

*** PRELIMINARY CONCLUSIONS ***

**THE REGULATION OF COMPETITION
ACROSS THE GLOBE:
GOOD PRACTICE AND INFORMATION**

**International Board
on Economic Regulations**

The International Board on Economic Regulations (IBER), which was launched by the Civil Law Initiative on 7 July 2015, at a press conference at the Quai d'Orsay - the French Foreign Ministry - under the distinguished patronage of the Minister of Foreign Affairs and International Development. The panel consists of eminent figures from the legal-economic world, from developed, emerging and developing countries across the globe. This document contains its first conclusions on the regulation of competition.

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SUMMARY

The International Board on Economic Regulations chose to tackle the regulation of competition for its first annual assignment.

Having compared national competition regulation systems in Europe, North and South America, Asia, Africa and the Middle East, analysing good practice and highlighting areas for improvement, the Board has made 32 recommendations. These recommendations are addressed mainly to countries that are setting up their own competition regulation system, and to countries that would like to reform their existing system so as to make it more efficient, in both economic and democratic terms.

These 32 recommendations fall into three categories:

1. those relating to the theoretical economic concepts that underpin the competition regulation system;
2. those relating to the institutional architecture of regulation and its internal operation;
3. those relating to democratic requirements, particularly the interaction between the regulatory authorities and the executive, the legislature and the judiciary.

1 Introduction

1.1 Purpose of the International Board on Economic Regulations (IBER)

1.1.1 The International Board on Economic Regulations was set up in response to four observations

The International Board on Economic Regulations was set up in response to four observations.

The first observation was that economic regulation, whether it concerns the institutional architecture, operations between the actors or the legal and judicial framework, is conceived as essentially domestic. But today what economist would dare say, or would have said at any time over the last thirty years or more, that the economy, companies, trade, or competition always operate within a strictly national framework? It is clear that the design of regulation is out of step with economic reality.

The second observation that led to the creation of the Board is the fact that thirty years after the term "régulation" – the French word for regulation that derives from English, and which only partially tallies with the older French term "réglementation" – entered the economic and legal vocabulary, its content has been radically transformed, and the activity of regulation is also quite different. Regulation is no longer merely traditional intervention by the state in economic mechanisms. Regulation now refers to very modern tools, combined under the catch-all label of "soft law", which, in terms of responsiveness, flexibility and economic realism, no longer have anything to do with traditional tools. It is precisely for this reason that the French term "régulation" is now much further removed from the older French term "réglementation", which is also translated as "regulation".

Today's economy, which is totally permeated with digital technology, ultra mobile, plastic and evanescent, can no longer be regulated with tools that were developed for the economy of the 20th century. To talk about the digital economy as if it were an item with a separate existence no longer really makes sense, we live in an age in which everything is digital, all sectors combined. This new economic paradigm requires an imaginative approach. The Board therefore asked where it might look for innovative and pragmatic ideas for regulation, and thinks that a useful starting point is to compare good practice from across the globe.

Third observation: the regulation of the economy is bound to be one of the major concerns of emerging or developing countries in coming years. These countries are in the process of structuring their economies, which have, in many cases, suffered from exponential growth. Meanwhile their companies have experienced a rate of change which has impacted whole sectors, company size and methods of organisation that was previously unheard of, and never known in the countries described as the developed "North". These countries are looking for solutions, recommendations, and an understanding of their challenges and own specific difficulties. It is precisely to these needs for illumination that the Board hopes to provide a response through its comparative work.

The fourth and final observation derives from the fact that existing institutions that think about what "good regulation" is, concentrate mainly on microeconomic analysis. The International Board on Economic Regulations wishes to promote another, complementary, vision of regulation, approaching it through a macroeconomic prism which is also institutional, legal and judicial. It has therefore drawn up its own dashboard in order to analyse the features, strengths and weaknesses of different methods of regulation from across the globe.

1.1.2 The IBER wishes to promote an original and specific approach, complementing the existing institutions

In pursuing this goal, the Board has the following functions:

- 1) To compare different legal systems, with respect to the normative, institutional and procedural landscapes;
- 2) To use this comparative study to identify regulatory good practice that combines economic efficiency, legal certainty and democratic requirements;
- 3) On the basis of these observations, to formulate instructions and recommendations for economic regulators, governments, companies and the whole of the international scientific, economic and legal community, giving priority to developing countries.

In order to carry out this analysis and evaluation, the Board has created its own dashboard of relevant criteria (cf. Appendix 1). Unlike the more common approaches, this dashboard is focused less on the microeconomic aspects of regulation and more on the macroeconomic and institutional aspects.

1.1.3 The IBER is an international panel that brings together experts from both the "North" and the "South"

The IBER is a flexible panel, which operates administratively under the aegis of the Civil Law Initiative, while developing autonomously. Its composition is intended to evolve and acquire new members over time. For the purposes of this report, the panel called upon Chinese, American, Brazilian, Congolese, Syrian, Japanese and French experts in order to gather information about nearly every continent, with the exception of Oceania, which was not represented (cf. Appendix 2: Composition of the Board).

1.2 The inaugural subject: competition regulation

1.2.1 Competition is the mother of economic regulations

In its inaugural report, the International Board on Economic Regulations chose to look at the environment that gives rise to regulation, namely competition.

With the growing liberalisation of direct investments, the gradual removal of traditional instruments for controlling investments, the guardian of the market economy, which ensures that markets function properly and which has taken over everywhere, is competition law.

The need to regulate competition, before the economic actors are allowed to operate in a free market, goes hand-in-hand with the development of economic theory: a market economy does not allow the actors to have total freedom, regulated by an invisible hand, rather it allows for ordered freedom, in which anti-competitive behaviour is not tolerated, because by circumventing the rules of the game, and diminishing the well-being of consumers, it may lead to suboptimal economic performance.

1.2.2 Although the market is now global, there are as many competition regulations as there are countries

Competition regulation was once unique to the United States, which was the first country to go down this route with the Sherman Act of 1890. It then appeared relatively late in some other industrialised countries¹ and has now been adopted everywhere or nearly everywhere. The importance of setting up a legal and institutional framework to protect competition has

¹ It should not be forgotten that French competition law only really began in 1986-1987.

become even more acute given that the process of deregulation and privatisation, which was initiated in Europe in the 1980s, has continued ever since, with the fall of the Soviet empire, which led to the countries of central and eastern Europe joining the market economy in the 1990s, and a similar movement in the Asiatic and South American countries, which have chosen to abandon economies that had been predominantly socialised (cf., for example, at different times and at different speeds, China, Vietnam, and more recently Cuba). Developing countries need to acquire tools in order to regulate competition effectively.

Since 1990, the number of countries that have passed a competition law and set up a competition authority has increased constantly and exponentially, with the former now slightly outnumbering the latter. In 2014, the IBER estimated that approximately 120 countries had a competition authority and 130 had a legal framework for competition. Countries that do not have these institutions are those with low incomes. It should not be forgotten that in 1990, only 23 countries had a competition law, and only 16 had a competition authority. This represents an increase of more than 500% in a quarter of a century².

The economies of the developing countries must therefore not only acquire a clear competition law, but also regulatory tools, institutions and institutional, legal and judicial mechanisms that are sufficiently strong and credible, in order to avoid a growth crisis that would risk the economy coming to be governed by the law of the jungle. And this must be achieved in record time, when the economic fabric is being renewed and reassembled at a much faster pace than that experienced in the past by the countries that are now classified as industrialised. Without rules and a referee, a game involving numerous actors would inevitably descend into total chaos. Therefore it is vitally important for developing countries to have such rules available and to be able to apply them in order to ensure harmonious economic development, admittedly with adaptations in order to respond to the specific needs of the countries concerned, particularly with respect to the protection of infant industries³. And the regulations must be credible in order to ensure that they can be applied effectively (which means there is a need for law enforcement), thereby countering strategies to circumvent the rules or even openly oppose them that may be adopted by economic actors.

While trade, or more generally the business world, has indisputably become global, competition law and above all those who police it – the regulators, whether independent or not – are national everywhere, or supranational at best, through regional groupings such as the European Union or the West African Economic and Monetary Union, or the subject of cooperation agreements between countries.

The almost universal recognition of the effect principle⁴ inevitably creates friction between different legal systems: a national competition law applies as soon as the behaviour in question has an impact on the trade of that country. As the acts of a multinational company may have effects of greater or lesser significance simultaneously in many countries, the effect theory means that different national legislations become applicable simultaneously.

² OECD, 2014, *Coopération internationale dans la mise en œuvre du droit de la concurrence*.

³ The doctrine of infant industries, which was formalised by John Stuart Mill after early attempts by Alexander Hamilton and Friedrich List, recommends that temporary customs barriers be set up in order to give such industries the time to grow. This means putting in place transitional protectionism in order to allow national companies, said to be in their "infancy", to catch up in terms of economies of scale, productivity and therefore competitiveness, in terms of both price and other factors, in relation to foreign companies: it is the creation of a comparative advantage and therefore specialisation which is in issue. This process also involves encouraging consumers to favour the products of national companies. These theories were applied in Germany in the 19th century and then in 19th and 20th centuries in countries such as Russia and Japan. The issue of a similar doctrine, less with respect to customs duties than competition, has now arisen for the developing countries.

⁴ The "effect principle" or "objective territoriality principle" is inspired by American antitrust law.

Therefore when dealing with competition regulation, attention must be paid to existing foreign systems. At this point, the IBER's comparative study becomes very meaningful, as in the field of economic regulation, it would probably be absolutely suicidal – in any event radically counter-productive – to put on blinkers and ignore what was happening in foreign countries. Over a fairly lengthy period, the shrinking relevance, even irrelevance of national borders as economic borders made observers aware, at a very early stage, of the need for international consultation in this field. This was observable in the 1920s, in the "pre-globalisation" era⁵, although this growing awareness did not lead to any convergence. After the Second World War, the Havana Charter, which created the International Trade Organisation, also contained a chapter on practices restricting competition. However, the ITO never got off the ground due to opposition from the US Congress. But these attempts at wide-ranging initiatives in favour of convergence if not the harmonisation of competition rules came to nothing.

Nevertheless moves towards greater cooperation in the field of competition have been made, particularly between North-North countries⁶. However, these comity agreements in the application of competition rules are not sufficient to avoid dissent.

However, one initiative should be welcomed enthusiastically, namely the International Competition Network (ICN), which has been in existence since 2001. This is an informal network of competition authorities from across the globe, which is open to other actors in this field. The ICN originated in an American idea: the International Competition Policy Advisory Committee (ICPAC), which was set up by the US Department of Justice, submitted a report in February 2000 on international competition policy. The network held its 15th annual summit last April in Singapore. The aim is to adopt practical recommendations and thereby enhance the convergence of national competition policies. Developing countries that are ready to adopt laws in this field are also involved.

Box 1: Eurotunnel/SeaFrance: friction between British and French regulators

In 2013, the UK Competition Commission banned Eurotunnel from providing ferry services at Dover.

The effect of this was to block a merger between Eurotunnel and SeaFrance, which had already been authorised by the *Autorité de la concurrence*, the French competition authority, in exchange for certain behavioural commitments (Decision 12-DCC-154 of 7 November 2012). By definition, Eurotunnel must market its services on the British market: It was the decision of the Competition Commission which took precedence in practice.

Note that on appeal, the appeal tribunal of the British competition authority quashed the decision of the Competition Commission. It required it to reconsider whether the transaction constituted a merger or not (Competition Appeal Tribunal [2013] CAR 30, *Groupe Eurotunnel S.A. v. Competition Commission and SCOP*, 4 December 2013).

However, this decision has no impact on the following point: if two countries are unable to coordinate their actions, then the strictest rule, i.e. the most interventionist, will take precedence.

⁵ The French legal theorist William Oualid had asked for rules controlling private anti-competitive behaviour to be incorporated in the system of the League of Nations (cf. William Oualid, *Les ententes industrielles internationales et leurs conséquences sociales – La défense des travailleurs et des consommateurs* [International industrial cartels and their social consequences – The defence of workers and consumers] Geneva 1926).

⁶ See, for example, the agreement between the government of the United States of America and the European Communities regarding the application of their competition law 1991/1995, completed by the Euro-American agreement of 1998 on the application of positive comity principles in the enforcement of their competition laws. See also the agreement between the European Communities and the Japanese government that was signed on 10 July 2003.

Box 2:

A successful example of international cooperation in the field of competition regulation: the marine hose cartel case⁷

A case involving a cartel in the supply of marine hoses to oil and gas producers illustrates how important cooperation is for the success of investigations.

The case was concerned with price setting, bid rigging and allocating market shares. This conduct, which occurred between 2001 and 2006, involved four producers of marine hoses. The cartel was terminated at the beginning of 2007 subsequent to investigations by the European Commission, the Japanese Fair Trade Commission, the UK Office of Fair Trading (OFT) and the United States Department of Justice (DoJ).

The Australian Competition and Consumer Commission (ACCC) alleged that four foreign suppliers of marine hoses had entered into global cartel arrangements by submitting rigged bids to marine hose buyers in Australia. Even if the cartel had been set up abroad, Australia's jurisdiction in the field of competition law extends to companies whose conduct has repercussions in Australia.

This case would not have had a successful outcome without the assistance of the DoJ and the OFT, which supplied the ACCC with important information and documents for its investigation. The ACCC obtained the information and documents by virtue of a statutory arrangement with the DoJ and, with respect to the OFT, pursuant to a request under the relevant section of the UK Enterprise Act 2002. Thanks to this assistance, the ACCC was able to maximise the use of this information and successfully prosecute the international cartel.

⁷ Source: OECD 2014, *Coopération internationale dans le domaine du droit de la concurrence*

2 Competition at any price, at what price?

2.1 A shared objective: consumer well-being, but with different definitions that cannot be superimposed

"The antitrust laws are enforced to protect consumers by protecting competition, not competitors." Although its objective is clearly provocative, this statement by Tom Barnett, the Assistant Attorney General for the Antitrust Division at the US Department of Justice (DoJ), which was made subsequent to the *Microsoft* judgment of the European Court of First Instance⁸, sets out a rule which is nevertheless shared by all the countries that have built a system for the regulation of competition. Moreover, it is this objective of consumer well-being which explains why the theory that is now shared by the regulatory authorities is drawn from the belief that the objective must be optimal not maximal competition.

What is different, are the other objectives that may be assigned to competition law, depending on the territory concerned.

In Europe, competition policy is not limited to controlling mergers and the suppression of anti-competitive practices: it also includes regulations prohibiting state aid. Therefore, in Europe, competition policy is a powerful tool that is used to deepen the internal market, ensuring that the Union's member states do not focus solely on their own national affairs. Based on the European model, competition policy has the same objective in the West African Economic and Monetary Union.

The relevance of this objective is open to discussion. The Board wishes to point out that in the United States, action against unjustified state aid is not part of the federal legislative and regulatory arsenal in the field of competition, even though one might think that this country has been at the forefront of the theory of competition law since it adopted the Sherman Act in 1890.

In other countries, such as China, the objective assigned to competition regulation is clearly healthy economic development⁹. The Board considers that this objective is relevant as it is merely the macroeconomic extension of the microeconomic objective of achieving consumer well-being, and it does not therefore see any contradiction.

Recommendation no. 1: Do not confuse one's objectives. The first and foremost purpose of competition policy is to ensure consumer well-being in microeconomic terms and healthy and optimum economic development in macroeconomic terms. The other objectives such as regional economic integration must at best be secondary, otherwise they should not be included in the analytical grid of competition regulation.

2.2 The myth of pure and perfect competition is far from being shared

If the merits of pure and perfect competition, without any acknowledgement of market failings, were recognised, then the very principle of competition regulation would have no meaning, as the market would regulate itself. And yet it is precisely the country that is considered, whether in reality or the imagination, to be the most faithful to the doctrine of economic liberalism, i.e. the United States, that first devised, with the Sherman Act of 2 July

⁸ CFI, 17 September 2007, case T-201/04, *Microsoft Corp. v. Commission of the European Communities*. The decision runs to more than 150 pages. The Court of First Instance of the European Communities dismissed, almost in its entirety, Microsoft's appeal against the decision of the European Commission which had imposed a fine of nearly 500 million Euros upon it for violation of the competition rules and had obliged the firm to disclose certain technical information relating to its Windows operating system to its competitors.

⁹ Healthy meaning, mainly, resilient to shocks.

1890¹⁰, modern competition regulation, in both normative terms and in terms of control, which is the province of the American Department of Justice (DoJ).

With respect to the substance, subtle differences, which are sometimes merely semantic but revealing nevertheless, between national legislations actually reflect real doctrinal differences, in several ways. Certain legislations take account of the effects on employment. Others – and this is the case of the European Union and the French laws that deal specifically with the retail trade – provide for the protection of small and medium-sized enterprises when confronted by the buying power of large companies. Furthermore, in the United States, the main preoccupation is mergers and the fight against cartels. This is reflected in the fact that, in American English, the terms "competition laws" and "antitrust laws" are interchangeable. On the other hand, while the European Union seems to be stricter than the United States with respect to the control of mergers, the US is particularly strict with respect to co-ordinated effects¹¹. Some practices are considered to be illegal in certain countries while they are accepted elsewhere: France, for example, prohibits the abuse of economic dependence¹² and reselling at a loss¹³. The American term "monopolization" does not correspond exactly to what Europeans call "abuse of a dominant position", the slight difference between the two residing in the way in which the company concerned consolidates its position, and just how active and willing it is in the process.

And if the differences between national ideas about just what competition policy should encompass are immense among the industrialised countries, they are even greater between the industrialised countries and those that are developing or emerging¹⁴.

Therefore the Board has no precise recommendations to make regarding which theoretical bases to adopt in order to promote competition. On the contrary, it considers that developing countries must determine the outline of their own competition doctrine for themselves, taking account of their economic history and their own specific DNA. The Board considers that this must be the subject of an in-depth and wide-ranging debate in every country that wishes to adopt a system of competition regulation, in order to lay down clear and strong doctrinal foundations.

Recommendation no. 2: Each country should define clearly, in a way that is appropriate to its own history, the theoretical principles that it considers to be necessary in order to fulfil the objectives of competition regulation.

¹⁰ The Sherman Act was the first law that prohibited anti-competitive practices. Section 1 of the Act prohibits illegal cartels that restrict trade and commerce. Section 2 prohibits monopolies and attempts at monopolisation. However, mergers between companies do not come within the scope of the Sherman Act of 1890 but the Clayton Antitrust Act, which completed the Sherman Act in 1914.

¹¹ The study "Comparing merger policies in the European Union and the United States", *Review of Industrial Organisation*, vol. 36 no. 4, pp. 305 to 331, M.A. Bergman, M.B. Coate and S.W. Ulrick (2010). These authors consider that if the analysis is limited to the dominant position and to transactions of companies in a dominant position, it becomes apparent that if the EU examined the mergers carried out in the USA, the rate of challenged transactions would exceed by approximately 12 points the number recorded in the United States. They add, however, that while the EU is possibly stricter than the United States with respect to the abuse of a dominant position, overall, it is no more likely to challenge mergers. Finally, enforcement decisions show that the United States actively challenges mergers that would create or strengthen oligopolies based on collusion, while the EU initiates very few actions in this field.

¹² The abuse of economic dependence, or the abusive exploitation of a state of economic dependence, is one of the two practices prohibited by article L. 420-2 of the French Commercial Code, the other one being the abuse of a dominant position. This breach has no equivalent in EU competition law.

¹³ Reselling at a loss means setting a price below the effective purchase price, the net unit price shown on the purchase invoice less the amount of all the financial benefits granted by the seller and plus taxes (taxes on turnover, specific taxes) and the cost of carriage.

¹⁴ As was mentioned above, competition regulation in China is very far from aspiring to promote pure and perfect competition with full regard for liberal economic theories, rather its aim is to allow for healthy economic development.

Box 3: An example from an emerging country – Competition Law in Brazil: where the law has recently been recast

With respect to competition, the federal Constitution of Brazil affirms that the law must prohibit the abuse of economic power when it is intended to dominate the markets, to eliminate competition or increase profits, in an abusive fashion.

The Brazilian Competition Law, which was passed in 2011, **lists (non-exhaustively) nineteen different practices that are prohibited by the competition regulator including** collusion, market foreclosure, and agreements to limit R&D, production or investments.

The Brazilian Competition Law of 2011 marks an important stage in the modernisation of this legal field in Brazil. The main changes that it introduced include the introduction of a **suspensory procedure prior to a merger**, and the modification of the penalties for anti-competitive conduct, along with the **reform of the institutional structure of the country's competition regulation**, around the *Conselho Administrativo de Defesa Econômica*, or CADE.

Box 4: Competition regulation in China: a law first passed 20 years ago that has recently been completed

Promulgated in 1993, the Anti-Unfair Competition Law (AUCL) has not been revised for nearly 20 years, and it used to be the sole Chinese law regulating competitive practices. However, in order to improve the rules governing monopolies, on 30 August 2007, the permanent Committee of the National People's Congress adopted, the Anti-Monopoly Law of the People's Republic of China (AML), which came into force on 1 August 2008.

The distinction between the scope of the AUCL and of the AML lies in the difference between unfair competition and monopolies. Unfair competition encompasses practices that are contrary to good faith, such as fraud, coercion or incitement. Monopoly refers to an act that might eliminate or reduce competition in a relevant market. It can come into existence through horizontal or vertical agreements, by the abuse of a dominant position, or by anti-competitive agreements.

2.3 A place for pragmatism

The country that seems to be most convinced of the usefulness of the purest competition possible is also the country that has always applied competitive principles in a pragmatic fashion. In the United States, the "rule of reason", which first appeared in the Sherman Act, is a means to apply particularly strict principles flexibly, by distinguishing reasonable from unreasonable practice¹⁵.

The "rule of reason" therefore consists of analysing, on a case-by-case basis, the economic effects of offending practices in order to determine whether they are legal or not. The Board believes that this approach should be encouraged. The Board does not, however, intend to recommend excluding the rules *per se*, in principle, in other words rules that establish in advance a list of practices that are always prohibited. The Board recommends reducing such prohibitions *per se* to a hard core. Such red lines that must not be crossed have a clearly identified advantage: they ensure a degree of legal certainty which gives peace of mind to the business world. The Board considers for example that price fixing and market sharing agreements, otherwise known as "hard core cartels"), can be classified as unjustifiable.

Recommendation no. 3: Adopt a very limited number of prohibitions on unjustifiable practices *per se*, as a base. Leave the rest to the "rule of reason".

¹⁵ After the adoption of the Sherman Act, it seems that the rule of reason was first applied in 1898 in the case of *Addyston Pipe and Steel Co v. United States*. The United States' Supreme Court acknowledged for the first time that "agreements to not compete" may be justified in certain circumstances.

In addition, the Board has no objection to authorising the use of derogations from competition law, such as the defence of "national champions" or necessary aid for companies in difficulty, provided such public interest exceptions are listed exhaustively and strictly defined. In the Board's view, in developing countries, which may be destabilised by too rapid growth, such derogations also serve to maintain a certain public economic order. In addition, the Board has the impression that such general derogations are preferable to sectorial derogations (cf. 2.4. infra).

Recommendation no. 4: Explain reasonable derogations from competition law, and provide strict definitions of them.

Box 5: In Japan, public interest is the sole determinant of competition policy

Under the Japanese anti-monopoly law, which dates from April 1947, there is an explicit requirement that a cartel be against the public interest before it can be banned. Accordingly, a commercial practice is only considered to be inequitable or unfair when it is contrary to the public interest. It is on this point that the Japanese competition regulation system differs most from the American system, even though it was based on this system after the war (the Japanese competition regulator is known in English as the Federal Trade Commission, although there is no ambiguity about its origin).

However, majority opinion affirms that "the public interest" in question is precisely the public's right to benefit from freedom of competition. Public interest is not the higher interest that limits freedom of competition, but rather the interest that maintains controls on anti-competitive transactions.

2.4 The sectors that benefit from a derogatory system

In the United States, many sectors are, in reality, outside the scope of competition law, and in consequence beyond the control of the regulators who operate under the ordinary competition law. The American Congress has granted exemptions to a certain number of sectors, such as insurance or professional baseball, from the federal antitrust laws. Mergers in the air transport sector have also had the benefit of an exemption for a number of years¹⁶: up to about 30 years ago they were the responsibility of the Department of Transportation, which did not apply the antitrust laws.

The Board thinks that the existence of multiple sectorial exemptions of this kind is not desirable: in the United States it is held to be responsible for the increasing complexity of the whole of American regulation, which is felt to be regrettable. The Board prefers to recommend exemptions based on general principles rather than sectors, so that competition regulation does not become regulation "à la carte".

Recommendation no. 5: Avoid sectorial exemptions from competition law. Failing that, reduce the exempt sectors to a minimum, such as the cultural sector.

¹⁶ The air transport industry was deregulated to a great extent by the Airline Deregulation Act 1978. The Civil Aeronautics Board was dismantled in 1985. Certain competition regulations, including the regulation of conduct that is otherwise prohibited by section 5 of the FTC Act, were transferred to the Department of Transportation. At the present time, mergers of airline companies generally fall within the remit of the Department of Justice, although the Department of Transportation carries out its own analysis of competition and presents its views to the Department of Justice with complete confidence (*Statement of the Department of Transportation, Mergers and Acquisitions*, 23 February 2015).

2.5 Other ways to cut economic rents

The Board wishes to stress that secondary objectives pursued by competition regulation, such as the wish to eliminate rents, may be achieved by other economic policies, such as taxation or commercial law. It is preferable not to assign multiple objectives to competition regulation, on pain of not achieving any of them or pursuing contradictory goals¹⁷.

Recommendation no. 6: Do not devise a competition regulation system without thinking about how it will work with other economic policies. Devise a policy mix that covers competition, taxation and trade, in order to share out objectives that cannot all be dealt with by the single tool of competition regulation.

2.6 What about innovation?

The enforcement of a strict competition law may seem to contradict the need to innovate¹⁸, which is nevertheless as necessary to consumer well-being as low prices. The contradiction derives from the fact that, in order to be profitable, innovation requires a certain degree of protection, which generates an "innovation rent". If the competition rules are applied too strictly, without calling upon the "rule of reason" mentioned above, this innovation rent may sometimes seem to constitute the abuse of a dominant position. Destroying innovation rent in the name of full competition is disastrous for economic development, as it discourages all risk-taking and all attempts to innovate as companies fear that the results of their human financial investment in research and development will be confiscated. All the empirical work shows a relationship between competition and innovation which takes the form of a bell curve¹⁹.

In order to resolve this apparent contradiction, the Board recommends including the protection and promotion of innovation as part of the objective of maximising consumer well-being. In practical terms, just as competition law must be enforced in accordance with the "rule of reason", the competition regulators must not exclude the need to promote innovation from their analytical software and, thence, to allow economic actors to retain the rent innovation that accompanies it for a specific period. The Board notes that the need for innovation may also be the criterion by which to trace the boundaries between prohibitions *per se* (which are unjustifiable all circumstances) and practices that must be analysed on a case by case basis according to the rule of reason.

The Board would like to point out that that is closely linked to the fact that the concept of perfect, atomised competition is obsolete (cf. supra). Including innovation as one of the constituent parts of consumer well-being, which is one of the aims of competition policy, makes it possible to link it to the concept of non-static, dynamic economic efficiency, which is now unanimously shared²⁰.

Recommendation no. 7: Affirm that innovation is one of the constituent parts of consumer well-being, and one of the objectives of competition policy.

¹⁷The Board will only refer here to the Tinbergen rule, a rule of economic policy that was formulated by the economist, Jan Tinbergen. It states that, for any economic policy with set objectives, the number of tools must be equal to the number of objectives. It is usually linked with Mundell's rule. The two form both the normative base of economic policy and the justification for the "policy mix".

¹⁸T. Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 Antitrust L. J. 313 (2012).

¹⁹Aghion, Bloom, Blundell, Griffith and Howitt, 2005.

²⁰See the pre-occupations of A. Singh and of R. Richter / E. Furubotn, *Neue Institutionenökonomik*, 2003.

3 What institutions are required to regulate competition efficiently?

3.1 The institutional architecture: one or more institutions dedicated to competition regulation, and for which territorial jurisdiction?

With respect to the institutional architecture, the first question to be asked by a developing country with no competition regulation, is how many authorities are required. As a result of its comparative analysis the Board is unanimous in proposing that countries need to have a single competition regulator.

In the United States, for example, the coexistence of two distinct regulators does not seem to be justified. It has simply come about for historical reasons. Two bodies have as their main responsibility the enforcement of all the antitrust laws: the DoJ (Department of Justice) and the FTC (Federal Trade Commission). They decide between them which will examine any particular case. While this duality has not particularly caused any conflicts of jurisdiction between the two authorities, it has engendered a regrettable doubling of costs. It is true that only the Department Justice is authorised to commence criminal proceedings and this jurisdiction must be preserved. However, in other fields in which the antitrust laws are enforced, such as the analysis and regulation of mergers, there does not seem to be any valid reason for the Department of Justice to have responsibility. The FTC has the necessary expertise and this should suffice.

Similar costs of duplication and coordination can be seen in the People's Republic of China, which has no fewer than three different regulators:

- The Ministry of Commerce or MOFCOM, which through its Anti-Monopoly Bureau is responsible for controlling mergers;
- The National Development and Reform Commission or NDRC, which has jurisdiction to deal with illegal cartels relating to prices;
- The State Administration for Industry and Commerce, or SAIC, which is responsible for illegal practices not relating to price-fixing: it deals with unfair competition, anti-competitive agreements, abuses of a dominant position and anti-competitive practices by state companies.

Furthermore, the Chinese anti-monopoly law of 2008 overlaps with the law on unfair competition, particularly with respect to abusive price setting and reselling at a loss. In practice, the coordination of the three authorities charged with the regulation of competition has proved to be difficult. The Anti-Monopoly Commission of the State Council, whose purpose it is, struggles to achieve this end. Its role remains relatively inadequate. The relevance of having three different entities is therefore a real issue.

Therefore the Board unanimously recommends having only one single national regulator.

Recommendation no. 8: Set up one single competition regulator, to deal with both the control of mergers and the prohibition of anti-competitive practices.

The Board wishes to point out, nevertheless, that for developing countries, the creation of a new independent institution entails the costs of setting up a new administrative structure. In certain cases, the lack of financial resources may make the establishment of new regulatory structures in developing countries difficult to achieve.

In this area, the Board has two recommendations: firstly an ad hoc budget should be put in place for the regulator; secondly states should look to make savings through regional cooperation.

Recommendation no. 9: Guarantee the regulator well-established and intangible financial resources.

Given the lack of resources, concentrating resources at regional level seems to be a convincing option, provided, obviously, that the supranational administration is sufficiently efficient. The case of the WAEMU is particularly significant and should be replicated.

Box 6:

The West African Economic and Monetary Union: a successful example of pooled regulation

The West African Economic and Monetary Union brings together Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.

Competition regulation in the WAEMU is essentially governed by the founding treaty of this organisation, which came into force on 1 August 1994, particularly:

- Article 88, which prohibits concerted practices that aim to distort competition, abuses of a dominant position and public assistance that may favour certain actors;
- Article 89, which grants the Council of the WAEMU the power to lay down precise provisions for the enforcement of competition regulation (including fines and exceptions);
- Article 90, which grants the Commission of the WAEMU the power to enforce the competition rules laid down in articles 88 and 89, under the control of the Court of Justice.

In the community law of the UEOMOA, the power to regulate competition is held exclusively by the Union. The member states are only competent to adopt criminal sanctions for anti-competitive practices.

The principal role is performed by the Commission, which is responsible for enforcing the WAEMU competition rules. Its members are appointed by the Conference of heads of state and government for four years. Once a case has been referred to it, it has the power to initiate an investigation or to proceed no further: its final decisions take the form of authorisations, exemptions, orders, temporary measures, fines or periodic penalty payments for non-compliance.

Meanwhile, the Court of Justice of the WAEMU oversees the enforcement of the competition rules by the Commission. It assesses the legality of decisions made by the Commission and rules, with full jurisdiction, on appeals lodged against the decisions of the Commission imposing a fine or a periodic penalty payment for non-compliance, having the possibility to revise or quash those decisions.

In 2002, a consultative Competition Committee was also created by a regulation. Made up of civil servants who are competent to deal with competition, with two representatives from each member state, it is consulted by the Commission for its opinion, prior to any decision being taken with respect to cartels and abuses of a dominant position, and before certain decisions are taken with respect to state aid.

The Board also notes that such a system of regional cooperation makes it possible to achieve greater legal certainty for cases across the region, thanks to the convergent, even harmonised, competition law. Therefore, by granting exclusive power to the Union to legislate in the field of competition, economic actors are assured a degree of legal certainty. Thanks to the conformity obligation imposed upon national legislatures by community regulations and directives it is possible to avoid disparities between laws and to promote their harmonisation.

Furthermore, by cooperating in this way, the member states are able to achieve the gains of operating in a network. There is in fact close cooperation between the various national competition regulators and the Commission of the WAEMU. As part of its investigations, the Commission informs them systematically of procedures concerning companies located in their territories. Meanwhile, the national competition regulators monitor the market constantly in order to identify any malfunctions relating to anti-

competitive practice (particularly by producing an annual report on the state of competition in their country). They are also responsible for overseeing the execution of the Commission's decisions at national level, and may be granted a sectorial competence by the Commission, depending on the case.

Recommendation no. 10: If it is not possible to allocate national resources, foster territorial cooperation and regional convergence, following the successful example of the WAEMU.

3.2 Credibility through expertise and independence

3.2.1 Recruitment and training

Recruiting the right people is a very real problem when a competition regulator is first set up: how can a country create a category of officials with sufficient expertise in the field of competition when it has no previous experience in this area? Competition experts cannot be decreed from on high. They must therefore be recruited in relevant talent pools and trained in a sufficiently specialised way. There must also be enough of them to allow the newly created regulator to function effectively (particularly with respect to the conduct of investigations into anti-competitive practices). We can see what happens when the regulator is understaffed from the Chinese experience where the Ministry of Commerce (MOFCOM) has insufficient staff, which lengthens the time taken to examine merger files, which has harmful effects.

With respect to relevant talent pools, these are fairly easy to identify. In France, certain members of the competition authority college come from the *Cour de Cassation* (Court of Cassation) and the *Conseil d'État* (Council of State, the highest administrative court). Similarly in Japan, the members of the FTC are former law lecturers or judges.

The Board also recommends recruiting from these classes of people: judges, particularly, with expertise in public and private law, must be courted on account of their expertise and independence.

The Board also advises countries that are in the process of setting up their regulatory system to recruit officials from their economics ministries, and above all – on account of their experience of independence and technical knowledge of economic mechanisms – officials from central banks.

Recommendation no. 11: In order to ensure that the competition regulator has enough competent staff, recruit a sufficient number of judges and officials from the Ministry for the Economy or from the central bank of the country concerned, who are recognised for their expertise and independence.

It will also be useful to lay down clear criteria for the evaluation of the candidacies. In the WAEMU, the lack of a community regulation clarifying the basis of the evaluation of the criteria for the appointment of members of the national competition regulators may be regretted.

Recommendation no. 12: Put in place clear rules for the recruitment of the regulators' staff, particularly for the members of the college (list of aptitudes and procedures at hearings).

Furthermore, with respect to the training of the recruited officials, the ICN organises activities to promote competition and enhance capacities. The former is known as "competition advocacy" which involves highlighting the need for competition policy in order to achieve greater economic efficiency and greater consumer well-being. The latter is known

as "capacity building", which involves creating and strengthening institutions with responsibility for competition in developing countries. The Board welcomes these initiatives and encourages action to take them further, by setting up real two party training schemes, bilaterally between the ICN and the interested countries, and exchanges of experts.

Recommendation no. 13: Set up training schemes by increasing cooperation and enhancing expert exchange programmes.

3.2.2 Independence *vis-à-vis* the executive: the importance of the doctrine of appearances

In Brazil, the CADE is directly linked to the Ministry of Justice. Even if its decisions are generally not guided by political interests, such a link is not risk free for the independence of the regulator.

In countries in which the regulators are considered to be fully independent, anomalies – in any event by virtue of the doctrine of appearances – may also subsist: in France, the budget of the competition authority is decided by the Minister of Finance.

The Board recommends that the regulator be a fully independent administrative authority, which means above all that it should have financial autonomy and that it may not take instructions from the executive.

As in judicial matters, it is common to speak of subjective and objective impartiality ("justice must not only be done, it must be seen to be done"). In the eyes of the Board, objective independence is one of the conditions for the credibility of the competition regulator.

As an interesting example in a developing area, more specifically West Africa, the independence of the Commission is clearly affirmed in article 18 of the WAEMU treaty, according to which "the members of the Commission perform their functions independently in the general interest of the Union. They do not seek nor accept instructions from any government or other body. The member states are required to respect their independence". Furthermore, only the Court of Justice of the WAEMU has the competence to modify or quash the decisions made and sanctions imposed by the Commission.

Recommendation no. 14: Create an independent regulator and guarantee its objective independence and hierarchical and financial autonomy.

Box 7: Competition regulators in the Middle East: differentiated national models; full independence is yet to be achieved

Some countries in the Middle East have competition regulators in the form of specialist bodies, within ministries with responsibility for the economy. The institutional model adopted by **Saudi Arabia, Jordan, Qatar and the United Arab Emirates** is based on the creation of "autonomous" **commissions, chaired by the relevant minister**, which have responsibility for competition regulation. These commissions are not legal entities. While this model allows the government to monitor the business world at all times and to intervene rapidly in the markets, the centralisation of regulation within ministerial bodies hardly satisfies the imperative that competition regulators be independent.

These bodies do not have real guarantees of organic and functional independence. In organic terms, the bodies consist of individuals with professional backgrounds from many disciplines, who are appointed mainly by the public authorities. On the whole, the commissions are chaired by the Minister for the Economy and made up of representatives of the public sector, representatives of sectorial regulators, representatives of the chambers of commerce and consumer protection and experts. Beyond the multidisciplinary nature of the commissions, in Saudi law and in Jordanian law there is a commitment to giving these commissions some signs of organic independence. Their terms of office are of limited duration (four years in Saudi Arabia and two years in Jordan) and can be renewed once.

Other provisions put in place **rules for the prevention of conflicts of interest** by imposing an obligation for professional secrecy and an obligation to not deliberate in a case in which the person in question has an interest.

In functional terms, these commissions do not have real independence. They do not have any legal personality which would allow them to have an autonomous budget or run an autonomous administrative department. These commissions are therefore very dependent on the ministries within which they are created. Even if they have decision-making powers within their field of competence, they are largely dependent on work prepared by the internal departments of the ministry to which they are attached. In so far as the regulatory function is split between the commissions and the ministerial departments, a *de facto* hierarchical relationship can come into existence. The commissions may also be influenced by the directions taken by the Minister for the Economy who chairs them in the countries mentioned. Apart from his political weight, the intervention of the minister concerned, who may present his observations or points of view, may have a serious impact on the decisions taken. Other countries in the Middle East have chosen to strengthen the independence of their competition regulators.

Aware of the need to implement competition policy through an independent body, countries such as **Egypt, Kuwait, Syria and Iraq now have regulators that can be described as independent in both organic and functional terms.**

In organic terms, a number of factors indicate a degree of independence. Firstly, there are signs that the regulators come from a range of disciplines, are professionals and are competent. The commissions are collegial with three categories of members: *ex officio* members from the public sphere, judges, representatives of chambers of commerce and associations for the protection of consumers, and competent qualified persons with competence in the field. Secondly, the conditions under which the regulators' members perform their functions constitute guarantees of independence. Unlike those of civil servants, the terms of office of the regulators' members are limited in time and cannot be renewed. Egyptian law also stipulates reasons for removing members from office. A government representative attends meetings of the Syrian competition authority in order to defend the public interest. In addition, real rules to prevent conflicts of interest have been put in place in these countries. The regulators' members are required to observe professional secrecy and to abstain from the deliberations in cases in which they have an interest.

In functional terms, the regulators have an independent status. Firstly, they are subject to more flexible rules regarding the body to which they are attached and by which they are supervised, in comparison with traditional administrative structures. They are **independent bodies attached either to the chairman of the Council of Ministers (as in Syria) or to the Council of Ministers (Iraq) or the Minister with responsibility for the Economy (Egypt and Kuwait). Their decisions are enforceable and can only be revised or quashed by a judicial authority.** On the other hand, they are regulators with **legal personality and administrative and financial autonomy.** In consequence, they have their own budgets and departments in order to carry out their duties as competition regulators.

Nevertheless, the independence of these regulatory authorities is not yet complete. The public authorities still have several ways to control them. Firstly, the regulators' members are appointed by the government. Secondly, the regulators' power is often supplementary in the sense that the executive ratifies the regulations introduced by these bodies. Furthermore, the regulators have an obligation to submit progress reports on the management of their assignments to the government. **Even their decision-making power is relative as the government has the last word in several fields, such as the granting of exceptions, the commencement of criminal proceedings or the signing of settlement agreements.** Finally, **the financial autonomy of the regulators is not complete as their credits are often recorded in the budget of the ministries to which they are attached.**

To conclude, the competition authorities are not truly independent. While the positive law of the Middle East is gradually sanctioning regulators in the constitution, the competition authorities still have legislative independence. Even so, this does not mean that they are merely ministerial departments. Having been granted certain aspects of independence, the status of the competition regulators is a new development which marks them out from traditional bodies. The countries of the Middle East have adopted an intermediate position for their regulators, between total independence and the tightened public control to which traditional administrative bodies are subject. Operating

within a new wave of empowerment or functional decentralisation, regulators now constitute a new category of specialist public bodies. But the choice that has been made does not satisfy the imperative to have truly independent regulators.

3.3 Credibility through transparency and predictability

3.3.1 Proactive transparency

The members of the Board unanimously believe that regulators' activities must be totally transparent, in order to create a climate of confidence and ensure that business functions properly, and because transparency underpins a regulator's credibility.

The requirement for transparency begins when the rules are devised.

Recommendation no. 15: When competition rules are devised, open the process to public consultation before they are enacted.

Transparency means, first and foremost, having a proactive approach to the public that covers companies in particular, with respect to competition regulation.

Because of this, the CADE in Brazil makes every effort to make its procedures as transparent as possible. It publishes all its decisions that can be disclosed on its website, and in the Brazilian official journal (the *Diário Oficial da União*). This constitutes a mass of very valuable information for companies.

Conversely, it seems that access to information on the websites of the three Chinese competition regulators, remains limited, in spite of their efforts, which is regrettable. It would be helpful for the economic actors to have access to the decisions rendered.

Similarly, the fact that it is difficult to access the case law of the Court of Justice of the WAEMU is also regrettable.

Recommendation no. 16: Set up a website in order to publish, on a regular basis, the guidelines followed by the authority, its decisions and even the commentaries on its decisions.

The regulators may also usefully go beyond digital transparency and open their doors to economic actors by, for example, organising annual open days. Another possibility would be to organise annual conferences at which to review the business of the previous year and explain the bases of their decisions.

Recommendation no. 17: Organise annual open days and/or colloquiums with companies.

3.3.2 Predictability without rigidity in order to guarantee legal certainty

Transparency is a constituent part of predictability, as, by providing a maximum amount of information about the regulator's reasoning, it allows well-intentioned economic actors to comply with its methods as far as possible. Legal certainty presupposes that the law is easy to access.

However, predictability is not exactly the same thing as transparency. It is also a rule of conduct, requiring the regulator to observe clear lines, whether with respect to economic reasoning or with respect to the type and proportion of the penalties imposed. When law is reasonably stable over time, it is predictable.

On this last point, businesses must have an idea of the amount of the likely penalty, at least within a range, and the decision to impose a penalty must be predictable, so that

companies can make provision for this eventuality and not be caught off guard. While record sanctions undeniably send out a strong message, they can also be felt as a sledgehammer blow in certain sectors, having a destabilising effect beyond the company in breach of the rules.

The issue of the proportionality of penalties is a subject of debate in Brazil. The general feeling is that there is a lack of objectivity when amounts are set. The circumstances in which additional penalties can be added to the initial sanction are not sufficiently objective, which creates not merely a feeling of legal uncertainty, but also a feeling of injustice.

In China, it is also regrettable that the reasoning behind the amount of a financial penalty is not explained to the company. When fines above a certain amount are imposed, proceedings could be more transparent if the company had a right to be heard before the amount of the penalty was set.

Recommendation no. 18: Draw up and publish an objective grid showing the amount of financial penalties – or the range of penalties – so that companies in breach can have the best possible idea of how much is likely to be imposed.

With respect to the "reasonable stability" of competition regulation, it is notable that in Brazil, one of the faults of the system is the fact that the CADE is not bound by its own decisions, and therefore can change its position without any requirement to justify the change. This certainly gives a degree of flexibility and dynamism to the decisions of the CADE, but the smooth running of business requires a greater degree of predictability, or, in any event, managed flexibility.

Recommendation no. 19: Reduce the degree of uncertainty surrounding the competition regulator's decisions by requiring the authority to produce a reasoned justification for any change in the doctrine or case law.

3.4 Credibility through diligence

Proceedings that drag on interminably are harmful for the business world – both for worried companies and for companies that have lodged a complaint with the regulator on account of anti-competitive practices. The Board unanimously regrets that the length of investigations, particularly with respect to merger control, can threaten the relevance even the viability of such transactions. The share exchange ratio can change dramatically in a few months. As a recent example, the merger between the French cement company Lafarge and the Swiss group Holcim nearly failed after the procedures before the national competition authorities went on for more than one year. In this case, the involvement of more than one national authority, with no coordination, did not facilitate matters.

In Brazil, the introduction of a standstill period during the examination of a merger (which cannot therefore be concluded during that period) has made it possible to bring clarity to the procedure. Henceforth, the CADE has a period of 240 to 300 days, regardless of the complexity of the case, within which to deliver its conclusions.

Brazil also has a fast track procedure, in which eligible transactions can be dealt with in less than 30 days. Even if there is no legal obligation to respect this 30 day limit, the CADE makes it clear that compliance with this time limit is a strict objective. In practice, the most complex cases take between 45 and 120 days to be dealt with by the CADE, when the merger in question has a market share of less than 35%, and between 120 and 330 days in the most complex cases, in which the new entity will have more than 35% of market share.

In China, MOFCOM adopted a new simplified examination procedure for mergers in April 2014. Less cumbersome for companies, this procedure should make it possible to get

authorisation for a transaction within 30 days after validation by MOFCOM of the receipt of all the required documents. If, in practice, depending on the complexity of the merger, MOFCOM may authorise it between four and eight weeks after it has received all the documents, this simplified examination procedure is a good thing.

The fact that an authority can use different procedures depending on the complexity or scope of the envisaged merger is a particularly useful tool, as it makes it possible to cut the average time it takes to examine a transaction.

Recommendation no. 20: Put in place a simplified merger examination procedure and, if it is necessary to carry out an in-depth examination, set a six-month time limit as reasonable.

It is regretted that in several countries, particularly Brazil where the average is seven years, that investigations into anti-competitive practices take much too long. If the decisions of the Brazilian CADE are referred to a judge, proceedings investigating anti-competitive practices will last considerably more than 10 years! This is not satisfactory for anybody. And at the same time, investigations in this field, which are often tricky, require evidence to be collected and *inter partes* proceedings to be set up, both of which take time and cannot be hurried.

Recommendation no. 21: Give the head of the regulator a dashboard showing the time limits for the different types of procedures/proceedings. The aim is to detect, as quickly as possible, investigations, particularly into anti-competitive practices, that are exceeding the usual time limit to a worrying degree.

In France, the legislature has introduced procedures through which certain cases can be fast tracked, namely cases where leniency is appropriate, and cases in which the complaint is not contested. When a complaint is not contested, the procedure is governed by the Commercial Code. If a company does not challenge the complaint made against it, the maximum amount of the penalty may be reduced by half and the real amount of the penalty itself may be diminished (article L. 464-2-III). If the company offers to make commitments, these may also be taken into account when the penalty is calculated.

France also has settlement procedures to deal with anti-competitive micro-practices (article L. 464-9 of the same code).

Meanwhile in Brazil, the cooperation instruments associated with its competition regulation system have been improved, making its procedures more efficient. These instruments include a leniency procedure, guaranteeing that the documents and identity of the party that provided the regulator with information remain confidential. This has increased the level of confidence at the CADE and, in consequence, the leniency programme has made it possible for the regulator to save time and money in its fight against certain cartels.

The Board recommends putting in place procedures of this type in order to ensure that the regulator operates as efficiently as possible.

Recommendation no. 22: Create simplified procedures and cooperation instruments in order to speed up certain cases: those where leniency is appropriate, those in which the complaint is not contested, and those involving anti-competitive micro-practices in which settlements can be reached.

3.5 Credibility through education and pragmatism

The Board wishes to stress the importance of explaining the reasoning behind regulators' decisions.

With respect to merger controls or the control of abuses of a dominant position, education is essential before the economic analysis is carried out: this means delineating the relevant market.

The concept of the relevant market²¹ is used as a framework for any economic analysis by a competition authority, being used as the basis for the modelling of the potentially destabilising effects of competition. The authority will have to justify its definition of the market at some length, the definition being both sectorial and geographic. In some cases, the definition of the relevant market may be hotly disputed by the regulator and the company concerned. This issue was, for example, a particular source of conflict between the French competition regulator and the French company Casino with respect to the definition of the Parisian convenience store market (the issue was the inclusion or non-inclusion of small grocery shops).

Recommendation no. 23: Explain fully why the relevant market has been defined in the way that it has.

3.6 Achieving credibility through tools

American law has the most severe penalties, and treble-damages may be imposed under section 4 of the Clayton Act.

Law enforcement is certainly a way of achieving credibility and provides a guarantee that competition law will be respected in a country or geographical area. However, the golden mean is still important, as disproportionate penalties are often said to be the reason why the American Congress has exempted a certain number of sectors, such as insurance or professional baseball (cf. supra) from the federal antitrust laws. Therefore, everything comes down to proportionality, and intransigence with respect to the effective payment of penalties.

Box 8:

The intransigence of the European Commission: a record fine of one billion euros!

The European Commission accused the American firm Intel of taking advantage of its dominant position in the market for x86 central processing units for microcomputers, between October 2002 and December 2007. The company gave wholly or partially hidden rebates on its components to computer manufacturers. This practice enabled it to strengthen its position as the world leader in microprocessors ahead of its competitors, particularly Advanced Micro Devices (AMD). The Commission did not dispute the rebates *per se*, but the conditions under which Intel granted them.

In 2000, AMD lodged a complaint against Intel with the European Commission, accusing it of paying manufacturers to delay the marketing of PCs equipped with AMD chips. The Commission, which already suspected it of unfair competition in order to maintain its leadership, then carried out an in-depth investigation. It made formal accusations against Intel in 2007 and 2008, finding fault with its commercial policy. Intel granted rebates to distributors of personal computers to incite them to sell Intel's products in preference to those of its competitors. The Commission ordered Intel to stop these illegal practices immediately.

It also imposed a fine of €1.06 billion, which was the largest fine ever imposed upon a

²¹The relevant market comprises, in a specific geographical area, all the products or services of which it is reasonable to think that the buyers consider them to be interchangeable or substitutable on account of their characteristics, their price and the use for which they are intended. However, it is not always easy to reach agreement about these criteria.

company in Europe, being much larger than the one imposed on Microsoft the previous year, which came to €899 million, on account of its failure to cooperate subsequent to a finding that it had abused its dominant position. Legally, the European Commission may impose a fine up to 10% of a company's annual turnover. In 2008, Intel posted turnover of \$37.6 billion, which meant that the fine could be as much as 3.76 billion.

Recommendation no. 24: Impose penalties that have a sufficiently deterrent effect.

Very deterrent penalties should also be accompanied by leniency programmes. By way of example, China adopted a leniency programme granting any company whose evidence had made it possible to establish the existence of a cartel a reduction in the amount of the penalty – in some cases reducing it to zero – that would have been imposed. This leniency programme made it possible to speed up the fight against monopolies.

Recommendation no. 25: Deterrent penalties should be accompanied by leniency programmes.

Finally with respect to the law enforcement of penalties, the Board recommends leaving the responsibility for pursuing international cartels to the countries that have the strictest legislation and the greatest potential to enforce it, even when other countries are affected. This can involve including sales made abroad, when the damages are calculated, if these sales are influenced by an international cartel. This would also eliminate the exemption for export cartels, which were included in numerous legislations for many years (cf. German law²²). By derogation from the effect principle, a national authority can take action against behaviour that took place in its territory, even if it had no effect in this country.

Recommendation no. 26: Include sales made abroad in the calculation of damages, if these sales are influenced by an international cartel.

With respect to the criminalisation of commercial law, particularly competition law, the Board is split. Criminalisation exists for example in Japan, the United States, massively in the Middle East, but not in the European Union. In France, a movement towards decriminalisation was initiated in 2008. In any event, the Board always recommends combining criminal sanctions with administrative sanctions, which can be imposed directly by the regulator.

Box 9:

The massive criminalisation of actions that interfere with proper competition in the Middle East

In Middle Eastern countries the competition regulator does not generally have a repressive function, anti-competitive practices falling within the sole jurisdiction of the criminal courts. In consequence, prosecutions are not initiated automatically but require a prior application by the head of the competition authority, the Minister concerned or his representative, depending on the case. When the competition authorities find that any of the complaints made could constitute a criminal offence in the field of competition, it is up to the head of the competition authority, the Minister concerned or person to whom the Minister has delegated that function to refer the case to the prosecuting authority which will initiate the prosecution.

Therefore the approach adopted means that anti-competitive practices are treated as criminal offences. Two reasons can be given to justify this approach. Firstly, the competition authority's power to impose penalties is replaced by a power to enter into a settlement, which could involve a financial penalty. On the other hand, it seems that the decision not to give the competition authorities the power to impose financial penalties could reflect a desire to confirm the purely administrative nature of this body. This approach makes it possible, *a priori*, to avoid any functional confusion between the regulator and the court and therefore any possibility of combining the administrative and criminal proceedings.

²²In German law, the exemption for export cartels in paragraph 6 of the Competition Code (*Gesetz gegen Wettbewerbsbeschränkungen*, old version), was only removed in 1999.

However, while the severe and deterrent nature of the criminal sanctions incurred is far from negligible, the effectiveness of an approach that is limited to criminal prosecution remains to be demonstrated. In fact, this approach means that the competition regulator has no weapons that would deter market actors from indulging in illegal practices. Lacking any criminal jurisdiction, the Middle Eastern competition authorities cannot be described as "competition police officers". In this model, the regulator is more like an ordinary arbitrator, with no real power to impose penalties on any actor that has infringed the rules of competition. Furthermore, this model has encountered procedural difficulties in Qatar. The Qatari Court of Cassation has just criticised a decision of the Court of Appeal in which it did not check the existence of a written authorisation from the Minister for the Economy to the director of the consumer protection body allowing him to require a prosecution to be initiated as such authorisation cannot be supposed to exist and must be evidenced in writing.

Box 10:

The sanctions imposed by the European Commission in the field of competition

Fines imposed by the European Commission upon those in breach of competition law correspond to a percentage of the company's annual sales for the product concerned. This percentage – which may be as high as 30% – depends upon the nature of the breach (abuse of a dominant position, price fixing or market sharing), its geographical extent and whether it was implemented. In the case of cartels, for example, the percentage is generally between 15% and 20%.

In order to take account of the duration of the breach, this percentage is multiplied by the number of years and months during which the breach was committed. Accordingly a breach that lasted for two years is twice as harmful as a breach that lasted for only one year.

The fine can then be increased or reduced: if the breach is repeated, the fine will be increased; if the company's involvement is limited, the fine will be reduced. In the case of cartels, there is an "entry fee" representing 15% to 25% of the value of sales for one year: this increase constitutes a deterrent regardless of the size or duration of the cartel.

In total, the fine imposed by the European Commission may not exceed 10% of the company's total annual turnover. The upper limit mentioned in article 23 of European regulation no. 1/2003 which, on the basis of article 103 of the TFEU, authorises the Commission to impose fines on companies that are in breach of competition law.

There are specific proceedings for the reduction of fines:

- within the framework of leniency proceedings, the first company to provide evidence of the existence of a cartel sufficient to allow the Commission to investigate the case may be given total immunity from fines. Companies that do the same subsequently may benefit from reductions that may be as high as 50% of the fine that would have been imposed upon them;
- within the framework of settlement proceedings, the Commission may offer to reduce the amount of the fine by 10%;
- if the company is not able to make a contribution, the Commission may exceptionally reduce a fine that is likely to seriously harm a company's economic viability.

In 2014, the Commission imposed €2.2 billion in fines (1.7 billion for mergers and 0.5 billion for other anti-competitive practices).

Basic fine	Percentage of value of relevant sales (0-30%) x Duration (years or periods less than one year) + 15-25% of value of relevant sales: additional deterrence for cartels
Increased by	Aggravating factors e.g. ring leader, repeat offender or obstructing investigation
Decreased by	Mitigating factors e.g. limited role or conduct encouraged by legislation
Subject to overall cap	10% of turnover (per infringement)
Possibly further decreased by	Leniency: 100% for first applicant, up to 50% for next, 20-30% for third and up to 20% for others
	Settlement: 10%
	Inability to pay reduction

Source: http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf

Box 11: Sanctions in the United States

Any violation of the Sherman Act is a crime punishable by a fine. Fines may amount to as much as \$10 million for companies, and up to \$350,000 and/or three years' imprisonment for individuals. This applies if the offence was committed before 22 June 2004.

For offences committed after 21 June 2004, the fine may amount to \$100 million for companies, and up to \$1 million and/or 10 years' imprisonment for individuals.

In certain circumstances, the maximum fine may exceed the upper limits mentioned in the Sherman Act and amount to twice the profit made by the guilty parties (or the victims' losses) on the transaction in question, if they exceed \$100 million.

Otherwise, collusion between competitors can also involve postal fraud, electronic fraud, false declarations and other crimes, all acts against which the Antitrust Division of the Department of Justice will commence proceedings.

In the context of the leniency proceedings, a company or an individual can avoid having to pay the financial penalty and/or criminal fine that they would have had to pay if they had not cooperated with authorities.

In 2014, the Antitrust Division brought proceedings against 44 managers and 18 companies, collecting a total of \$1.3 billion in fines.

Apart from the tools that can be deployed downstream, particularly the power to impose sanctions, one of the priorities for the authorities is indisputably to have adequate investigatory powers so as to be able to pursue investigations into anti-competitive practices, which are sometimes very difficult to resolve. For a regulator, the fact of having such powers is also a guarantee of independence.

The Board considers that the procedures that facilitate the search for evidence introduced by the French legislature for the Competition Authority are of particular value. The French competition authority has its own investigation departments and investigators, who are led by the general rapporteur (article L. 461-4 of the Commercial Code). The investigation departments run by the Ministry for the Economy are still in place. The cooperation between these two networks of investigators is also organised by the Commercial Code. In consequence, the authority can require the assistance of local investigators who operate under the authority of the Minister. The investigators can carry out any investigation that is necessary to enforce the Commercial Code. The powers vary according to whether a straightforward or complex investigation has been launched, this decision being at the discretion of the authority.

In the case of a straightforward investigation (which can be launched without judicial authorisation) the investigators can never seize all the documents as a whole. They can require professional documents to be produced, they have access to software and stored data and can ask for transcripts to be made by any appropriate means. They are authorised to register the identity of the person under investigation and to call upon the services of a qualified person, who is not an investigator, or postpone the moment at which they state their position and adopt an identity in order to check up on the sale of goods and the supply of services on the Internet.

In more complex investigations (i.e. those using investigative resources which, by their nature, interfere with individual freedom and require a request to be made to a judge dealing with custody and release for judicial authority to carry out a visit and seizure), the investigators may access certain private premises, seize the originals of all types of documents, make copies of the whole of a hard disc and the messaging system and ask for laptops to be made available.

Furthermore, the sanctions imposed in the event that the functions of these investigators are hindered have been enhanced²³.

Recommendation no. 27: Give authorities greater investigatory powers for which they have direct responsibility.

Finally, the Board notes that in some countries the regulatory authority has the power to initiate a prosecution while in others it does not. For example, the European Commission and the Japanese FTC have such powers. In France, however, the competition authority has an obligation to investigate every referral. The Board has no particular recommendation to make in favour of either approach.

²³Two years' imprisonment and fines of €300,000.

4 Regulation and democracy

4.1 The democratic conditions for the transfer of the regulatory power: what should be the role of the courts? What is the relationship with the executive?

In a democratic system, it must be possible to lodge an appeal against the decisions of the regulatory authorities with the courts (cf. infra 4.2.). However, before considering rights of appeal, the Board wishes to make a few remarks on the position of the courts vis-à-vis the decisions of competition regulators.

The Board particularly wishes to draw attention to the American theory of "deference". This theory sprang from the decision of the American Supreme Court of 25 June 1984 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In this decision, the Supreme Court determined how a court should examine a decision made by an independent regulatory authority. In this decision it laid down the doctrine of administrative deference, which is sometimes known as "Chevron deference". The idea amounts to saying that the courts – which are usually not specialised – should know their place and not interfere too precisely in the authority's decision that has been referred to them, which is supposed to have the authority of expertise. It therefore requires a kind of respect for the authority's expertise. Naturally, the external legality of the decision is examined, but the examination of the lawfulness of the decision on the merits is limited to any obvious error of assessment. The aim is to not weaken the regulatory institutions by challenging their expertise and credibility.

The Board believes that the principle of "Chevron deference" is a good model to replicate.

Decisions quashed on the basis of the merits sometimes pose problems that come down to purely economic debates, which can be difficult to decide objectively, and which can weaken the regulatory authorities. For example, in 2002, the Court of First Instance of the European Union quashed three decisions of the European Commission refusing mergers: *AirTour v. European Commission*, 6 June, *Schneider Electrics v. Commission* 22 October and *Tetra Laval v. Commission* 25 October. Regardless of the cases in hand and the discussion on the merits, the signal given with respect to the regulators' credibility was, at the time, devastating.

Recommendation no. 28: Apply the principle of "deference" when the courts review the decisions of the competition regulator. Limit the court's power to checking external legality, errors of law and obvious errors of assessment.

With respect to whether the review should be conducted by an administrative court or an ordinary court²⁴, the Board has no precise recommendations to make and will do no more than recommend that national judicial systems should be respected.

Beyond the relationship with the judiciary, the Board also looked at the more relevant issue of the relationship between the independent regulator and the executive. The issue here is whether, in certain circumstances, it is relevant to allow a right of evocation, or a right to set aside, or to give the final word to the Minister of the Economy over the regulator's decisions.

This possibility exists in France, for example. With respect to the control of mergers, article L. 430-7-1 of the French Commercial Code gives the Minister of the Economy the right to take over a case when it has been the subject of a phase 2 decision (phase involving an in-

²⁴Mixed systems can also be relevant. In France, decisions to authorise mergers fall within the competence of the *Conseil d'État*, with no possibility of further appeal. However, with respect to anti-competitive practices, it is the Paris Court of Appeal that is competent at first instance, with the possibility of appeal on points of law to the Court of Cassation. This dual system does not seem to pose any particular difficulties.

depth analysis of the effects of the merger). He may then override the authority's decision, adopting an alternative decision based on reasons of public interest other than the maintenance of competition, such as industrial development, the competitiveness of the companies concerned *vis-à-vis* international competition, or the creation or retention of employment.

The Board thinks that including a power of evocation of this type is a good idea, as competition should not take precedence, in all circumstances, over other equally legitimate considerations of public interest. However, such a mechanism could always be deployed in an unreasonable or even abusive way. Therefore, in order to construct a culture in which a specialist, independent administrative authority can operate successfully, the Board recommends strictly limiting this possibility to cases that are listed exhaustively and requiring the Minister concerned to fully explain why they have taken the decision. The Board also recommends allowing a legal challenge against the use of this power of evocation.

Recommendation no. 29: Ensure that any interference by the executive in the workings of the competition regulator is strictly regulated.

Even if the Board considers that this dimension is less important than the two previous subjects, the issue of the link between the authority and the normative power may also arise, particularly with respect to whether it is necessary to establish a possibility or even an obligation to consult the regulator when a competition law is drafted.

In France, for example, the competition authority (*Autorité de la concurrence*) may be consulted by parliamentary committees on draft laws and on any question concerning competition (article L. 462-1 of the Commercial Code). It gives its opinion on all competition issues when requested to do so by the government. It also must be consulted by the government on any draft regulation instituting a new regime whose direct effect would be either to make the practice of a profession or the access to a market subject to quantitative restrictions, or to establish exclusive rights in certain areas, or to impose uniform practices in terms of price or terms and conditions of sale. The opinions of the *Autorité de la concurrence* may be accompanied by recommendations aiming to improve the competitive operation of markets. Finally, the authority has the possibility to refer a matter to itself on any competition question and to issue recommendations and, in terms of practical reality, the French competition authority frequently uses this possibility.

The Board considers this model to be of particular interest, but notes that it only came into being over time, after the *Autorité de la concurrence*, formerly known as the *Conseil de la concurrence* (Competition Council), was able to build up its credibility and find its place in the institutional landscape. In consequence, the Board thinks that during the first stages of the life of a competition regulator, it is preferable to not put in place consultation obligations of this type, and that to provide rights of consultation is sufficient.

Recommendation no. 30: Gradually allow a consultation procedure without making it mandatory initially

4.2 Rights of appeal

Only regulators' final decisions, ruling on suspicions of anti-competitive practices, abuses of dominant positions or merger applications, may, in the Board's opinion, give rise to an appeal to a court of law, under the ordinary law. In any event, steps taken as part of the investigation, which are preparatory to the final decision, may be challenged within the context of the challenge to the external legality of the decision, on the grounds of a procedural irregularity. In order to prevent the regulators' action being obstructed and paralysed, the Board recommends limiting the rights of judicial appeal against steps taken within the investigation to cases in which it is alleged that rights or freedoms, such as the requirements

of the rights of the defence, have been violated. When the parties under investigation are given the right to appeal against steps taken as part of that investigation, the Board recommends also granting judges the right to impose a deterrent financial penalty upon the appellant, in the event of an abusive appeal.

The Board notes the fact that it is not always just to reserve rights of appeal to "final" decisions only. The regulators are, by their very essence, sources of ("soft law"). In consequence, the Board recommends following the example of a recent decision of the French *Conseil d'État* which proposes considering as eligible for judicial appeal to have a decision set aside, steps (such as press releases, warnings, adoptions of positions) that are likely to produce noticeable effects, particularly economic effects, or whose purpose is to have a significant influence upon behaviour of the individuals concerned.

Recommendation no. 31: Establish a right of appeal against decisions taken by the authorities and against steps that may have noticeable effects, particularly economic effects, or whose purpose is to have a significant influence upon the behaviour of the persons concerned. Do not allow appeals to be lodged against steps taken as part of the investigation unless there has been a violation of rights and freedoms, and sanction abusive and obstructive appeals by deterrent fines.

The Board also recommends making provision in the written law for interested parties to challenge decisions handed down by the regulator refusing the protection of or lifting business confidentiality. The Board insists on the need to make explicit provision for this type of appeal. The issue arose recently in France whose Commercial Code did not make provision for this situation. In consequence, the *Conseil d'État* ruled on this point of law reaching a *sui generis* decision dated 10 October 2014, which forms part of its case law. The *Conseil d'État* found that the decisions made by the general rapporteur refusing to protect business confidentiality or allowing such confidentiality to be lifted were likely to cause harm, by themselves, to the parties who had submitted documents or other items to the proceedings. In the absence of an express legal provision allocating the dispute to the ordinary courts, decisions made by the general rapporteur of the Competition Authority refusing to protect business confidentiality or allowing for such confidentiality to be lifted, which are considered by the *Conseil d'État* to be separable from the proceedings before the competition authority, fall, in accordance with the ordinary law, under the jurisdiction of the administrative court and within the competence of the *Conseil d'État*, ruling with no possibility of further appeal.

Recommendation no. 32: Establish an explicit right of appeal with respect to the protection and lifting of business confidentiality.

Box 12: The European example of appeals against the decisions of the Commission relating to competition

Any decision by the Commission authorising an investigation may be subject to an appeal to have it set aside before the General Court of the European Union, and then of an appeal to the European Court of Justice. This appeal is independent of any appeal against a decision that a breach has been committed.

Should a company wish to challenge the conduct of an investigation, an appeal cannot be lodged independently. Such challenges are made as part of the appeal on the merits against the Commission's decision that a breach has been committed before the General Court and then before the Court of Justice, where appropriate.

All the steps within the investigation are only preparatory or enforceable measures stemming from the inspection decision and cannot be challenged directly.

On the other hand, steps taken in the course of the preparatory proceedings, which are themselves the final phase of special proceedings – distinct from the Commission's final decision on the merits – whose legal effects are mandatory and final, so that they affect the interests of the appellant by

clearly changing its legal position, are steps that may be challenged under the appeal seeking to have the decision set aside. This applies for example to a **decision by the Commission dismissing an application for the protection of a document that is allegedly confidential**, to a **decision by the Commission imposing sanctions in the event of obstruction or refusal to comply**, or to a **decision by the Commission requiring companies to provide it with the information it needs to perform its functions**.

4.3 Autonomous operation but more responsibility

The Board wishes to conclude its recommendations with an observation: as competition regulators oversee the rest of the economy, there is real friction between competition considerations.

The Board's final point is a piece of advice rather than a real recommendation: competition regulators should pay more attention to the personal and demographic data gathered by large digital companies and to the integration of these companies, as the possession of such data could constitute an important barrier to the entry of future competitors.

SUMMARY OF RECOMMENDATIONS

- **Recommendation no. 1: Do not confuse one's objectives. The first and foremost purpose of competition policy is to ensure consumer well-being in microeconomic terms and healthy and optimum economic development in macroeconomic terms.** The other objectives such as regional economic integration must at best be secondary, otherwise they should not be included in the analytical grid of competition regulation.
- **Recommendation no. 2: Each country should define clearly, in a way that is appropriate to its own history, the theoretical principles that it considers to be necessary in order to fulfil the objectives of competition regulation.**
- **Recommendation no. 3: Adopt a very limited number of prohibitions on unjustifiable practices *per se*, as a base. Leave the rest to the "rule of reason".**
- **Recommendation no. 4: Explain reasonable derogations from competition law, and provide strict definitions of them.**
- **Recommendation no. 5: Avoid sectorial exemptions from competition law.** Failing that, reduce the exempt sectors to a minimum, such as the cultural sector.
- **Recommendation no. 6: Do not devise a competition regulation system without thinking about how it will work with other economic policies. Devise a policy mix that covers competition, taxation and trade,** in order to share out objectives that cannot all be dealt with by the single tool of competition regulation.
- **Recommendation no. 7: Affirm that innovation is one of the constituent parts of consumer well-being, and one of the objectives of competition policy.**
- **Recommendation no. 8: Set up one single competition regulator, to deal with both the control of mergers and the prohibition of anti-competitive practices.**
- **Recommendation no. 9: Guarantee the regulator well-established and intangible financial resources.**
- **Recommendation no. 10: If it is not possible to allocate national resources, foster territorial cooperation and regional convergence, following the successful example of the WAEMU.**
- **Recommendation no. 11: In order to ensure that the competition regulator has enough competent staff, recruit a sufficient number of judges and officials from the Ministry for the Economy or from the central bank of the country concerned, who are recognised for their expertise and independence.**
- **Recommendation no. 12: Put in place clear rules for the recruitment of the regulators' staff, particularly for the members of the college (list of aptitudes and procedures at hearings).**
- **Recommendation no. 13: Set up training schemes by increasing cooperation and enhancing expert exchange programmes.**
- **Recommendation no. 14: Create an independent regulator and guarantee its objective independence and hierarchical and financial autonomy.**
- **Recommendation no. 15: When competition rules are devised, open the process to public consultation before they are enacted.**
- **Recommendation no. 16: Set up a website in order to publish, on a regular basis,**

the guidelines followed by the authority, its decisions and even the commentaries on its decisions.

- Recommendation no. 17: Organise annual open days and/or colloquiums with companies.
- Recommendation no. 18: Draw up and publish an objective grid showing the amount of financial penalties – or the range of penalties – so that companies in breach can have the best possible idea of how much is likely to be imposed.
- Recommendation no. 19: Reduce the degree of uncertainty surrounding the competition regulator's decisions by requiring the authority to produce a reasoned justification for any change in the doctrine or case law.
- Recommendation no. 20: Put in place a simplified merger examination procedure and, if it is necessary to carry out an in-depth examination, set a six-month time limit as reasonable.
- Recommendation no. 21: Give the head of the regulator a dashboard showing the time limits for the different types of procedures/proceedings. The aim is to detect, as quickly as possible, investigations, particularly into anti-competitive practices, that are exceeding the usual time limit to a worrying degree.
- Recommendation no. 22: Create simplified procedures and cooperation instruments in order to speed up certain cases: those where leniency is appropriate, those in which the complaint is not contested, and those involving anti-competitive micro-practices in which settlements can be reached.
- Recommendation no. 23: Explain fully why the relevant market has been defined in the way that it has.
- Recommendation no. 24: Impose penalties that have a sufficiently deterrent effect.
- Recommendation no. 25: Deterrent penalties should be accompanied by leniency programmes.
- Recommendation no. 26: Include sales made abroad in the calculation of damages, if these sales are influenced by an international cartel.
- Recommendation no. 27: Give authorities greater investigatory powers for which they have direct responsibility.
- Recommendation no. 28: Apply the principle of "deference" when the courts review the decisions of the competition regulator. Limit the court's power to checking external legality, errors of law and obvious errors of assessment.
- Recommendation no. 29: Ensure that any interference by the executive in the workings of the competition regulator is strictly regulated.
- Recommendation no. 30: Gradually allow a consultation procedure without making it mandatory initially
- Recommendation no. 31: Establish a right of appeal against decisions taken by the authorities and against steps that may have noticeable effects, particularly economic effects, or whose purpose is to have a significant influence upon the behaviour of the persons concerned. Do not allow appeals to be lodged against steps taken as part of the investigation unless there has been a violation of rights and freedoms, and sanction abusive and obstructive appeals by deterrent fines.
- Recommendation no. 32: Establish an explicit right of appeal with respect to the protection and lifting of business confidentiality.

Appendix 1

The dashboard of the International Board on Economic Regulations

DASHBOARD

0. Preliminary questions

- Why regulate? What are the purposes of regulation in your country? What are the underlying theoretical bases? (e.g.: neoclassical belief that pure and perfect competition is the optimal model)

I. Who regulates?

1.1. The bodies empowered to regulate the economy

- Are there any dedicated regulators or does economic regulation fall within the remit of parliament and/or the government?

If there are regulatory bodies:

1.2. The independence of the regulatory authorities

- What is the **legal status** of the regulators?
- How much independence **do they have** vis-à-vis the executive?
- What is the **procedure for the appointment** of individuals to the decision-making colleges within the authorities?
- How long **are the terms of office**?
- Can the executive **change** a decision taken by a regulatory authority (who has the last word)?
- Are there any **organisational links** between the regulatory authorities and the executive, legislature and judiciary?

1.3. The level of geographical reference

- Is regulation carried out **nationally, locally, at supranational level**, or on a **cross-border** basis? Does the level of geographical reference depend upon the sector?
- How do these different geographical levels relate to each other? Is there a principle of "**subsidiarity**"? (cf. rules of geographical distribution determined by reference to relevance), and if so, how is it applied? Do higher authorities **have the right to transfer matters to themselves** from lower authorities?

1.4. The degree of transparency of the operations of the regulatory authorities

- Do existing **procedures** in these authorities ensure sufficient transparency?
- What happens when a case is **investigated**, i.e. how does the investigation proceed?
- Is it possible to report practices in a company **anonymously**?

- Do the **principles** that govern judicial proceedings in democratic societies also apply to proceedings before the agencies (**right to a public hearing, rights of defence, right not to incriminate oneself, requirement that both parties are represented**)?

1.5. The expertise and credibility of the regulatory authorities

- Where is the dividing line between expertise **and policy** in the regulatory authorities?
- Are the members **recruited** on the basis of their expertise assessed by objective criteria?

II. What is regulated?

2.1. The links between cross-cutting and sector-based regulation

- Do cross-cutting regulators **co-exist** with sector-based regulators?
- If the answer is yes, **how are they linked** (formal dialogue such as an obligation to seek the other's opinion, and informal dialogue? is one more important than the other? interference? does either have the right to transfer matters to itself?)
- How are the **limits between sectors** set? For example, is there an overarching regulator for the network industries? Has energy been divided into several sectors that are regulated independently?

2.2. How liberal is the economy?

- How detailed **is the regulation** of each sector? Does the degree of regulation vary from one sector to another?
- How are **market failures** identified?
- Are **prices** regulated or capped? What are considered to be **anti-competitive practices**?
- How do the antitrust laws **work**? Are mergers subject to checks (if any) *before* or *after the event*?

2.3. Economic regulation and the general interest

- How is the **mandate** of a regulatory authority defined? Is it laid down in law?
- Does the mandate of a regulatory authority **take account of higher interests**? The general interest? Legal certainty? (cf. stability of laws, stability of case law, economic actors' capacity to anticipate change)? Interactions with other sectors?
- Is there a **dialogue between the regulatory authorities and the non-economic authorities** (such as the French data protection authority (CNIL))?

III. Who is responsible for ensuring the regulations are applied?

3.1. The production of laws and regulations

- Who **produces** the regulations? Do the agencies share power with democratically elected representatives?
- How is power divided up?

3.2. The tools available to the regulatory authorities

- Are the decisions of the regulatory authorities **enforceable**?
- Do the regulatory authorities have the **power to pass laws? to issue regulations**?
- Do the regulatory authorities have the **power to impose sanctions**?
- What powers of enquiry and investigation do they have? Do they have **powers to issue orders? impose prohibitions or penalty payments for non-compliance**?
- Are they able to **impose structural and/or behavioural commitments**? Within what time frame?
- Do they have the **power to impose settlements**? Do they have the **power to refer matters to themselves**?

IV. Does regulation operate within a democratic framework? Does it protect companies?

4.1. Appeal procedures

- Is it possible to **appeal to the same authority asking it to reconsider its decision or to a higher authority**? Should persons concerned approach the regulatory authority, or the executive?
- Is it possible to challenge a decision of a regulatory authority **before a court of law**? Are there any restrictions on this type of appeal?
- **What types of decisions** of regulatory authorities can be challenged in court? Only final decisions imposing sanctions? Certain **severable decisions** such as decisions to lift commercial confidentiality?

4.2. The effectiveness of the appeal procedure

- **How much power** do the courts have over decisions made by regulatory authorities? Is their power limited to checks on external legality? Is internal legality checked and, if so, in what proportion (checks on obvious errors of assessment or normal checks)?
- What percentage of disputes is settled by **arbitration or compromise/settlement**? What is the cost of administrative procedures, and of *compliance*?
- Do **protective or emergency measures exist**?
- What is the **cost and duration of judicial proceedings**, on average and in terms of standard deviations?

4.3. The protection of companies' interests and legal certainty

- **Is the law** on the regulation of a sector **stable**?
- **Does soft law** (i.e. recommendations, guidelines, codes of conduct, etc.) have a significant place in the regulation of the sector? Is it stable? For example, do the regulatory authorities have to provide reasons for a change of direction in their soft law?
- How does the issue of the **protection and lifting of commercial confidentiality** operate in administrative and judicial proceedings?
- Is the **case law** in the field of regulation **comprehensible**? Is it commented?
- Is the **case law** relating to regulation stable? How do reversals of precedent operate? Can the effects be adapted over time, or are they retrospective? Must reasons be given

- for reversals of precedent?
- Ö When a court reviews a case, does it **take account of the concept of the general interest**?

V. Who assesses the quality of the regulation?

- Ö Are there any **democratic checks** on the quality of regulation? If so, do they operate at **national or supranational** level?
- Ö Are checks **periodic**?
- Ö Have the regulations and the way they operate been subject to major **reforms** in recent years? If so, what is the result of these reforms?

VI. Preliminary elements of analysis

- Ö **In your opinion, what are the genuinely special features of the regulatory system in your country?**
- Ö **In your opinion, what are the advantages and disadvantages of your regulatory system? The strengths and conversely the areas where improvements could be made?**
- Ö **Are there any concepts in this questionnaire that have no equivalent in your own juridico-economic system? Have any questions proved to be problematic for you for this reason? If so, which? Conversely, are there any concepts in your country that are not mentioned in this questionnaire?**

Appendix 2

The composition of the International Board on Economic Regulations

1. The panel

Jean-Michel Darrois, President

Nationality: French

A graduate of Sciences Po (Paris Institute of Political Studies) and of the Panthéon-Assas University (Paris II), Jean-Michel Darrois is a business lawyer. Formerly a member of the Attali Commission on French growth, he is currently head of the law firm Darrois Villey Maillot Brochier, which he founded in 1987.

Francisco Müssnich

Nationality: Brazilian

A graduate of Harvard Law School and of the Catholic University of Rio de Janeiro, Francisco Müssnich is a business lawyer. He is a senior partner at the law firm Barbosa Müssnich & Aragão, which he also founded. He has worked both in Brazil and internationally.

Paul C. Saunders

Nationality: American

A graduate of Georgetown University, Paul C. Saunders was a partner at the law firm Cravath until 2010. From 2010-2014 he was legal counsel to the firm's litigation department. He is currently Chair of the New York State Judicial Institute on Professionalism in the Law, a member of several working groups and committees, and he also teaches at Georgetown University.

Robert Safari Zihalirwa

Nationality: Congolese (DRC) / responsible for the West Africa region

A graduate of the law faculty of the University of Kinshasa, Robert Safari Zihalirwa is a judge by profession. He was successively a member of the prosecuting authority, a Judge at the Regional Court, a Judge at the Commercial Court, Presiding Judge at the Kinshasa Commercial Courts and Judge at the Court of Appeal. Elected as a Judge at the Common Court of Justice and Arbitration of the Organisation for the Harmonization of Business Law in Africa (OHADA) by the 38th session of the Council of Ministers of that organisation, he is currently serving a seven-year, non-renewable, term with that court, which is head-quartered in Abidjan in the Republic of Côte d'Ivoire.

Gabriel Hawawini

Nationality: French / responsible for the economic gains and costs of regulation

A graduate of the University of New York, where he studied economics, Gabriel Hawawini is a professor of finance at INSEAD Business School. He has taught most notably at the University of New York and Columbia University, and at the Wharton School of the University of Pennsylvania. At the same time, he sits on the boards of several companies and advises companies on management.

Hua Li

Nationality: Chinese

Hua Li is a partner with the law firm Squire Patton Boggs. Formerly she worked at the Ministry of Foreign Trade and Economic Cooperation, before becoming Vice-Director of Foreign Trade at the State Commission for the Economy and Trade.

2. Special consultants

Jimmy Kodo, OHADA/World Bank

Nasser Wahbi, Syrian researcher specialising in regulation, responsible for the Middle East region

Dominique B. Walter, lawyer, responsible for Latin America

Mika Yokoyama, Professor of Japanese Law

3. The general rapporteur: Angélique Delorme, master of petitions at the French *Conseil d'État*

The Board is also supported by the Civil Law Initiative, particularly its President, Jean-François Dubos.

We would also like to give our very special thanks to the national teams and the students of Sciences Po who worked on this report.