



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

Corporate Influence in Competition Policymaking

June 20, 2025

I. Introduction

1. *Business at OECD* (BIAC) appreciates the opportunity to provide its views to the OECD Competition Committee for the discussion on Corporate Influence in Competition Policymaking.¹ Our contribution focuses on the following main elements.

- The right to petition and freely express one's views to government is a protected fundamental right in leading jurisdictions. The free exercise of this right is especially important in the context of competition policy given the potential impact of market regulation on the rights and interests of market players.
- Corporate engagement improves competition policy decision-making, as decision-makers benefit from hearing different market actors' perspectives before the decision-makers engage in the objective assessment of the different inputs from all contributors, corporate and otherwise, in pursuit of the public interest. Competition policy consultation processes recognize the value of these elements, giving due weight to various interests, and are bounded by rules to ensure procedural fairness and soundness of decision-making.
- The scope of the Competition Committee's discussion on corporate influence is unclear. For example, it is unclear whether the issue is the nature of the corporation, the nature of the advocacy, or the nature of its impact. Corporations represent a broad range of often differing commercial interests, from small players to state-controlled enterprises, from upstream to downstream, and from industrial to consumer-facing market players.
- A discussion on the nature of influence in competition policymaking cannot credibly be limited to the advocacy efforts of corporate actors and certainly not a subset of corporate entities. Nor should the Competition Committee's discussion on this topic exclude consideration of the advocacy activities of other interest groups, government departments and, where relevant, even other competition authorities, especially where these groups have an impact on policy decision-making. Consideration of useful input should not be biased based on the source of the input. What matters is the substance of the input and how it is evaluated by policymakers.
- The Competition Committee's discussion focuses on the term "influence." *Business at OECD* assumes that, for the purposes of this debate, the discussion excludes illegal activities, e.g., acts of bribery or corruption that are proscribed by law. *Business at OECD* notes that this discussion lacks an agreed definition of what constitutes inappropriate influence² and that the Secretariat note acknowledges that "the boundary between legitimate engagement and undue influence is often inherently blurred, contested

¹ It is *Business at OECD's* understanding that the discussion will focus on policymaking and excludes enforcement actions, which is reflected in our contribution.

² OECD, Corporate Influence in Competition Policymaking – Note by the Secretariat, DAF/COMP(2025), ¶ 14 (May 7, 2025), [https://one.oecd.org/document/DAF/COMP\(2025\)4/en/pdf](https://one.oecd.org/document/DAF/COMP(2025)4/en/pdf) [hereinafter Corporate Influence Secretariat Note].

and contextual.”³ Wherever that fuzzy line may be drawn, the risk alone should not allow unbounded, amorphous concerns to corporate interests from being heard or to exclude them from policymaking discussions that affect their interests.

2. *Business at OECD*’s contribution sets out points of principle before making a series of recommendations to ensure that authorities’ consultation processes remain transparent, accessible, and meaningful.

II. Petitioning Government is a Protected Fundamental Right

3. In its previous contributions to the OECD Competition Committee, *Business at OECD* has stressed that the broad participation of interested parties in competition policy discussions is a hallmark of the democratic process. It is a reflection of the right to freedom of expression, political speech, and the right to petition government.⁴ In the United States, for example, this right has been enshrined in the *Noerr-Pennington* doctrine,⁵ which specifically provides immunity to businesses from antitrust law liability even for joint conduct if they seek to influence governmental action, whether through the executive, judicial, or the legislative branches of government. This doctrine was developed to ensure that the U.S. Constitution’s First Amendment rights of freedom of speech are protected. This constitutional right is also recognized in other countries, for example, Article 17 of the Basic Law for the Federal Republic of Germany guarantees the right of petition to the “competent authorities and to the legislature.”⁶

4. These rights are also reflected in both the European Convention of Human Rights,⁷ binding on forty-six European governments, and the EU Charter of Fundamental Rights,⁸ which binds the EU member states and EU institutions when applying European law, including competition law. In fact, these EU rights are recognized in context of the “Transparency Register”⁹ of the European Union institutions (that includes the European Commission), which lists out organizations that seek to influence the lawmaking and policy implementation process of the EU institutions, and is accompanied by a code of conduct.¹⁰ It is notable that excluded from its scope of the Register are meetings in the context of provisioning of legal and other professional advice to help clients comply with the law; meetings organized for the purposes of making submissions as a party or a third party in the context of a legal or administrative procedure (where meetings “consists of representing clients and safeguarding their fundamental or procedural rights, such as the right to be heard, the right to a fair trial, and the right of defence in administrative proceedings, and includes

³ *Id.* ¶ 22.

⁴ OECD, The Interaction between Competition and Democracy – Note by BIAC, DAF/COMP/WD(2024)94, ¶¶ 14-15 (Nov. 13, 2024), [https://one.oecd.org/document/DAF/COMP/WD\(2024\)94/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2024)94/en/pdf) [hereinafter BIAC Note on Competition and Democracy].

⁵ 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 Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).

⁶ Basic Law for the Federal Republic of Germany, BGBI III at 100-1, last amended by Art. 1 of the Act of 22 March 2025, BGBI. 2025 I Nr. 94, available in English at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (Article 17 [Right of petition] states, “Every person shall have the right individually or jointly with others to address written requests or complaints to competent authorities and to the legislature.”).

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, available at https://www.echr.coe.int/documents/convention_eng.pdf.

⁸ The EU Charter of Fundamental Rights also expressly recognizes, under Article 16, the freedom to conduct a business. Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

⁹ Transparency Register, EUR. COMM’N, https://commission.europa.eu/about/service-standards-and-principles/transparency/transparency-register_en.

¹⁰ Legal References and Data Protection – Code of Conduct, EUR. UNION, https://transparency-register.europa.eu/legal-references-and-data-protection_en#code-of-conduct.

activities carried out by lawyers or by any other professionals involved in representing clients and safeguarding their fundamental or procedural rights”); or submissions in response to direct and specific requests for information from, inter alia, the European Commission.¹¹

5. It is essential to the democratic process that all interested parties be allowed to engage with competition authorities when authorities are exercising their policymaking powers, advising government on competition laws, or indeed when exercising their enforcement policies. Limiting the ability of a particular (undefined) class of entities from participation in or dialogue with competition policy formulation contradicts democratic principles. *Business at OECD* would argue that respect for these fundamental principles is particularly important, given that intervention or enforcement action flowing from competition policy choices may result in significant penalties, civil liabilities (and criminal liabilities in particular jurisdictions), as well as reputational harm.

III. Benefits of Corporate Engagement in Competition Policy Decision Making

6. The constitutional rights set out above are also important for governments to make informed policy choices. Robust and balanced policy is best developed on the basis of a broad and inclusive spectrum of perspectives, information, and data. Broad input to competition policymaking – including by business – should be both welcomed and encouraged. Such input promotes the marketplace of ideas and is critical for ensuring sound and well-informed decisions. This applies equally to all stakeholders in the ecosystem, whether corporates, consumer representative bodies, NGOs, academic experts, economic consultancies, and so on.

7. This approach is notably reflected by the process designed by the OECD at its very founding, which ensures that its working committees can avail themselves of expert input from various perspectives, including organizations representing trade unions, consumers, and business. Such input informs and enriches OECD discussions and allows for better decision making.¹²

8. The essence of competition law and policy requires business to provide their perspectives in order to properly inform policymakers of market dynamics and whether particular conduct fosters competition or not. This is rightly acknowledged by the OECD Secretariat which notes:

Corporations are a prominent actor in the [competition] policymaking ecosystem, with a significant and legitimate interest in the direction of public policy. Their contribution to the policymaking

¹¹ Commission Decision (EU) 2024/3081 of 4 December 2024 on Transparency Measures Concerning Meetings Held Between Members of the Commission and Interest Representatives, and Repealing Decision 2014/839/EU, Euratom, 2024 O.J. (L 2024/3081) 1, art. 3, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202403081; and Commission Decision (EU) 2024/3082 of 4 December 2024 on Transparency Measures Concerning Meetings Held Between Commission Staff Holding Management Functions and Interest Representatives, and Repealing Decision 2014/838/EU, Euratom, 2024 O.J. (L 2024/3082), art. 3, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202403082.

¹² See BIAC Note on Competition and Democracy, *supra* note 4, ¶ 15. See also *How We Work*, OECD, <https://www.oecd.org/en/about/how-we-work.html>

As a forum and knowledge hub focused on designing better policies to improve lives, we convene countries and a range of partners from around the world to explore innovative ideas and best practices across the entire policy spectrum. Through its substantive committees and their subsidiary bodies, policy makers and policy shapers share insights and inspiration, tackling tough issues like inequality, youth unemployment, the gender gap, migrant integration, or ageing in poverty, to ensure that successes and challenges in one place can help inform and benefit others.

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.

process is important, offering valuable insights and expertise that help policymakers design better-informed policies.¹³

....

At the same time, corporations have a legitimate role in the shaping of policy that affects their interests and are also likely to hold key information on market realities that is invaluable to competition authorities and policymakers.¹⁴

It is to be expected that corporates should seek to inform competition policymaking to ensure that policies have real-world relevance and that corporates' interests are appropriately taken into account by the policymaker.

9. The value of corporate input is clearly recognized in competition authorities' consultation and engagement mechanisms. These mechanisms include significant information-gathering powers and information requests, some under sanction for non-cooperation, that authorities can use in their policy- and decision-making functions.

10. Competition authorities should seek out a plurality of views in order to assess and evaluate market realities. A notable example comes from the International Competition Network's (ICN) 2016 *Guiding Principles for Market Studies*.¹⁵ These note that in planning stakeholder engagement, authorities should "bear in mind that stakeholders have their own motivations and perspectives. To preserve the objectivity of a study, it is useful for authorities to guard against becoming too closely identified with any one or more stakeholders and their views."¹⁶ The ICN recognizes that the term "stakeholders" is far broader than corporate interests and extends to consumers representatives, trade unions, government departments, regulators and other public bodies, academia and the media, and "[o]ther parties that may have an interest in the market."¹⁷ The importance and value of inclusivity cannot be overstated in order to ensure that competition regulation or interventions are properly targeted and do not result in false positive errors or other unintended consequences.

11. Experienced and mature jurisdictions, such as the United Kingdom, have well-established and transparent protocols for consulting broadly, not just on key preliminary decisions but also on substantive considerations. These take place at key steps in the process.¹⁸ The UK's Competition and Markets Authority

¹³ OECD, Draft Agenda: 146th meeting of the Competition Committee, DAF/COMP/A(2025)2/REV2, at 7 (May 16, 2025) (on file with author).

¹⁴ Letter from Benoît Coeuré, Chairman, OECD Competition Comm., to Delegates regarding Information on the Competition Committee session on Corporate Influence in Competition Policy Making (Feb. 18, 2025) (on file with author).

¹⁵ INT'L COMPETITION NETWORK, GUIDING PRINCIPLES FOR MARKET STUDIES (May 2016), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_GuidingPrinciplesMarketStudies.pdf. [hereinafter ICN GUIDING PRINCIPLES].

¹⁶ *Id.* at 10.

¹⁷ *Id.*

¹⁸ For example, in the CMA's recent market investigation into mobile browsers and cloud gaming, the CMA welcomed submissions from relevant parties in the industry on the CMA's initial issues statement, on all of its Working Papers, and on the provisional decision report. These third party industry submissions were considered and referenced in the CMA's final report issued in March 2025. See *Mobile browsers and cloud gaming*, GOV.UK, <https://www.gov.uk/cma-cases/mobile-browsers-and-cloud-gaming>. Additionally, the CMA guidance *Market Studies and Market Investigations: Supplemental Guidance on the CMA's Approach* clarifies its consultative approach, including consulting parties on draft surveys and questionnaires, in line with the ICN's Guiding Principles. As a matter of general practice – and in line with the ICN's Guiding Principles – it is also common for such authorities to share RFIs in draft before issuing the final questionnaires to ensure questions are appropriately focused and practical in the relevant regulatory context.

(CMA) has in recent years demonstrated a proactive, strategic, and thoughtful approach to understanding and considering how best to support and ensure thriving competition in the emerging artificial intelligence (AI) and technology space. At the OECD's Competition Open Day 2025, Karen Croxson, UK CMA's Chief Data, Technology and Insight Officer summed up the importance of corporate input into competition policymaking:

I think we've invested a lot in understanding the [AI] technology. . . . There are many stakeholders to consider and this speaks a little bit, I think, to the ecosystem approach, the systems thinking approach [sic]; firms looking to develop these technologies, those looking to deploy them in interesting ways across markets to generate value, and of course the end users and consumers. It's a really complex picture. It's moving very quickly . . . and of course working alongside expertise in academia in civil society, think tanks . . . There's a role for everyone in our view: the incumbents, the challengers, the global giants, the dynamic scrappy startup . . . making sure that we are engaging a wide array of stakeholders proactively, crucially that include[es] firms, investors, direct engagement, engaging to understand real world of those out there unleashing and investing in these innovations.¹⁹

12. Broad and transparent consultations with interested parties and other engagement processes are critical for sound policymaking.

IV. Understanding the Scope of the Debate

13. This session aims to get a better understanding of the definition of “corporate influence,” identify when and how it may be harmful, and identify proportionate responses to mitigate such risks – while preserving the benefits of corporate contributions to competition policymaking. Not only could a disproportionate response to any identified issue undermine the benefits of corporate contributions to competition policymaking but could, as noted above, also infringe the right to petition government, freedom of expression, as well as being discriminatory and arbitrary. Various definitional issues related to this discussion are discussed in turn below.

A. Entities within Scope

14. The first question to consider is which actors may be within the scope of this discussion. In its Note, the Secretariat proposes focusing on “private economic entities . . . that engage with policymaking process.”²⁰ There may be a temptation to limit this debate to corporates that devote significant resources to influencing policy thinking. While well-resourced companies may be at the forefront of advocacy initiatives in their field, the decision by a company to devote resources to advocacy efforts may reflect the significance

COMPETITION & MKTS. AUTH., MARKET STUDIES AND MARKET INVESTIGATIONS: SUPPLEMENTAL GUIDANCE ON THE CMA'S APPROACH (CMA3) (Jan. 2014, rev. July 2017), https://assets.publishing.service.gov.uk/media/65cdfc4f130549000c867a9f/A_cma3-markets-supplemental-guidance-updated-june-2017.pdf.

¹⁹ OECD Competition Open Day, Session 3. How should competition policy respond to developments in generative AI, at 28:00 (Feb. 26, 2025), <https://www.oecd-events.org/competition-open-day-2025/en/online-session/c508d14c-6e64-ef11-bdfd-6045bd9540d7/session-3-how-should-competition-policy-respond-to-developments-in-generative-ai>. In addition, Croxson emphasized the need to revisit even recent evaluations (e.g., over an 18-24 month cycle) to ensure initial assumptions and market evolutions are reevaluated with appropriate frequency, given the pace of change in the industry. The UK initially consulted on a white paper setting out plans for implementing a pro-innovation approach to AI regulation review in March 2023. *AI Regulation: A Pro-Innovation Approach*, Gov.UK, <https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach>. Further analysis and emerging thinking was shared in April 2024 in the CMA's follow up paper setting out the CMA's strategic thinking on AI. COMPETITION & MKTS. AUTH., CMA AI STRATEGIC UPDATE (Apr. 29, 2024), <https://www.gov.uk/government/publications/cma-ai-strategic-update/cma-ai-strategic-update>.

²⁰ Corporate Influence Secretariat Note, *supra* note 2, ¶ 14.

of potential policy changes for that company. However, as recognized in the Secretariat Note, economic power does not automatically equate to effective influence, notably as “smaller firms or coordinated industry groups can also exert significant influence over policy decisions, indicating that size alone is not a definitive distinguishing factor of undue influence”²¹ (and therefore influence in general). The level of resources allocated to advocacy efforts are not necessarily a deciding factor for the actual impact of those efforts. Some corporate entities may also have close connections to policymakers, whether such corporate entities are state-owned or state-controlled, “national champions,” or local industry with political connections,²² or players in regulated sectors where the regulator may be subject to regulatory capture. Nonetheless, input from such entities forms a legitimate part of the debate.

15. In addition, there is a spectrum of diverse corporate interests involved in competition policy making. For example, the ICN *Guiding Principles for Market Studies* recognizes a range of corporate interests, including “producers, distributors/wholesalers, retailers, agents, etc. of inputs, substitutes and complements.”²³ These groups will often have diverging interests and may be advocating for very different policy outcomes. Broader corporate interests may also be reflected in policy inputs from businesses and trade bodies, professional organizations, sectoral business associations, chambers of trade, commerce or industry, and chambers of agriculture.²⁴

16. Nor can it necessarily be assumed that seeking to “influence” competition policy is exclusive to corporates. Associations, trade unions, civil society, NGOs or other lobbying groups can all provide influential input. For example, the recent changes in approach to the consumer welfare standard, espoused by the U.S. Department of Justice Antitrust Division and Federal Trade Commission under the Biden Administration, were largely the result of successful efforts by progressive advocacy organizations seeking to constrain larger players.²⁵ This demonstrates that competition policy can be successfully influenced at a multi-country-level by a broad range of interests, including smaller players. Policy engagement by corporates can therefore not be viewed with particular suspicion nor in isolation. *Business at OECD* believes that a discussion on influencing competition policymaking should take into account the advocacy activities of all relevant policy actors – big and small, corporates or not.

17. *Business at OECD* would submit that it is important to avoid bias or assumptions that the substance of advocacy is necessarily less tolerable due to the provenance of that input rather than the substance of the arguments made. Competition authorities are already adept at assessing the veracity and weight of arguments made by different interests and engaging in trade-offs in the public interest, as authorities do when exercising their competition powers.

²¹ *Id.* ¶ 24.

²² Mathew Heim & Caterina Midões, *The “European Champion-ships”: Europe’s Industrial Champions and Competition Policy*, BRUEGEL (July 25, 2019), <https://www.bruegel.org/blog-post/european-champion-ships-industrial-champions-and-competition-policy>.

²³ ICN GUIDING PRINCIPLES, *supra* note 15, at 10.

²⁴ *Id.*

²⁵ See, e.g., Anamitra Deb & Gus Rossi, *Why We’re Investing in Curbing the Power of Tech Platforms*, MEDIUM (Aug. 8, 2019), <https://omidyarnetwork.medium.com/why-were-investing-in-curbing-the-power-of-tech-platforms-6cf5d5ee4760> (“We support Open Markets Institute (OMI), a nonprofit organization working to fight corporate concentration and monopoly power. OMI is normalizing conversations in both the public and Congressional spheres about the harms created by tech giants. Our multi-year grant will help deepen OMI’s work by supporting research, creating policy positions, and enabling advocacy directed at policymakers and regulators working to protect the public and enable market innovation. This platform builds upon the legacy of Lina Khan, OMI’s former director of legal policy, who authored a foundational piece that helped spearhead the so-called ‘hipster antitrust movement.’ This important work helped broaden the focus of antitrust law solely from consumer welfare to include societal impacts like income inequality and unemployment. Additionally, OMI is helping lead conversations on antitrust across industries.”).

18. The Secretariat Note highlights various possible “harms” of corporate engagement in competition policy making.²⁶ Although it is true that policy making can result in inefficient or even distortive outcomes, the correlation between corporate engagement and the ultimate policy decisions, as distinct from other sources of distortion, is not shown, especially given the large number of actors and factors involved in policy making. If such an amorphous debate results in measures that shut out legitimate (and constitutionally protected) input from one group of interests, it guarantees distortion in outcomes and policymaking will be poorer. Such a posture also risks undermining the legitimacy of competition policy making.

B. Influence

19. The second question relates to the term “influence.” By contributing to the policymaking process, corporate entities attempt to ensure that policymakers understand corporate perspectives. It should be expected that corporations, and indeed all policy advocates, will seek to shape competition policy in a manner favorable to their legitimate self-interest (or ensure that policies do not inadvertently harm those interests).

20. Interested parties, including corporates, will usually advocate on a narrow set of issues related to their particular interests. It is for the competition policymaker to assess the validity and benefits of corporate contributions, balanced against other contributions and broader public interest considerations, in order to make the necessary trade-offs when adopting policies to increase market competition. In that sense, policymakers are very much like consumers who benefit from having as much information as possible to inform their decisions.

21. When competition policymakers decide on a particular course of action, there are likely to be a broad range of beneficiaries, e.g., consumers, market entrants, distributors, etc. Yet inevitably (and at times intentionally), some actors, including corporations, may benefit more than others. It is not necessarily true that those who benefitted from a competition policy outcome will have wielded “influence” (let alone undue influence) merely because their interests were ultimately fostered. As recognized in the Secretariat Note “the boundary between legitimate engagement and undue influence is often inherently blurred, contested and contextual.”²⁷

22. The Secretariat Note also accepts that there is a lack of a single definition of corporate influence. In order to distinguish between legitimate and illegitimate corporate influence, the Secretariat Note focuses principally on concerns of “undue influence.”²⁸ The term “undue influence” usually describes a situation where a decision maker’s free will and judgement has been supplanted by that of another, usually through

²⁶ Corporate Influence Secretariat Note, *supra* note 2, ¶¶ 20-21.

²⁷ *Id.* ¶ 22.

²⁸ *Id.* ¶ 14. As noted above, we assume that illegal acts are outside the scope of this debate. The Secretariat Note variously uses expressions such as influence that is “undue,” “problematic,” “distortive,” “manipulative,” “opaque,” “harmful,” “excessive,” “outsized,” etc. *Business at OECD* would submit that these terms are subjective and unhelpful without a more rigorous definition and common understanding. The Secretariat Note’s definition of “undue influence” is notably broader than definitions found in previous OECD papers that limit “undue influence” to where there is an intention to deceive. *See, e.g.,* OECD, Regulating Corporate Political Engagement: Trends, Challenges and the Role for Investors, OECD Public Governance Policy Papers, No. 13 (Mar. 18, 2022), [available at https://www.oecd.org/en/publications/regulating-corporate-political-engagement_8c5615fe-en.html](https://www.oecd.org/en/publications/regulating-corporate-political-engagement_8c5615fe-en.html); and OECD, Lobbying in the 21st Century: Transparency, Integrity and Access, (May 20, 2021), https://www.oecd.org/en/publications/lobbying-in-the-21st-century_c6d8eff8-en/full-report.html.

manipulation or unfair pressure. Undue influence has long been scrutinized by the English courts.²⁹ In *Daniel v. Drew*, Lord Justice Ward noted:

[I]n all cases of undue influence the critical question is whether or not the persuasion or the advice, in other words the influence, has invaded the free volition of the donor to accept or reject the persuasion or advice or withstand the influence. The donor may be led but she must not be driven and her will must be the offspring of her own volition, not a record of someone else's. There is no undue influence unless the donor if she were free and informed could say "This is not my wish but I must do it."³⁰

23. The notion of "undue influence" (and many of the other varied terms used) is therefore relative to the power relationship between the parties involved and – most importantly – relative to the decision maker's independence, capacity, and ability to exercise its competences freely. Thus, "undue" influence is not merely the ability to persuade but the ability to coerce or compel. Competition authorities have significant powers of investigation and scrutiny, often backed with the ability to impose significant penalties for non-cooperation, in support of broad enforcement powers. Competition authorities' day-to-day functions largely consist of assessing the veracity and weight of arguments made by different interests and then to engage in trade-offs in exercising their policy- and decision-making powers. It is difficult to imagine a scenario where an independent competition authority applies the law or exercises its discretion at the whim of particular industry stakeholders at the expense of the public interest or policy priorities.

C. Competition Policy

24. Lastly, the scope of the term "competition policy" is worthy of comment. *Business at OECD* is not convinced that, in this context, "competition policy" is significantly different than other policy areas or is more susceptible to "policy distortion" than others. In fact, and as noted above, competition authorities' very function is to assess the arguments of various (sometimes conflicting) interests and, using the applicable analytical framework, to make trade-offs between these views and the authority's mandate. In addition, nearly all OECD members' competition authorities are independent bodies that have structural protections to ensure their independence. Competition authorities also have powerful tools at their disposal and their competition policy decisions may lead to the creation of enforceable rights, penalties, and obligations, as well as potential regulatory intervention. As such, those entities likely to be affected can *and should* be expected to engage with decision makers. The more impactful the policy decision, the more rigorous the advocacy from affected parties is likely to be.

V. Consultation Processes

25. Competition policy formulation should provide opportunity for input by interested parties. This may come through formal consultations, as well as sector inquiries or market studies. These processes should be transparent and accessible (e.g., multiple language versions or compatible document formats), provide sufficient time for responses, and impose a minimal burden on respondents in order to encourage a broad spectrum of contributions. It is very much in the policymakers' interest to have an efficient consultation and feedback process in place. Best practices include broader engagement with the competition policy community (including corporates), such as organizing open hearing or workshops, as well as speaking at conferences. These engagements are highly valued by interested parties.

²⁹ Hall v. Hall (1868) 1 P. & D. 481, 482 (Eng.) ("Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment . . . will constitute undue influence, though no force has been either used or threatened.").

³⁰ Daniel v. Drew, [2005] EWCA (Civ) 507 at [36] (Eng.).

26. Competition policymakers may also need to engage bilaterally with interested parties – this can be important, for example, if written contributions need to be explained further, if confidential information needs to be shared, or if policymakers need an in-depth understanding of market dynamics or how new technologies function. Policymakers should exercise their discretion as to which interested parties to meet and with what frequency. However, it is important that policymakers do not grant privileged access to one party or group of interests over others, as this may signal bias. This is especially true if policymaking will result in enforcement action further down the line.

VI. Safeguards for Facilitating/Ensuring Balance in Stakeholder Contributions

27. The Secretariat Note recognizes that, in order to avoid potential responses undermining beneficial corporate engagement, “effective and proportionate responses [by competition policymakers] should not aim to prevent corporate engagement but rather enhance transparency, accountability, and integrity in such interactions.”³¹ *Business at OECD* would agree and would add that the underlying fundamental rights should also be respected and protected.

28. In order to ensure that the input obtained from interested parties is appropriate and balanced, *Business at OECD* suggests that competition policymakers consider the following:

- Engage early and continuously with interested parties through meaningful consultations as the authority develops its thinking and theories of harm.
- Engagement through hearings, workshops, and conferences to increase transparency and provide mechanisms for interested parties to engage with authorities.
- Ensure balanced attendance in agency-hosted events that are open to all stakeholders who wish to participate and provide input.
- Draw information widely from all affected stakeholders with mechanisms to validate and stress-test arguments and data.
- Retain skilled and experienced agency staff who have the expertise to assess and contextualize submissions to effectively weigh arguments and advise decisionmakers.
- Implement internal controls to evaluate and determine how to address conflicting input and balance different interests.
- Utilize effective internal controls to address any confirmation-, hindsight- or policy bias, especially where the policymaker is also the competition enforcer.³²
- Ensure transparency, particularly where noncompetition factors weigh on the minds of policymakers and where the policymaker enjoys broad discretion.
- Maintain independence from political or other interference in order to be in a position to take objective decisions and defend them once implemented.
- Ensure corporates that are subject to ongoing competition proceedings are not prevented or dissuaded from legitimately engaging in advocacy on competition policy matters important to that business.³³

³¹ Corporate Influence Secretariat Note, *supra* note 2, ¶ 46.

³² See also Ian S. Forrester, *Due process in Europe Competition Cases*, 34 EUROPEAN L. REV. 817 (2009).

³³ For example, when a company under competition scrutiny seeks to meet officials on a separate policy matter a member of the investigatory case team can be present in that policy meeting.

VII. Corporate Engagement with Academia

29. The relationship between corporations and academia has been raised as an additional area of debate, with a focus on potential conflicts of interests.

30. At the outset, it should be clear that engagement between academia and corporations, remains important. Such engagement enables academics to gain real-world insight into market dynamics and corporate incentives, often informed by analyzing data, which helps prevent academic exploration being (at least in some cases) untethered from market realities – i.e., purely “academic.” Engagement also assists academics to understand what key challenges require exploration and what new innovations are afoot so that their research may be relevant and illuminating. Finally, where corporations fund research, this enables researchers to devote time necessary to explore important issues that they may not otherwise focus on.

31. Engagement between corporates and academics helps improve understanding, allowing competition policymakers to take more informed decisions. The reverse is also true; limiting engagement between the business community and academia will reduce the real-life knowledge of academics and therefore the relevance of their work.

32. It is also worth recognizing that academia, which has been increasingly active in the competition policy debate, expresses a plurality of views (e.g., Chicago and Harvard schools of thought, Neo-Brandiesian or Ordo-liberal schools, etc.). Academics may legitimately advocate for their arguments to be recognized and adopted by policymakers, which would increase the academic’s intellectual authority. It is to be expected, therefore, that academics and schools of thought also actively engage with the policymaking community. Policymakers are not constrained from where they seek academic input nor which academics they engage with (subject to conflict rules). As noted above, policymakers can thereafter assess and decide which theories to credit and which not to credit.

33. It would be worrying if competition policymakers were to delegitimize or dismiss academic research purely on the basis that the researcher may have received funding from corporates, or from certain types of corporates, over others. The key issue relates to whether corporate funding either “dictates” the outcome of research (i.e., that funding impairs academics’ independence) or distorts the objectivity of academic research. In *Business at OECD’s* experience, academics are fiercely independent (and rightly so) given the credibility and integrity of their expertise is at stake when publishing papers.

34. In *Business at OECD’s* view, there are a number of mechanisms that can help to minimize the risk of conflicts of interest. The most obvious one is transparency and academic funding disclosure obligations.³⁴ Another important mechanism is more rigorous peer review of academic papers, particularly prior to publication. Corporates who fund academic research should also consider instituting practices that help maintain academic independence, such as arms-length engagement.

VIII. Conclusion

35. Corporate engagement with policy makers is a protected right in democratic societies and provides vital expertise and market insight that enhances the quality of policy making. Corporate engagement in competition policymaking is therefore both legitimate and essential for informed, balanced, and effective competition policy outcomes. This is notably the case as competition policy relates to the activities of corporate entities. Any discussion on corporate influence must be grounded in a clear and inclusive understanding of influence and reflect the reality that many different entities and interests are involved in competition policy formulation. This is necessary to avoid arbitrary or discriminatory exclusions and to

³⁴ See, e.g., *Declaration of Ethics*, ASCOLA, <https://ascola.org/declaration-of-ethics/>.

ensure that policymaking processes remain fair, as well as transparent and accountable. By embracing a diverse range of stakeholder perspectives – including those of corporate actors – competition authorities can better fulfill their mandate to promote fair, efficient, and dynamic competition.