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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

-- Paper by Allan Fels and Hilary Jennings --

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<http://www.oecd.org/competition/globalforum/independence-of-competition-authorities.htm>*

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COMPETITION AGENCIES: WHAT IF THEY ARE NOT INDEPENDENT? AND ARE THERE ANY DISADVANTAGES TO BEING INDEPENDENT?

-- Paper by Professor Allan Fels and Hilary Jennings --*

1. The independence of competition agencies is generally considered key to their legitimacy as effective enforcers. However, the concept of stand-alone, independent regulatory bodies may be incompatible with the systems or norms of government in some countries. In these cases, regime designs which seek to ensure separation of the competition agency from political interference and other external interests are unlikely to have much relevance. This raises the question of how best to ensure the competition agency in these situations is an effective regulator, and that both it and the competition regime have legitimacy when the public governance framework does not provide for fully independent regulators.
2. The key is checks and balances to ensure integrity and legitimacy. In particular, if independence is not an option then an increased emphasis on the principles of procedural fairness and transparency will be key to ensuring legitimacy and effectiveness in decision-making and process.
3. The arguments presented in favour of the independence of competition agencies often overlook some potential disadvantages of being an independent regulator, notably that a competition agency's advocacy potential may be weakened compared to if it were a part of the government machinery. For competition agencies dealing with wide-ranging government regulatory failures or entrenched State-owned Enterprises, being within the administrative framework may deliver better competition policy outcomes, at least in many circumstances.

1. The principle of independent regulatory agencies

4. Regulatory agencies are entrusted with rule-making or enforcement powers derived from their functions and specified mandate and objectives. They receive delegated powers with the intention that they exert them to fulfil the ultimate goals underpinning their establishment. Regulatory bodies therefore represent a decentralised model of government. Traditional departments or agencies of government are designed to be subordinate to the political authorities of the country, such as Ministers or political leaders of the executive branch of government, in their daily operation even if in practice they are granted significant operational and budgetary autonomy. Independent regulators are one step further removed and provide a system of safeguards for a market or situation that replaces the traditional interventions or influence of Government.¹

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¹ OECD Working Party on Regulatory Management and Reform *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation* (n.4) 33, 72.

5. Regulation via independent competition agencies, like other public sector bodies, is a means to help ensure and encourage market efficiency and protect against consumer harm.² The rationale for seeking to establish independent regulatory agencies is to engender confidence that regulatory decisions are made with competence and integrity, and that they are shielded from short-term political considerations and capture from private interests. The delegation of regulatory powers has been explained in the academic literature in various ways. First, as a means of reducing decision-making costs in terms of the value of specialised and technical agencies delivering policies and outcomes with a level of efficiency and neutrality that politicians cannot match³, and allowing legislators and government executives to economise on the time and effort, if required, to identify and agree on desirable refinements to legislation.⁴ Second, it is a form of delegation that facilitates blame-avoidance, whereby politicians delegate tasks likely to be politically damaging or embarrassing, but keep those where the political opportunity cost is positive.⁵ Third, as a means of dealing with the time consistency problem of credible commitment, in that it increases the likelihood that particular regulatory settlements will continue over time, especially in light of changes in government and government policy, particularly given the often short-termist nature of elected governments.⁶

6. Regulatory agencies, whether independent or not, can be seen in most instances as agents to their political or executive principals – whether in day-to-day operations or in respect of longer-term goals. This might suggest that a fully independent competition agency is a contradiction in terms. However, in practice the concept of an independent agency is always context-specific and heavily influenced by the behavioural approach of the agency itself. The evolution of statutory regulation in a given jurisdiction depends upon the historical context of the relationship between competition and regulation, as well as the balance between the present needs of the relevant economic regulation (i.e. statutory regulation administered by specialised agencies on the basis of a legislative mandate) and constitutional traditions.⁷ That said, whilst context is highly relevant to the solutions adopted in any one particular jurisdiction across the full range of regulatory regimes, the overall trend for market regulation is towards fully independent regulatory bodies, which is seen as a necessary component of effective governance in industrialised countries.⁸

7. The benefits of independent competition agencies are generally regarded as greater legitimacy and better quality of decisions as well as consistency of decisions. These in turn promote confidence in the impartiality of the regime and the credibility of the enforcer, thereby achieving greater political

² Robert Baldwin, Martin Cave, Martin Lodge *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press 2012) 4-7.

³ T.M. Moe “The New Economics of Organization” (1984) 28 *American Journal of Political Science* 739–77.

⁴ Giandomenico Majone “Strategy and Structure the Political Economy of Agency Independence and Accountability” in OECD Working Party on Regulatory Management and Reform *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation: Proceedings of an Expert Meeting in London, UK 10-11 January 2005* (2005) 130. <https://www.oecd.org/gov/regulatory-policy/35028836.pdf>.

⁵ M. Fiorini “Legislative Choice of Regulator Forms” (1982) 39 *Public Choice* 33-66.

⁶ B.Levy, P. Spiller “The Institutional Foundations of Regulatory Commitment” (1994) 10 *Journal of Law, Economics and Organization* 201-246.

⁷ Giandomenico Majone “Strategy and Structure the Political Economy of Agency Independence and Accountability” (n 4) 128-130.

⁸ See for example, the 2014 OECD Best Practice Principles on the Governance of Regulators, which state: “An independent regulator is important to enhance regulatory certainty and stability. This is more prevalent where the regulator is a market regulator.” OECD *The Governance of Regulators: OECD Best Practice Principles for Regulatory Policy* (OECD Publishing 2014) 49 <http://www.oecd.org/gov/regulatory-policy/the-governance-of-regulators-9789264209015-en.htm>.

acceptability of the law and its application. The perceived significance of independence for achieving the objectives of competition law and policy is therefore high, even though as the OECD points out there is limited empirical evidence to support the assumption that independence enhances the effectiveness of competition regimes.⁹ Nevertheless, this has done little to dampen enthusiasm for promoting independent competition agencies as the institutional arrangement that can best ensure the realisation of competition law and policy objectives.

2. The rallying call for independent competition agencies

8. Agency independence from the political process is now considered a necessary component for an effective competition regime.¹⁰ Independence is a means of ensuring that the agency makes its decisions on an objective basis, free from political and private interests, applying the law and economic analysis to the particular circumstances of the case in line with accepted competition policy principles.¹¹

9. The broad consensus that competition agencies should be independent has been developed over time. As the Chair of the OECD Competition Committee, Frédéric Jenny, points out, some 20 years ago most of the delegates to the Committee were Ministry representatives. Today the Committee representatives are predominantly independent competition agencies, which are for the most part separate from the executive.¹² This general agreement among OECD Members that independent agencies constitute good practice for competition regimes is underpinned by the inclusion of the independence of competition agencies as one of the indicators in the OECD's competition law and policy indicators, which measure the strength and scope of competition regimes.¹³

10. Competition agencies themselves have been strong advocates for greater independence. For example, the European Commission adopted a Communication in 2014 setting out that there should be minimum guarantees to ensure the independence of the European national competition authorities, as one of a number of areas where action should be taken to ensure a genuine competition area in the EU.¹⁴ The

⁹ OECD *Independence Of Competition Authorities - From Designs To Practices: Secretariat Background Paper* (2016) 6-7 [https://one.oecd.org/document/DAF/COMP/GF\(2016\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)5/en/pdf)

¹⁰ See for example: UNCTAD Secretariat *Independence and Accountability of Competition Agencies* (UNCTAD 2008) http://unctad.org/en/docs/c2clpd67_en.pdf; John Clark "Competition Advocacy: Challenges for Developing Countries" (2005) 6(4) *OECD Journal of Competition Law and Policy*; Giorgio Monti "Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network" (2014) *EUI Working Paper No 2014/1*; Abel Mateus "Why Should National Competition Authorities Be Independent and How Should They Be Accountable?" (2007) 3(1) *European Competition Journal*.

¹¹ William E. Kovacic "Competition Agencies, Independence and the Political Process" in Josef Drexler, Wolfgang Kerber and Rupprecht Podszun (eds) *Competition Policy and the Economic Approach* (Edward Elgar 2011).

¹² Frédéric Jenny "Institutional Designs of Competition Authorities: Debates and Trends" in Frederic Jenny and Yannis Katsoulacos (eds) *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects* (Springer 2016) 1-57.

¹³ OECD "New Indicators of Competition Law And Policy in 2013 For OECD And Non-OECD Countries" *OECD Economics Department Working Papers No. 1104* ECO/WKP(2013)96 [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP\(2013\)96&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2013)96&docLanguage=En)

¹⁴ *Communication from the Commission to the European Parliament and the Council* "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives" COM (2014) 453 and the accompanying Staff Working Documents: "Ten Years of Antitrust Enforcement under Regulation 1/2003"

country submissions to the 2016 GFC roundtable discussion from both OECD Members and non-Members highlight the significance the majority of competition agencies attach to independence and detail the legislative and specific safeguards in place in their respective jurisdictions to secure independence. The submissions stress the agencies' separation from oversight by their executive, and point to recent legislative and the operational developments to strengthen their relative independence and as further evidence of their autonomy.¹⁵ Given the widely held view that independence and autonomy provide legitimacy to a competition agency's actions, it is unsurprising that agencies are keen to be seen to measure up to this accepted good practice.

3. The spectrum of independent competition agencies

11. The concept of independent regulatory bodies and independent competition agencies covers a wide spectrum of institutional and operational arrangements. It ranges from agencies that are structurally and operationally independent at one end of the scale, to agencies that come under the responsibility of a Minister or ministry, and which are subject to some form of supervision or general instructions by the executive or parliamentary system at the other end.

12. Structural independence (i.e. formal or *de jure* independence) implies the competition agency is a legally separate entity that is not part of a government ministry, its head or members of the board are appointed for a fixed term and cannot be removed without due cause, and in some cases the agency is not reliant on the government for its budget but instead receives funding from an industry levy or from a share of fines. The ministerial model has a competition agency as part of a ministerial department, which suggests increased scope for political intervention and directions from the executive on the agency's day-to-day activities, budgetary dependence, and the likelihood that the head of the agency can be dismissed at will. In between these two models are a range of different institutional structures that have a greater or lesser extent of operational (or *de facto*) independence.

13. Operational independence, regardless of the agency's position within the government architecture, implies that the agency has the ability to decide which cases to investigate as well as the appropriate enforcement actions and solutions to adopt. In addition, it suggests that the terms of appointment and reasons for the removal of the head of the agency are limited and pre-agreed. It also implies that the agency is free to "make comments and otherwise to participate in government and regulatory matters, and in the course of those activities, to take positions that are independent of those held by others in the public and private sectors."¹⁶ Independence in any event is impacted by the actual practice of the agency, rather than purely as a result of structural design.

14. Some competition agencies may be subject, in principle and/or in practice, to general supervision or instructions from their executive. The degree of supervision can vary from co-ordinating the agency's activities without engaging directly in agency decisions, to actively intervening or deciding on individual cases, either externally or through ministerial representation in the decision-making body. Instructions may be given on the general application of the law or on other policy or budgetary matters that apply equally to all government bodies. In a number of EU member states, Ministers may instruct the competition agency to

SWD (2014) 230 and "Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues" SWD (2014) 231.

¹⁵ See the submissions to the 2016 OECD Global Forum on Competition, Session III, Independence of Competition Authorities – From Design to Practices, available at: <https://www.oecd.org/competition/globalforum/independence-of-competition-authorities.htm>

¹⁶ John Clark "Competition Advocacy: Challenges for Developing Countries" (n 10) 71.

conduct market studies or other competition analyses, which the agency would not otherwise be able to initiate itself, even if the outcome is not directed by the Minister.¹⁷

15. In some jurisdictions governments may provide a steer on how they see the competition regime fitting within broader economic priorities, whilst acknowledging the independence of agencies to determine their operational priorities. In 2013 the UK Government published a non-statutory high level “strategic steer” for the new Competition and Markets Authority (CMA), which set out its views on the strategic priorities that should inform the work of the CMA.¹⁸ In this case, the publication of the Government’s view on the high-level aims of the new competition authority made the high-level communication, which might otherwise be covert, open and transparent.

16. Agencies may then be under pressure from government to prioritise certain sectors or cases that are in the spotlight. The US Congress has long had a focus on oil price-gouging when prices at the pump increase. In the UK, concerns over retail dominance in the food supply chain and the effect on small producers and the farm industry led to pressure on the Office of Fair Trading to investigate the sector. And similar pressure for action in the UK banking and energy sectors have resulted in the CMA making them a clear priority, perhaps against strictly economic considerations.

17. Governments can maintain a role in a competition agency’s decision-making process, despite their notional independence, where non-competition goals exist in the competition law and policy. These public interest considerations range from narrower non-competition factors, notably national security/defence, media plurality and financial services, through to wider socio-economic or development goals, such as promoting small businesses and employment, fairness and equity, preventing abuses of economic power or strengthening international competitiveness and industrial development.

18. In many jurisdictions, the government has the power to intervene in merger control. This intervention often follows the competition agency’s competition assessment of the proposed merger, and is based on public interest clauses that allow the competition agency’s decision to be overruled. In other jurisdictions the government intervention exempts the merger from the competition agency’s assessment from the outset.¹⁹ Even where the possibility of intervention exists, not all governments make use of it in practice. Arguably, where the process of intervention is transparent and formalised, for example requiring the government to intervene publically and to specify the overriding policy interests, the more likely it is to temper the use of public interest exceptions in merger cases.

19. Independence is a complex and multifaceted issue. A competition agency can in practice be part of a ministry and yet be more independent than an agency that is a separate body. Therefore enshrining the agency’s independence in legislation does not guarantee that its behaviour and decisions will be independent. Independence will depend on a “culture of independence, strong leadership and an appropriate working relationship with government and other stakeholders”.²⁰ This will very much depend

¹⁷ Submission by the European Union to the OECD Competition Committee *Roundtable on Changes in Institutional Design of Competition Agencies* (5 December 2014) 5 [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2014\)107&docLanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)107&docLanguage=en)

¹⁸ UK Department for Business, Innovation & Skills *Competition Regime: Government Response to Consultation on CMA priorities* (2013) 10-12.

¹⁹ OECD *Public Interest Considerations in Merger Control: Background Paper by the Secretariat* (2016) 14-15 [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2016\)3&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En)

²⁰ OECD *The Governance of Regulators: OECD Best Practice Principles for Regulatory Policy* (n 8) 48.

on the people appointed as the head or members of the board of the competition authority. It is worth noting that most governments have a role in the selection or appointment of the head of agency and members of the board. And it seems unlikely that the government of the day would nominate or appoint heads of agency with whom they could not work, even if the nomination and appointment system is transparent and based on objective qualitative criteria. It is human nature, and perhaps common sense, to favour individuals with whom you are likely to establish a good working relationship.

20. The life cycle of competition agencies may also have a bearing on its relative independence. At the start of a competition regime, a new agency may be more closely connected to central government and may form a sub-unit of a ministry. This may be useful in the first few years after the creation of the agency, to provide it with visible political support and possibly facilitate access to additional resources from the parent ministry. As the competition agency establishes itself in its enforcement role and builds a competition culture, it may progress towards greater autonomy, potentially culminating in it being re-established as a stand-alone agency and upgrading its powers and functions.

21. There are diverse institutional and operational models to support the independence of competition agencies. However, no regulatory bodies are absolutely independent. The effectiveness of competition agencies as enforcers and advocates cannot be determined by the degree and nature of their independence from the administration.

4. No independence for the competition agency – what does that mean for the competition regime?

22. What happens when the regulation is not independent? What should happen in these circumstances? And does this lack of structural and operational independence mean that the competition agency's actions necessarily lack credibility?

23. The fact is that competition agencies operate within a variety of different governance structures. The backdrop of these different political processes and administrative structures not only affects the choice of regulatory model, it also shapes how competition agencies carry out their functions. The governance framework and political culture of a jurisdiction may be such that independent regulators would not fit within the existing administrative context and be effective. Moreover, creating credible and effective independent regulatory bodies would require deep-seated administrative and political reforms, rather than simply grafting on a structural model that establishes an independent competition authority.

24. Regulatory models are designed to fit within a country's overarching governance structure, whether that involves a strict separation of powers, a parliamentary system or where power vests in the governing party or head of state. Within these systems, power to make regulatory decisions may be allocated to a Minister, while others may allocate primary decision-making powers to a position defined in statute that may be held by the head of a ministry or another public official within the ministry. The decision-maker may have the power to delegate the decision-making, either fully or in part. The competition agency may be considered an independent body even though it is part of a central department of government (for example the EU's DG Competition or the US Antitrust Division in the Department of Justice), because it has been assigned specific tasks for which it and not the larger organisation is responsible (although formally the decisions of DG Competition are taken collectively by all EU Commissioners). In non-independent models under a ministerial-based regulation scheme, the function of the competition agency (located either within the ministry or notionally outside it) may be to investigate cases and provide a recommendation, but it would be for the Minister, or his delegated official, to take the final decision (as was the case in Egypt until the law was amended in 2014 to make it the Egypt Competition Authority Board's decision rather than the competent Minister to refer a case for prosecution). Alternatively, the system may provide for the competition agency to be the decision-maker, but within a

structure that provides for inputs from other departments, ministries, regulators or government bodies (for example in China). Arguably a system where the decision-making power clearly lies outside of the competition agency provides greater transparency than a system where decisions of the agency can be overruled by the executive or a ministry, or where it is unclear what significance or role the views of other non-competition bodies play in the decision-making process.

25. An obvious consequence of the lack of actual or perceived independence is inaction on the part of the competition agency or decision-maker. In Latin America a legacy of state intervention and protectionism limited the effectiveness of competition agencies to address anti-competitive conduct and restraints at the start of many regimes. These larger political economy influences impacted on the independence and prosecutorial discretion of many agencies in the region, even though a number of countries had competition laws in place since the early to mid-1900s.²¹ The submission from Argentina to the OECD GFC 2016 roundtable discussion points out that despite the 1999 Act 25,156 providing for the creation of the Tribunal for the Defence of Competition (TDC), a new administrative agency to replace the National Commission for the Defence of Competition (CNDC) which came under the responsibility of the Secretary of State for Trade and International Economic Negotiations, the TDC was never established, while political control of the CNDC was tightened.²² In Thailand the existing Office of the Trade Competition Commission sits under direct Ministerial control and the overseeing Commission comprises influential businessmen. This may explain why there has been little momentum to develop competition law and policy in Thailand. Some 85 cases have been filed with the Thai Office of the Trade Competition Commission since the competition law came into effect in 1999 but to date no cases have reached a final ruling.²³

26. A competition agency's autonomy may be constrained where there is a requirement to consult with other parts of government. This presents the opportunity for intra- and inter-ministry involvement, as well as other regulators or government bodies to express their views, either because they have an interest in competition policy or where the competition outcome might conflict with another policy interest.

27. Regimes that include a procedure expressly setting out the consultation process and who is to be consulted provide increased transparency. The European Commission's DG Competition publishes its Manual of Procedures, setting out the process for inter-service consultations that are required under the Commission's Rules of Procedure.²⁴ The UK CMA's guidance document on mergers sets out that the CMA may (and is in some cases required to) contact other government departments and regulators industry associations and consumer bodies for their views on merger cases where appropriate.²⁵ The document

²¹ Eleanor Fox and D Daniel Sokol "Introduction" in Eleanor Fox and D Daniel Sokol (eds) *Competition Law and Policy in Latin America* (Hart Publishing 2009) 3-4.

²² Argentina submission to the 2016 OECD Global Forum on Competition, Session III, Independence of Competition Authorities – From Design to Practices, available at: [https://one.oecd.org/document/DAF/COMP/GF/WD\(2016\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2016)1/en/pdf)

²³ Bangkok Post *Trade Competition Act to Get Revamp* 5 February 2016, <http://www.bangkokpost.com/print/852660/>

²⁴ Rules of Procedure of the Commission of 24.2.2010 (C(2010)1200 final. And DG Competition *Antitrust Manual of Procedures: Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU* (2012) http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf

²⁵ In relation to mergers involving regulated industries (water, gas electricity, telecommunications, rail, aviation, health and financial services), the respective sector regulators have a formal or informal role. The relevant regulator will, as a matter of practice, be consulted by the CMA to assist in reaching its decision on whether or not to make a reference. The role of the water regulator (Ofwat) and the communications regulator (Ofcom) is in certain circumstances prescribed by statute.

describes the process for consulting with sector regulators on mergers in their regulated sector as well as the notification and consultation process for seeking views from third parties in relation to a public interest merger.²⁶ In China, the Ministry of Commerce (MOFCOM) is required to consult with relevant government departments and other third parties during its merger reviews.²⁷ However, it does not disclose which departments are consulted. Without a clear process, the consulted government departments can hold up the merger review process and put the timing beyond MOFCOM's control. Delays resulting in lengthy review periods averaging 154 days, even for mergers with little or no discernable competition problems, were identified as a problem in China's merger review system.²⁸ However, the introduction of a simplified review system in April 2014 significantly reduced merger review periods, and while the expedited process still provides for third party consultation, this now has a time limit of ten days.²⁹

28. It may be customary for the decision-maker to solicit comments and opinions from other government departments. Consultation may also be necessary to give legitimacy to the action of the decision-maker. In China, it is regarded as commonplace for decision-making in central government to require consulting and co-operation with other relevant government departments – known as the “huiqian procedure” (meaning countersign). This is considered an important consensus building mechanism and decisions or policy proposals that have been through the huiqian procedure are more likely to be ratified by the State Council, which sits at the top of China's political hierarchy. Indeed, if MOFCOM, for example, were to make an important merger decision without appropriate consultation of other relevant departments, the legitimacy of its decision could be challenged within the government administration.³⁰ China's governance architecture provides for in-built co-ordination mechanisms that mean the decisions of the three competition agencies have to take into account the interests of other government bodies. This emphasis on consensus building in the Chinese regulatory system leads to a process of negotiation, bargaining and balancing of competition interests, much of which takes place behind closed doors.³¹

29. The influence of other government bodies over the actions of competition agencies is likely to depend on the relative power and position of the different actors within the administrative system. Higher-ranked bodies may be better able to compel co-operation from lower-ranked bodies, who in turn may find it difficult to ignore or insist on compliance from the higher-ranked entities. In these circumstances, and if there is no real operational independence, stand-alone competition agencies may face additional difficulties in making their voices heard in wider economic policy making or resisting pressure to incorporate the opinions of more powerful government bodies in their decision-making. For competition agencies located within ministries, their relative ranking may be linked to that of their home ministry, which may afford them greater influence over the extent to which the opinions of other government bodies are incorporated.

²⁶ Competition and Markets Authority *Mergers: Guidance on the CMA's Jurisdiction and Procedure* (2014) 7.13-7.16, Chapters 16 & 17. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2_Mergers_Guidance.pdf

²⁷ Ministry of Commerce (PRC) *Measures on the Review of Concentrations Between Business Operators* Order No 12, 15 July 2009 articles 6-7.

²⁸ Wendy Ng “The Independence of Chinese Competition Agencies and the Impact of Competition Enforcement in China” in *Journal of Antitrust Enforcement* 2015 17-18.

²⁹ Ministry of Commerce (PRC) *Guiding Opinions on the Notification of Simple Cases of Concentrations Between Business Operators* 18 April 2014, article 8.

³⁰ Angela Huyaye Zhang “Bureaucratic Politics and China's Anti-Monopoly Law” in *Cornell International Law Journal* 48(2014)1 688.

³¹ Wend Ng “The Independence of Chinese Competition Agencies and the Impact of Competition Enforcement in China” (n 28) 6-7.

30. The actions of competition agencies can also be constrained by the influence or directives of the governing party or the head of state where these have a controlling interest in state affairs. This can have number of implications for the operational independence of competition agencies. For example, through the appointment of like-minded senior officials to competition agencies, or through the supervision of competition agencies by committee or groups appointed by the controlling party or head of state to ensure the implementation of party lines and policies. This obscures the separation between the executive, politics and the implementation of competition law and policy, and impacts the operational independence of competition agencies regardless of their structural location within the regulatory system.

31. These consultation processes bring industrial policy, industry-specific concerns and other policy considerations into a competition agency's review and investigation processes. It requires the competition agency to balance and co-ordinate these other policy considerations with competition law and policy.

32. On the other hand, an open and collaborative process of consultation can facilitate the assessment of competition and mitigate the risks for time delays and unexpected public interest or socio-economic concerns coming up late in the process. It can assist the competition agency to gain insight into industries and sectors without which it may have neither the capacity nor the expertise to conduct an effective competition assessment. This may be particularly relevant for younger competition agencies that have resourcing constraints or where economic and legal expertise on competition is scarce. Other government bodies, notably sector regulators, may have the industry knowledge and data that can usefully inform the competition agency's market investigation process. The competition agency will have to weigh up the potential self-interests of these third party inputs against the benefits of accessing industry-specific information and expertise.

33. A number of competition agencies may have multiple roles and responsibilities that can affect the implementation of competition law and policy. Some of these may be complementary, such as agencies with both competition law and consumer protection remits. Other combinations of roles increase the risk of conflict where the policies contrast rather than complement, for example where competition law enforcement sits alongside a price regulation function.

34. Even where multiple roles are generally considered beneficial, such as an integrated competition and consumer agency, the priority and resources allocated to the competition role compared to other roles will impact the effectiveness of the competition function. In Peru, the focus of the National Institute for the Defence of Free Competition and the Protection of Intellectual Property (INDECOPI) on its consumer protection functions in the early to mid-2000s, which appears to have been the result of political pressure, effectively demoted the priority given to competition law enforcement.³²

35. In Thailand, the same Director General oversees the Office of the Trade Competition Commission as well as the Office of Price and Quantity Administration, within the Department of Internal Trade. However, this arrangement is set to change with the Cabinet approval in October 2016 of the draft Trade Competition Bill, which is expected to spin-off the Competition Commission into a separate agency.³³

³² OECD *Competition Law and Policy in Peru: A Peer Review* (OECD Publishing 2004) 15 -18; Simon Evenett and Claudia Schatan "Findings in an International Perspective" in Claudia Schatan and Enrique Rivera Urrutia (eds) *Competition Policies in Emerging Economies: Lessons and Challenges from Central America and Mexico* (Springer 2008) 224; David Gerber *Global Competition: Law, Markets and Globalization* (OUP 2010) 245-246.

³³ Pornapa Thaicharoen and Ampika Kumar "New Trade Competition Act Approved by the Thai Cabinet" *Baker & McKenzie Global Compliance News* 3 November 2016 <http://globalcompliancenews.com/new-trade-competition-act-approved-thai-cabinet-20161103/>

36. In China, the same Bureau within the National Development and Reform Commission (NDRC) has responsibility for price-related anti-competitive behaviour and price supervision: the Bureau of Price Supervision and Anti-Monopoly.³⁴ Indeed, price control was the original mandate of this Bureau. While this has the potential to create tensions between the two mandates, it is also feasible that the competition law may be applied in a manner consistent with these other functions. In the case of the NDRC, a number of its cases have focused on consumption goods (infant formula, automobiles, rice noodles, tourism, consumer electronics) and were investigated in line with both the Price Law and the Anti-Monopoly Law, indicating that the NDRC considers both laws as a means of regulating and supervising prices.³⁵ In addition to price control, the NDRC also has the function of formulating industrial policy and co-ordinating industry planning through the Industry Co-ordination Bureau. The same NDRC Deputy Director oversees the Price Bureau,³⁶ the Price Supervision and Anti-Monopoly Bureau and the Industry Co-ordination Bureau. Therefore, it is perhaps unsurprising that the NDRC has investigated a number of high profile cases that have far-reaching implications for the competitive structure of domestic industries, with a recent emphasis on the technology sector and the licensing of Standard Essential Patents.³⁷

37. The existence of local competition agencies can impact on the implementation of competition law and policy. Where regulatory systems are decentralised, this can result in different incentives to enforce the competition law, or disinterest if local officials have multiple roles and objectives. Local governments are likely to have wider responsibilities than the central government departments. The former may be more inclined to focus on higher-profile tasks that are more observable and measureable (such as GDP growth and foreign direct investment) and attract more rewards and/or autonomy from central government. This could have unintended consequences of promoting local protectionism if the emphasis is on promoting economic development, whereby local governments compete for economic growth within their own jurisdiction by setting up trade barriers and other constraints to discourage local companies expanding outside of their own region. Local competition officials may therefore have fewer incentives to tackle local monopolies where local governments have competing policy objectives.³⁸

38. The judiciary plays an important role for independent regulators by providing a safeguard on legal interpretation and the ensuring the regulators do not exceed their intended powers. This maintains trust and accountability in the system. While it does not automatically follow that there is a lack of judicial oversight of a competition agency if it is not structurally or operationally independent, there may be fewer incentives for business to appeal an administrative decision if the decision-maker effectively makes the final determination of how to interpret and enforce the law. To do so may also risk retaliation in future engagements with the administration, not just from the competition agency, but also from parts of government involved with regulatory control over other aspects of their business.³⁹

³⁴ The NDRC's Price Supervision and Anti-Monopoly Bureau is in charge of preventing price instability, controlling inflation as well as pricing-related anti-competitive behaviour.

³⁵ Wendy Ng "The Independence of Chinese Competition Agencies and the Impact of Competition Enforcement in China" (n 28) 12-15; Angela Huyaye Zhang "Bureaucratic Politics and China's Anti-Monopoly Law" (n 30) 698.

³⁶ The Price Bureau is responsible for regulating the price of certain basic commodities in a number of sectors including natural gas, diesel, electricity, some medicines, and basic telecoms rates.

³⁷ Angela Huyaye Zhang "Bureaucratic Politics and China's Anti-Monopoly Law" (n 30) 699.

³⁸ *ibid* 700-705.

³⁹ *ibid* 678.

39. The implementation of competition law and policy can be a pluralistic process involving several different actors across central government and local administrations. The relative power of these various actors who have a say in competition enforcement and policy will affect how much influence they will have on the competition agency. The outcome of these consultation and negotiation processes with other government bodies will impact on the extent to which other policies and priorities are likely to be incorporated into the decisions of the competition agency.

5. Procedural fairness and transparency principles to fill the independence gap

40. The above section illustrates how competition agencies operate within the wider regulatory and governance structures of their respective jurisdictions. It may therefore not be realistic or operationally effective for the competition agency to be independent of the mechanisms and conventions within the broader governance framework that link it to other government departments and the political system. Recognising that these limitations on independence shape enforcement processes and outcomes how can the competition regime be effective and legitimate where the public governance framework does not envisage fully independent regulators?

41. One of the principal ways of underpinning legitimacy and public confidence in competition policy and enforcement is through the adoption of procedural fairness and transparency principles. There has been growing pressure for accountability and procedural fairness in competition law proceedings, with a number of international and regional bodies identifying core principles of procedural fairness. These include: the 2010 ASEAN *Regional Guidelines on Competition Policy*, which contained a chapter on procedural fairness issues⁴⁰; the OECD Competition Committee's 2012 report on *Procedural Fairness and Transparency: Key Points*⁴¹; the International Competition Network's 2013 report on *Competition Agency Transparency Practices*⁴² and its 2015 *Guidance in Investigative Processes*⁴³; and the International Chambers of Commerce's recommended framework for international best practices in competition law enforcement proceedings.⁴⁴

42. A number of common principles emerge from these various efforts, which include: (i) clearly articulating the competition law and the associated prohibitions, investigation powers, procedures and sanctions; (ii) transparency in the decision-making process; (iii) accessible and timely notice of charges and evidence on which the agency relies; (iii) meaningful opportunities for parties to respond, present evidence and confer with agency officials; (iv) appropriate use of the agency's powers; and (v) publication of decisions. The specific procedures for ensuring procedural fairness will vary depending on the design of each particular legal system, but the principles are equally important and relevant to interventionist and non-interventionist competition law enforcement regimes alike.

43. Clear and transparent enforcement procedures are key inputs to the competition system that lead to better outputs. They expose the agency's actions and analysis to informed criticism through testing the theories of harm against the facts and evidence that have been relied on to support the theories. This makes

⁴⁰ ASEAN *Regional Guidelines on Competition Policy* (ASEAN Secretariat 2010)

⁴¹ OECD *Procedural Fairness and Transparency: Key Points* (OECD Publishing 2012)

⁴² International Competition Network *ICN Agency Effectiveness Project On Investigative Process: Competition Agency Transparency Practices* 2013 at <http://internationalcompetitionnetwork.org/uploads/library/doc902.pdf>

⁴³ International Competition Network *ICN Guidance on Investigative Process* 2015 at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>

⁴⁴ International Chamber of Commerce Commission on Competition *Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings* Document No 225/666 2010.

for clearer investigations and leads to better case outcomes. Good process improves the accuracy and reliability of legal outcomes through clarity on what amounts to a strong case, i.e. where theories and evidence align to demonstrate consumer harm. Better final decisions provide greater precedence value and greater legitimacy.⁴⁵ On the other hand, unsound enforcement outputs are inhibited because good process principles make it harder to pursue weak cases where the facts do not support the proposed theories of harm.⁴⁶ All of which bolsters the legitimacy of the substantive outcomes and, more generally, of the law and its application. It also helps business to understand the law and comply with it.

44. Strengthening procedural fairness safeguards can support the effectiveness of the competition agency when it lacks operational independence. These principles promote better checks and balances in decision-making by pushing agencies to focus on stronger substantive arguments. Procedural fairness also improves access to and disclosure of public information, and promotes transparency through the publication of enforcement decisions. Parties are provided with clear information about the agency's concerns during investigations and merger review which enables them to focus on the real issues under dispute and makes them better placed to accurately address these concerns. Moreover, clear and transparent enforcement procedures can reduce the potential for the improper influence of political or industrial policy bias on substantive competition assessments or remedies, and help to guarantee more predictable outcomes. In practice this means clarifying the extent and nature of third party influence in the decision-making processes by making consultations transparent and making third party inputs and views publically available.

45. As enforcement action is ramped up in a number of emerging regimes there is an increased likelihood of dissatisfaction with enforcement decisions and challenges to agency decisions. This may be attributed to a perceived lack of expertise of the competition agency or a perceived lack of procedural fairness in the enforcement process. These criticisms draw more attention in high profile cases, which are likely to be subject to greater political pressure. This requires an agency to adopt a principled approach to procedural fairness if it is to have its actions and decisions taken seriously.⁴⁷ Procedural safeguards and transparency are likely to reduce political pressures to investigate high profile companies even if evidence suggests a lack of consumer harm. Adopting good processes will also address concerns where agencies engage in an analysis of complex business behaviours, for example in abuse of dominance cases, for which the economic issues are not clear and where existing case law in other jurisdictions is not on point.⁴⁸ Clear procedures will help the competition agency to get hold of the necessary information to determine the strength of the case and whether or not to pursue it.

46. An increasing number of jurisdictions are adopting procedural safeguards into their competition law systems. This is due, in part, to increased recognition that competition agencies have an institutional self-interest in procedural fairness precisely because it provides legitimacy to the agency's actions. In addition, countries are motivated by underlying economic incentives whereby businesses are more likely to

⁴⁵ D Daniel Sokol "Due process, Transparency and Procedural Fairness in Asian Antitrust" in *Competition Policy International* 28 January 2015 <https://www.competitionpolicyinternational.com/due-process-transparency-and-procedural-fairness-in-asian-antitrust/>

⁴⁶ Douglas H Ginsburg and Taylor M Owings "Due Process in Competition Proceedings" in *IBA Competition Law International* (Vol 11 No 1 April 2015) 39-49.

⁴⁷ Stanley Wong "Thinking About Procedural Fairness of Competition Law Enforcement Across Jurisdictions: A Suggested Principled Approach" in *Competition Policy International* 23 April 2014 at <https://www.competitionpolicyinternational.com/thinking-about-procedural-fairness-of-competition-law-enforcement-across-jurisdictions-a-suggested-principled-approach/>

⁴⁸ D Daniel Sokol "Due process, Transparency and Procedural Fairness in Asian Antitrust" (n 45).

invest in economies that employ fair rules, and that have legal guarantees that protect procedural fairness and respect private property.⁴⁹

47. In summary, procedural fairness safeguards are designed to ensure that businesses are protected from arbitrary decisions, abuses of power and undue political influence that are a common feature of weak legal institutions. This applies to independent and non-independent agencies alike. However, where there is no independent competition agency, enhancing procedural fairness and transparency principles can fill the gap and provide legitimacy to the institution because where good processes are assured, competition agency outcomes will improve.

6. The costs of independence

48. Complete autonomy from the wider governance framework and political considerations is neither possible nor desirable. In order for competition agencies to remain accountable and effective there needs to be some connection to and engagement with the political process. Therefore, the current emphasis on greater independence of competition agencies should not disconnect the agency from policy-making. But in ensuring that the agency is sufficiently shielded from short-term political considerations and undue influence, there is a risk that the measures end up isolating the agency from necessary political support.

49. Competition agencies need to be sensitive to both political currents and commercial realities. On the one hand if the agency is structurally independent it can better distance itself from short-term and populist policies. However, being within central government can make it easier to read and act on political signals. An agency located within a ministerial body is likely to be better informed about activities in other parts of government that would benefit from its input and will have improved access to policy-makers in the executive and legislative branches. Therefore structural independence may have a potentially negative effect on competition advocacy.

50. The effect of independence on an agency's competition advocacy role is particularly important given that government-imposed restrictions on competition are a key concern of competition policy.⁵⁰ Competition agencies are primarily focused on the enforcement of competition law and tackling private restrictions of competition, where independence is generally perceived to support the effectiveness and legitimacy of an agency's enforcement actions. However, while general advocacy and advice to governments is a core function of most competition agencies, agency independence may be a weakness when it comes to tackling anti-competitive government restraints.

51. The closeness of a competition agency's interactions with government will depend largely on the institutional model. This affects both how the agency conducts advocacy and how effective it will be. Where a competition agency is located at the fringes of government or is stand-alone, it is likely to be politically weak. It may not benefit from being able to work through a more powerful sponsoring ministry that may consider itself a competition advocate by virtue of having responsibility for the competition agency and closer oversight of the competition regime. Independent agencies will also find it more difficult to get access to Ministers or political leaders.

⁴⁹ J.M. Gidley and M.J. Hyman "The Emergence of Due Process Following the Growth of International Antitrust Enforcement" published in *Antitrust in Emerging and Developing Countries Conference Papers 2nd Edition*.

⁵⁰ International Competition Network (ICN) *Advocacy and Competition Policy* 2002 30 at <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>

52. Being outside the central government machinery implies the competition agency will have minimal involvement in the policy-making and economic reforms that determine the strength and form of competition. Even if the agency is aware of specific rule-making and government interventions that threaten competition, its decentralised status means it will not be part of the decision-making process. As Bill Kovacic notes: “[i]f a competition agency has no connection to the political process, it runs a risk that its voice will not be heard when these and other decisions are made.”⁵¹ This problem of a political disconnect was highlighted in the OECD’s Peer Review of Indonesia’s Competition Law and Policy, which noted that the KPPU’s independence created considerable distance between it and the central government and frustrated the KPPU’s efforts to secure government backing, for example for key legislative amendments to the competition law.⁵²

53. In addition, the traditional competition advocacy approach of general actions to influence competition decisions within governments is often not sufficient to tackle deep-rooted government restrictions effectively. Instead competition advocacy arguably requires a more comprehensive programme that targets underlying anti-competitive laws and policies. This would include policies covering international and interstate trade, foreign ownership and investment, tax, intellectual property, small businesses, the legal system, and public procurement among others.⁵³ But such a comprehensive approach requires high-level political resolution, which requires the engagement of senior political leaders. This is necessary in order to push pro-competitive reforms up the political agenda, and prevent individual government departments from making competition policy and reform lower priorities on their respective agendas. Independence therefore runs the risk of isolating competition policy and making it the preserve of a separate agency rather than a whole-of-government function.

54. The adoption of a Fair Competition Review Mechanism in China in 2016 aims to achieve pro-competitive policy making at both the central and provincial levels of government through the introduction of a decentralised system of self-assessment for new policy measures and existing regulations.⁵⁴ The policy was adopted by China’s central leadership and empowers the three competition agencies to formulate implementing rules for the self-review and other aspects of the new system. Arguably, the support of central leadership is likely to be key given that the system will challenge local “administrative monopolies”. Competition reform is not just a technical exercise; it also needs to address the political nature of the task.

55. Intervening in government policy making can present challenges whether the competition agency is independent or not. When an agency is part of central government, it may face constraints on what it can comment on, how far it can go in asserting its views, and whether it can make these views public. An independent agency may have more freedom to make forceful comments to other government bodies and engage them even on politically sensitive topics. However, because the agency’s independence removes it from the political process it may never get the opportunity to engage the government on a particular topic, either because the government department rarely, if ever, consults with the competition agency, or there is no mechanism to submit its views at the appropriate moment in the debate. A number of independent competition agencies faced this challenge when trying to respond to government interventions in the recent financial and economic crisis. Many were either not consulted, for example in the terms of economic

⁵¹ William E. Kovacic “Competition Agencies, Independence and the Political Process” (n 11) 304.

⁵² OECD *Reviews of Regulatory Reform: Indonesia – Competition Law and Policy* (OECD Publishing 2012) 35.

⁵³ Allan Fels and Wendy Ng “Rethinking Competition Advocacy in Developing Countries” in D. Sokol, T Cheng and I. Lianos (eds) *Global Competition Law and Economics: Competition Law and Development* (Stanford Law Books 2013).

⁵⁴ PRC *Opinions on Establishing a Fair Competition Review System in Market Development* April 2016 at http://www.gov.cn/zhengce/content/2016-06/14/content_5082066.htm.

bailouts, or had little opportunity to input on changes in financial and other regulations that had potentially significant competition implications.⁵⁵

56. Nevertheless, a number of competition agencies have found a balance between institutional design and their engagements with government, in order to mitigate the potential trade-off between the protection of the agency's enforcement integrity and its ability to advocate. In some regimes the head of the competition agency is a member of the cabinet or a high-ranking member of the executive branch, which gets them a seat at the policy-making table and means that they can bring their competition expertise and insights to bear in these discussions. For example, the head of the European Union's Competition Commission is a member of the European Commission, while the Chairman of Korea's Fair Trade Commission is member of South Korea's cabinet. Other agencies have emphasised the need for a continued high-level dialogue between the agency and government. In the UK, for example, the CMA considers that the government's Strategic Steer provides an open and transparent process for consultation on a "no surprises, no veto" basis.⁵⁶ A few systems provide a statutory requirement for the competition agency to be consulted on regulatory proposals, for example in Colombia, France (when the proposal directly affects competition) and Spain. Other competition agencies state that they are routinely consulted by other government departments, often as part of a wider Regulatory Impact Assessment procedure.⁵⁷

57. The dual role of competition agencies – enforcement and advocacy – can lead to a trade-off between independence and advocacy. On the one hand, an independent competition agency or one that is at arms' length from central government is likely to have more autonomy in carrying out its enforcement role. This perceived independence increases confidence in the agency and the enforcement regime generally. On the other hand, an independent agency may not have sufficient access to policy makers and politicians and may not be consulted on matters that affect competition policy, which limits its ability to influence government policy and tackle government restrictions on competition. However, being involved in the political process may negatively impact the competition agency's credibility with consumers, business and the general public.⁵⁸

⁵⁵ Frédéric Jenny "Competition Authorities: Independence and Advocacy" in D. Daniel Sokol and Ioannis Lianos (eds) *The Global Limits of Competition Law* (Stanford University Press 2012) 171.

⁵⁶ Speech by the CMA Chair Lord Currie 21 May 2014 at <https://www.gov.uk/government/speeches/the-case-for-the-british-model-of-independent-regulation-30-years-on>

⁵⁷ ICN *Framework of Competition Assessment Regimes* 2015 at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1034.pdf>

⁵⁸ Allan Fels and Wendy Ng "Rethinking Competition Advocacy in Developing Countries" (n 53) 192-193.

73 Conclusion

58. There are potential costs for an independent competition agency in terms of its remoteness from the political process. Where the development of market competition is challenged by entrenched government restrictions, a more limited degree of independence may be a worthwhile trade-off for the ability to engage senior level policy makers and politicians on these obstacles. Indeed, in developing and emerging economies, the function of competition law may have other objectives, in addition to correcting market failures. Competition law may be required to address wider regulatory failures and it may be that being a part of the mechanisms and conventions within the broader governance system is more important, and effective, than agency independence to deliver these changes.

59. Therefore, it is necessary to consider the wider administrative framework in order to determine how a competition agency can best ensure its integrity and credibility as both a competition law enforcer and its effectiveness as a competition policy advocate in its particular governance system. A system of checks and balances is required to underpin good processes and improve competition outcomes. Competition agencies need to be aware of their institutional environment and their role in the political process. If agency independence is considered paramount, strategies should be considered to improve the effectiveness and standing of the competition agency with policy-makers to set the scene for competition policy reform.