18, 2022), [https://one.oecd.org/document/DAF/COMP/WD\(2022\)115/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2022)115/en/pdf); and BIAC Public Interest Considerations Note, *supra* note 7.

<sup>13</sup> Patricia Wruuck, *Industrial Policy Puts Global Cooperation at Risk*, YALE GLOBAL ONLINE (Nov. 14, 2008), <https://archive.yaleglobal.yale.edu/content/industrial-policy-puts-global-cooperation-risk>.

<sup>14</sup> See OECD, *Competition Policy, Industrial Policy and National Champions – Note by BIAC*, DAF/COMP/GF(2009)9, at 209-211 (Oct. 19, 2009), <https://www.oecd.org/daf/competition/44548025.pdf>.

previously stated that, as a general rule, non-competition issues should remain outside the scope of competition enforcement.<sup>15</sup> The challenge is how to recognize when industrial policies have an anticompetitive impact and how to apply effective and proportionate mechanisms that avoid (or minimize) the negative impact of such policies. BIAC has previously submitted that special laws and regulators are best placed to address specific concerns (e.g., employment protection, environmental protection, or foreign direct investment screening) rather than competition policy itself.<sup>16</sup>

14. Competition policy serves as a vital lever within the broader framework of industrial policy. By ensuring fair competition and preventing monopolistic practices, competition policy creates a conducive environment for fostering innovation, efficiency, and market dynamism. This, in turn, bolsters the competitiveness of industries by incentivizing companies to continuously improve their products and services. Additionally, competition policy complements industrial policy initiatives by encouraging investment, entrepreneurship, and the entry of new players into the market, thus promoting diversity and resilience within key sectors. By leveraging competition policy as an integral component of industrial policy, countries can effectively nurture a vibrant and competitive business landscape, driving sustainable economic growth and prosperity.

15. Governments may wish to see competition authorities being sensitive to political or industrial policy priorities (especially during a crisis). The danger is that authorities who are not “responsive” enough will find governments interfering more directly in their activities.<sup>17</sup> A current example of political interest in a foreign acquisition is U.S. President Biden’s position in relation to the proposed acquisition of U.S. Steel by Nippon Steel to protect U.S. jobs and ensure domestic ownership.<sup>18</sup> These situations may place competition authorities under pressure to open improperly targeted investigations or secure a predetermined outcome, driven by non-competition consideration (or exercise its discretion consistently with the industrial policy), otherwise an authority risks being criticized for ignoring political priorities. This often results in political efforts to undermine an authority’s independence.

16. Competition authorities are likely to be increasingly asked by governments to factor industrial policy considerations in their enforcement agendas and assessments including during “traditional” competition regulation, not merely as part of market dynamics. This puts into question the very essence of objective competition policy.

17. Competition authorities, therefore, need to develop mechanisms to minimize the likelihood (or perception) that they are pursuing pre-determined outcomes (“picking winners”) or applying the rules in a discriminatory manner. Authorities should clearly explain the benefits of objective review and the dangers of promoting special interests in an ad hoc or discriminatory manner. In addition, authorities should consider clearly setting out their prioritization principles, and engaging in a transparent process as to how these principles will be applied. This is particularly important where new tools (for example, the ability to impose remedies after a market study to increase that sector’s competitiveness) may place the authority in

<sup>15</sup> See e.g., BIAC 2020 Economic Recovery Note, *supra* note 10. A minority of BIAC members believe that industrial policy should be included in the objectives of competition policy to ensure, for example, the competitiveness of firms, encourage investment strategies, innovation, and SME growth.

<sup>16</sup> OECD, Competition Enforcement and Regulatory Alternatives – Note by BIAC, DAF/COMP/WP2/WD(2021)18 (June 7, 2021), [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2021\)18/En/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2021)18/En/pdf).

<sup>17</sup> See e.g., Frédéric Jenny, Damien Neven, Jacques Buhart, David Henry, Thomas Funke, Mathew Heim, Catarina Midões, Nicholas Levy, David R. Little, Henry Mostyn, Ioannis Lianos, Massimo Motta, Martin Peitz, Cristoforo Osti, Almos Papp, Christian Wik, Kristian Hugmark, Julia Vahvaselkä, Antoine Winckler & Thierry Boillot, *Which Competition and Industrial Policies For the New EU Commission After Siemens/Alstom?*, May 2019, Concurrences N° 2-2019, Art. N° 89966, <https://www.concurrences.com/en/review/issues/no-2-2019/dossier/which-industrial-policies-for-the-new-eu-commission-en>.

<sup>18</sup> See Statement from President Biden on US Steel, THE WHITE HOUSE (Mar. 14, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/14/statement-from-president-biden-on-us-steel/>. See also OECD Industrial Policy 2024 Background Note, *supra* note 1, ¶ 56.

the invidious position of straying into industrial policy that would more naturally sit with governments. As with the Covid pandemic,<sup>19</sup> the OECD Competition Committee can have a critical role in assisting authorities to balance these competing tensions and express, as a community, where the boundaries should be, which will in turn support authorities in discussions with their governments.

18. Where public interest considerations need to be addressed in the context of case selection or competitive assessment, these should be provided by law and be set out clearly, with appropriate processes for their assessment and be reviewable by the judiciary. Both Professors First and Fox have commented that the “pervasive presence” of public interest considerations requires “norms of transparency and proportionality” in their consideration.<sup>20</sup> This calls for increased competitive neutrality advocacy by authorities, covered in section VII below.<sup>21</sup>

## V. Case Study: The Recent Industrial Policy Adopted by the South African Department of Trade, Industry and Competition

19. South Africa is considered the most robust and experienced competition enforcement agency in Africa. It is also a jurisdiction where industrial policy considerations are not merely informing competition decisions, but there is evidence that industrial policy may be the main driver. It is a helpful case to explore the boundaries and impact of competition law and industrial policy.

20. The South African Competition Act 89 of 1998 (the Competition Act) remained largely unchanged until the amendments adopted in 2018. Prior to those amendments, South African competition policy followed traditional competition law factors, tended to promote consumer welfare standards, promoting efficiency and competition between businesses, for the ultimate benefit of consumers and societal goals. The 2018 amendments, however, were based largely on South Africa’s industrial policy and developmental goals led by the Department of Trade, Industry and Competition (DTIC). While the Competition Act has always incorporated elements of industrial policy through public interest factors, the 2018 Amendments were a clear signal that public interest or industrial policy objectives are to be weighted equally by the authority, at times above the traditional competition assessment.

21. Merger control review in South Africa has always included a two-stage assessment (whether a merger can be justified on traditional competition factors and importantly on defined public interest factors).<sup>22</sup> The amendments not only expanded the scope upon which public interest conditions can be imposed but also public interest factors themselves, including:

- a. a particular industrial sector or region;
- b. the effect on employment;
- c. the effect on the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;
- d. the effect on the ability of national industries to compete in international markets; and
- e. the effect on the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in the market.

<sup>19</sup> See e.g., OECD, OECD Competition Policy Responses to COVID-19 (Apr. 27, 2020) [https://read.oecd-ilibrary.org/view/?ref=130\\_130807-eqxnnyo7u&title=OECD-competition-policy-responses-to-COVID-19](https://read.oecd-ilibrary.org/view/?ref=130_130807-eqxnnyo7u&title=OECD-competition-policy-responses-to-COVID-19).

<sup>20</sup> Harry First & Eleanor Fox, *Philadelphia National Bank, Globalization, and the Public Interest*, 80 ANTITRUST L. J. 307, 351 (2015).

<sup>21</sup> See OECD Industrial Policy 2024 Background Note, *supra* note 1, ¶ 82.

<sup>22</sup> See *id.* ¶¶ 93, 92 n.46.



22. In pursuing the mandate set out by the DTIC, the Commission has maintained a focus on the promotion of ownership of historically disadvantaged South Africans and placed a positive obligation on firms to divest a controlling interest in the merging parties' business to historically disadvantaged shareholders and the creation of so-called employee share ownership schemes for employees of the merging parties.<sup>23</sup>

23. South African public interest goals have demonstrated the increasing influence of respective Ministers and the DTIC. The DTIC has become directly involved in merger review and introduced new forms of intervention, new theories of harm, as well as the acceptance of non-merger specific commitments.<sup>24</sup> As a result, merging parties have elected to engage the Minister of the DTIC directly, rather than the competition authority, in order to obtain merger approval (requiring significant non-merger specific, public interest-related commitments).<sup>25</sup>

24. In addition, the 2018 Amendments introduced a new test for price discrimination by a dominant firm which "impedes the ability of small or medium businesses or businesses controlled by historically disadvantaged persons, to participate effectively in the market." While the amendments did not replace the traditional "substantial lessening or prevention of competition" test for price discrimination, it introduced a novel, standalone test designed to protect a particular group of competitors, rather than traditional competition factors which aim to protect consumer welfare more generally.<sup>26</sup>

25. The DTIC has been explicit in its objectives to utilize "competition policy" to address industrial policy priorities:

South Africa's competition regime blends traditional competition concerns with developmental outcomes appropriate for South Africa. Our competition policy aims to address [] high levels of economic concentration and promote effective competition that supports industrialization, builds dynamic firms, protects and creates jobs and promotes economic inclusion and transformation.<sup>27</sup>

26. South African enforcement provides an example of how a government's industrial policy may affect prioritization in elevating non-competition factors to the forefront. This has resulted in the concomitant impact of disincentivizing investment<sup>28</sup> and the ability of agencies to remain independent from

<sup>23</sup> See John Oxenham, Andreas Stargard & Michael-James Currie, *Developments in South African Merger Control – Ministerial Interventionism and the Impact on Timing and Certainty* (Mar. 2016), <https://africanantitrust.com/wp-content/uploads/2016/04/aba-final-merger-control-south-africa-mc-edits-18-04-2016.pdf>. The Commission has finalised guidelines outlining how it intends to approach issues of public interest in merger control (Guidelines). It is noteworthy that the Guidelines place a positive obligation on merging parties (international and local) to address the public interest factors contained in the Amendments. See also Government Notice No. 4544, Revised Public Interest Guidelines Relating to Merger Control, Gov't Gazette No. 50323 of 20 March 2024, [https://www.greengazette.co.za/notices/in-terms-of-section-79-1-of-the-competition-act-no-89-of-1998-as-amended-the-act-revised-public-interest-guidelines-relating-to-merger-control\\_20240320-GGN-50323-04544](https://www.greengazette.co.za/notices/in-terms-of-section-79-1-of-the-competition-act-no-89-of-1998-as-amended-the-act-revised-public-interest-guidelines-relating-to-merger-control_20240320-GGN-50323-04544).

<sup>24</sup> John Oxenham & Patrick Smith, What is competition good for – weighing the wider benefits of competition and the costs of pursuing non-competition objectives, at 14, <https://www.compcom.co.za/wp-content/uploads/2014/09/140822-What-is-competition-good-for-FINAL.pdf>.

<sup>25</sup> See, e.g., Anheuser-Busch InBev SA/NV and SABMiller PLC; SOIHL Hong Kong Holding Chevron South Africa Proprietary Limited; K2017235138/Old Mutual plc; Glencore South Africa Oil Investments (Pty) Ltd/Chevron South Africa (Pty) Ltd to create Astron Energy (Pty) Ltd; and Sibanye Gold Limited t/a Sibanye Stillwater / Lonmin Plc.

<sup>26</sup> See Michael-James Currie, *South Africa's Amended Price Discrimination Provision: An Analytical Framework in Relation to the Grocery Retail Market*, Dissertation submitted for the degree of Master of Arts in Economics for Competition Law (2020), [https://www.primerio.international/wp-content/uploads/2024/04/Currie\\_Masters-Dissertation\\_Kings-College\\_2020.pdf](https://www.primerio.international/wp-content/uploads/2024/04/Currie_Masters-Dissertation_Kings-College_2020.pdf).

<sup>27</sup> See DTIC, Competition Policy for Jobs and Industrial Development, at ¶ 1 (May 19, 2021), [https://www.thedtic.gov.za/wp-content/uploads/20210519\\_Competition\\_policy.pdf](https://www.thedtic.gov.za/wp-content/uploads/20210519_Competition_policy.pdf).

<sup>28</sup> See e.g., *AB InBev Strikes South Africa Jobs Deal That Eases Way for Tie-Up*, FIN. TIMES, <https://www.ft.com/content/f4148936-0261-11e6-99cb-83242733f755>.

government, resulting in corporate parties seeking redress outside of the respective agencies<sup>29</sup>, influencing, in some instances, accepted due process norms.<sup>30</sup>

## VI. Essential Elements of Competition Policy to be Protected

27. The trends described above affect the private sector incentives to invest, to enter new markets and compete on the merits, which in turn denies consumers the benefits of such competition. Uncertainty and lack of clarity on the primary elements that drive competition authorities' decision-making (or government intervention) undermines legal certainty and therefore distorts incentives to invest or innovate.<sup>31</sup> From BIAC's perspective, it is a priority to maintain evidence-based, objective tests, framed by the rule of law and which are transparent and certain.

28. Essential elements of the competition system that should be protected. These systems should be:

- a. evidence based, ensuring that decisions are based on real-world data and cognizable elements;
- b. rule of law based, ensuring legal certainty and consistency with jurisprudence through independent review by the courts;
- c. reliant on objective tests, that enable authorities and parties to clearly prove (or disprove) allegations on the basis of both inculpatory and exculpatory evidence; and
- d. promoting transparency and certainty, enabling businesses to understand the scope of the law, with understandable criteria against which to measure conduct and therefore have legal certainty in making business decisions.

29. As noted above, BIAC is also mindful that policy makers may look to the competition law system to provide solutions to broader societal or industrial policy concerns beyond the promotion of competition and enhancing consumer welfare, to include for example the promoting employment, consumer protection or sustainability goals.<sup>32</sup> While protectionism is roundly rejected as an effective industrial policy tool<sup>33</sup> (even if protectionism may appear popular in the short term), yet the skepticism about unrestrained market access raises concerns of promotion of foreign champions, negatively affecting economic resilience and exacerbated inequalities. The question is, pragmatically, not how to exclude industrial policy factors from competition policy, but rather what mechanisms to build out to ensure that such factors are appropriately

<sup>29</sup> See Willem Boshoff, *Support Competition, Support the Consumer*, BUSINESS DAY (Mar. 15, 2023), <https://www.businesslive.co.za/bd/opinion/2023-03-15-willem-boshoff-support-competition-support-the-consumer/> (“For example, the concessions extracted from eager merging parties under the guise of ‘public interest’ often bear little relation to the particular market or to the consumers buying in that market.”).

<sup>30</sup> See ELEANOR M. FOX & MOR BAKHOUM, *MAKING MARKETS WORK FOR AFRICA: MARKETS, DEVELOPMENT, AND COMPETITION LAW IN SUB-SAHARAN AFRICA* (2019).

<sup>31</sup> See Eleanor M. Fox, *South Africa, Competition Law and Equality: Restoring Equity by Antitrust in a Land where Markets were Brutally Skewed*, CPI ANTITRUST CHRON. (Dec. 2019) at 11, <https://www.competitionpolicyinternational.com/wp-content/uploads/2019/12/CPI-Fox.pdf>.

<sup>32</sup> See, e.g., Case AT.40156, Czech Rail, <https://competition-cases.ec.europa.eu/cases/AT.40156> (predatory pricing investigation of the Czech state-owned rail incumbent, České dráhy). On October 30, 2020, the Commission issued a Statement of Objections setting out its preliminary concerns, noting “To deliver on the project of the European Green Deal, emphasis is placed on projects increasing the efficiency of the transport system, strongly prioritising the rail transport and improvement of the railway networks. This cannot be achieved without the existence of effective competition.” Press Release, Eur. Comm’n, Antitrust: The Commission Sends Statement of Objections to České dráhy For Alleged Predatory Pricing (Oct. 30, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2017](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2017). On September 29, 2022, the Commission closed the investigation without any finding, stating that “the evidence did not confirm the Commission’s initial concerns.” *Daily News 30 / 09 / 2022*, EUR. COMM’N, [https://ec.europa.eu/commission/presscorner/detail/en/mex\\_22\\_5911](https://ec.europa.eu/commission/presscorner/detail/en/mex_22_5911).

<sup>33</sup> See Chiara Criscuolo, Nicolas Gonne, Kohei Kitazawa & Guy Lalanne, *Are Industrial Policy Instruments Effective? A Review of the Evidence in OECD Countries*, DSTI/CIEE(2022)10/FINAL (OECD Sci., Tech. & Indus. Policy Paper No. 128, May 2022), <https://www.oecd-ilibrary.org/docserver/57b3dae2-en.pdf?expires=1712246823&id=id&accname=guest&checksum=49BCBAF9A648358B569565EC74866B7E>.

and transparently taken into account, whether by an authority or government. In other words, how to correctly assess what competition on the merits is, in the context of sector regulation and other industrial policies affecting competitive dynamics.

30. BIAC previously noted that authorities should refrain from interventions that seek to redesign market, as this pulls competition authorities into the sphere of regulation, often in sectors prioritized by government which places authorities in a position where they may be expected to address political priorities (or be criticized for ignoring them).<sup>34</sup> This is a growing challenge, notably when authorities may be exercising new sector inquiry powers that enabling them to impose remedies addressing “structural” problems, without any finding of infringement. BIAC noted in its 2023 contribution to the OECD roundtable on the optimal design, organisation and powers of competition authorities that the unbounded exercise of these new powers “may place the authority in the invidious position of straying into industrial policy that would more naturally sit with governments.”<sup>35</sup> As governments expect competition authorities to be responsive to political or industrial policy priorities, it will be increasingly important for authorities to develop mechanisms to minimize the likelihood or perception that authorities are involved in “picking winners” or pursuing pre-determined outcomes. To address this, BIAC already recommended that authorities clearly set out their prioritization principles and engaging in a transparent process on how these principles will be applied, in order to limit the impact of political influence and provide greater certainty to **targeted sectors**.<sup>36</sup>

31. To minimize pressure on competition authorities’ freedom of action independence from vested interests should be ensured but, importantly, combined with internal checks, and balances (such as peer review panels, for example) can help to weed out inappropriate elements from decision-making, thereby increasing the predictability and credibility of the competition system.<sup>37</sup> In that context, authorities should continually strive to ensure that their decision-making processes are transparent, so that users of the system have a high level of certainty as to how competition policy proceedings may affect them. This could include the use of soft-law instruments that set out decision making and prioritization, guidance to commercial actors, as well as consultations and dialogue.

## VII. Competition Neutrality and Institutional Independence

32. The OECD’s *Recommendation of the Council on Competitive Neutrality* is a potentially powerful tool in competition authorities’ arsenal to address inappropriate industrial policy distortions of competition assessments.<sup>38</sup> Competition authorities should play an important role in the consultative process within their governments when considering new regulatory policies and initiatives directed towards meeting the

<sup>34</sup> See OECD, Using Market Studies to tackle Emerging Competition Issues – Contribution from BIAC, DAF/COMP/GF/WD(2020)53, ¶ 36 (Nov. 26, 2020), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)53/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)53/en/pdf).

<sup>35</sup> See OECD, Optimal Design, Organisation and Powers of Competition Authorities – Note by BIAC, DAF/COMP/WP3/WD(2023)47, ¶ 12 (Nov. 27, 2023), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2023\)47/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)47/en/pdf) [hereinafter BIAC 2023 Optimal Design Note].

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* ¶ 6 (“To the extent that non-competition factors are going to be considered as part of a competitive assessment, there should be clear legislative guidance on how these factors will weighed, particularly where there might be inherent tensions between competition and non- competition factors, or indeed tension between different non-competition factors.”).

<sup>38</sup> OECD, Recommendation of the Council on Competitive Neutrality, OECD/LEGAL/0462 (May 30, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462>.



challenges in these exceptional times,<sup>39</sup> and authorities should engage in rigorous, even challenging,<sup>40</sup> discussions to ensure that new regulatory initiatives are consistent with competition policy. In particular, as noted by the OECD Secretariat in 2018, “Competition authorities will want to act within their capacity as an advocate for competitive markets to promote the use of horizontal policies within a government’s industrial policy . . . playing a formal role within the types of ‘productivity commission’, that are sometimes given the objective of driving efficiency and productivity across the economy.”<sup>41</sup> More than that, “[A]gencies need to be proactive and constructive in identifying alternative non-distortionary solutions when providing critical opinions on more distortionary policies that are sometimes proposed.”<sup>42</sup> This is particularly relevant as distortive regulation can interfere with the ability of authorities to exercise their function.<sup>43</sup>

33. In 2023, BIAC recommended that authorities consider the following advocacy aimed at government:<sup>44</sup>

- Placing competitive neutrality at the core of authorities’ policies and becoming role-models in the application of the OECD *Competitive Neutrality Recommendation*, as the incentives for government to intervene in markets continues to grow.
- Robustly promote competitive neutrality within governments to underpin core competition principles and minimize governments’ inclination to engage in discriminatory or distortive policies. This could include undertaking competitive-neutrality assessment in the authority’s annual report; publishing a scoreboard objectively assessing government interventions; flag breaches of competitive-neutrality norms to governments.
- In addition, the OECD could serve a useful role in setting out best-practice implementation guidance for member authorities and scoreboards. Authorities can share their experiences in the implementation and best practices for collective benefit.

34. Competition authorities that respond to pressure from government risk affecting legal certainty in the application of competition law.<sup>45</sup> Cooperation between authorities is founded on the principle of mutual

<sup>39</sup> See Angel Gurría, OECD Secretary-General, OECD Competition Committee: Competition Policy in the Time of COVID-19, Address Before the OECD Competition Committee (June 15, 2020), <https://web.archive.oecd.org/2020-06-15/556117-competition-policy-in-time-of-covid-19-june-2020.htm>.

<sup>40</sup> For example, the UK Competition and Markets Authority’s Annual Plan 2018/19 expressly noted the CMA’s ambition “to be seen as a trusted and challenging competition and consumer protection adviser to the UK and devolved governments.” COMPETITION & MKTS. AUTH., COMPETITION AND MARKETS AUTHORITY ANNUAL PLAN 2018/19 PRESENTED TO PARLIAMENT PURSUANT TO PARAGRAPH 13(2) OF SCHEDULE 4 TO THE ENTERPRISE AND REGULATORY REFORM ACT 2013 ¶ 4.27 (Mar. 2018), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/903618/Annual\\_Plan-201819\\_Redacted\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903618/Annual_Plan-201819_Redacted_.pdf) (emphasis added).

<sup>41</sup> OECD, Latin American and Caribbean Competition Forum – Session III: Industrial Policy and the Promotion of Domestic Industry – Background Note DAF/COMP/LACF(2018)5, ¶ 29 (Aug. 22, 2018), [https://one.oecd.org/document/DAF/COMP/LACF\(2018\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2018)5/en/pdf).

<sup>42</sup> OECD, Summary Record Latin American and Caribbean Competition Forum – Note by the Secretariat, DAF/COMP/LACF/M(2018)1, at ¶ 24 (Nov. 23 2018), [https://one.oecd.org/document/DAF/COMP/LACF/M\(2018\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF/M(2018)1/en/pdf).

<sup>43</sup> See Int’l Competition Network, Lessons to Be Learnt from the Experience of Young Competition Agencies: An update to the 2006 report (2019), [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC\\_YoungerAgenciesReport2019.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC_YoungerAgenciesReport2019.pdf) (found that 70% of responding authorities reported experiencing challenges due to legislation that prevented them from addressing some forms of anticompetitive conducts which negatively-affected competition in their domestic markets and abroad). See also William Kovacic, *Policies and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687, 704 (2014) (“Partisanship can degrade the brand of the antitrust agencies, reduce their influence abroad, and discourage longer term investments that strengthen agency performance. Though difficult to quantify, these constitute a potentially serious, unnecessary drag on agency effectiveness.”).

<sup>44</sup> See OECD, Optimal Design, Organisation and Powers of Competition Authorities – Note by BIAC, DAF/COMP/WP3/WD(2023)47 (Nov. 27, 2023), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2023\)47/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)47/en/pdf).

<sup>45</sup> See Kovacic, *supra* note 43, at 704.

trust,<sup>46</sup> based on the respect for each other's legal systems, and is particularly reliant on the development of mutual trust on the basis of minimum conditions in competition law. But if those minimum conditions are not met, for example where decisions are taken based on discretionary industrial policy considerations, such trust is eroded. Authorities should actively work together to ensure that such minimum conditions exist, and divergence is minimized.

35. Competition and industrial policies should be balanced in order to ensure both are utilized efficiently to complement each other and avoiding any negative unintended consequences. Competition authorities need to be part of that balancing exercise and have the competence to defend their independence and mandate, ensuring that industrial policy is guided by principles which support competitive and efficient markets<sup>47</sup> further that the industrial policies facilitate transparency, certainty and accountability. Support from agreed international norms and organizations is critical.

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<sup>46</sup> See OECD, Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings, OECD/LEGAL/0408 (Sept. 15, 2014), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408> (“RECOGNISING that co-operation based on mutual trust and good faith between Adherents plays a significant role in ensuring effective and efficient enforcement against anticompetitive practices and mergers with anticompetitive effects.”).

<sup>47</sup> See OECD Industrial Policy 2024 Background Note, *supra* note 1, ¶ 127.