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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

-- Paper by Michal S. Gal --

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*More documentation related to this discussion can be found at
<http://www.oecd.org/competition/globalforum/independence-of-competition-authorities.htm>*

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AGENCY INDEPENDENCE

-- Paper by Prof. Michal s. Gal¹ --

1. Why Political Agency Independence?

1. Political independence is the ability of an agency to make decisions without – or with limited-political interference. Agency independence from political pressures from within the government has long been recognized as an important element in achieving the goals of regulatory agencies, including competition law agencies.

2. The reasons are straight-forward and the OECD background paper² makes a strong case for their application:

- **Ensuring and strengthening competence:** "Where there is a need for specialist regulator expertise, [it] is best maintained in a specialist unit with quarantined resources." The reason is that "[p]olitical intervention undermines sound policy making when it causes the agency to bend the application of competition law to serve special interests at the expense of the larger society's wellbeing."³
- Creating a **credible commitment** to governmental policy that could not easily be changed. As noted in the background paper, "[a] lack of commitment by policy makers to competition law and policy has the potential to substantially affect all companies and thereby the functioning of all markets."
- **Increasing consistency and predictability:** "Greater distance from political influences is more likely to result in more consistent and predictable regulatory decision making." Independence may also increase the **clarity and visibility** of the decision parameters that are essential for setting guidelines for businesses.
- Maintaining public confidence in the **objectivity and impartiality** of decisions.

3. To that I would add the following:

- **Reducing the use of the competition authority as a political pawn:** An agency which is not independent in its choice of cases can sometimes be used as a pawn in a governmental game of

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² OECD background paper for this session.

³ William E. Kovacic and Marc Winerman, "The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness," 100 *Iowa L. Rev.* 2085 (2015). See also Mark Thatcher, "Regulation after delegation: independent regulatory agencies in Europe", 9(6) *Journal of European Public Policy* 954 (2002).

public perception in a way which does not increase social welfare. This can be illustrated by two examples. The first involves the way that some governments dealt with claims of high oil prices.⁴ To create a perception of a solution, the competition authority was mandated to embark upon an investigation, despite the lack of an efficient tool to combat the heart of the problem, the illegal price fixing of the OPEC cartel. Spending scarce investigative resources on such an endeavor may be futile, as governmental price fixing does not come under the competition law. Yet the competition agency was utilized to help calm public opinion by taking some governmental action in the affected market. A more recent example involves political cries to deal with privacy issues raised by digital firms such as Google through the competition law.

- Nobel Laureate Josef Stiglitz teaches that ‘capture also occurs in a more subtle way: through the promulgation of ideas’.⁵ He therefore urges governments to ensure that the voice of those whose interests are likely to be hurt by regulatory failure is well represented in the regulatory procedures. Independence can sometimes help meet this need by **strengthening the agency’s role as a voice for increased welfare through competition** and its ability to carry out this role effectively.
- Independence may strengthen the competition agency’s **positive reputational effects** on both the wider public and the government, which, in turn, strengthen its ability to engage in more challenging tasks. Such reputational effects, in turn, may contribute to the enhancement of competition in the long run, through increased resources or readiness to take into account the competition authority’s suggestions.
- Independence may also **increase efficiency**, at least in two ways: Independence spares the competition authority the burden of persuasion and lobbying in each and every case. Rather, the competition authority can swiftly apply the competition law. Also- Private parties may be more willing to come forward and reveal troubling behavior to an impartial agency, thereby saving governmental investigatory resources.

4. Therefore, strong reasons support the political independence of the competition authority. On this background, this short note focuses on two main issues:

- Asks provocatively whether there can be too much independence. In doing so, I build upon new theories of agency independence that shed light on optimal design mechanisms.
- Focus on some of the conditions for independence in different settings.

2. Can there be too much independence?

5. There is wide agreement that agency independence from other governmental bodies is a prerequisite for the effective enforcement of competition laws. Yet can there be too much independence? I think you’d all agree with me that eating French éclairs is a real treat. But eating too many éclairs could actually be unpleasant and unhealthy. Is the same true with regard to agency independence? The answer is a cautious yes: in some situations there can be too much independence. Why is this a cautious yes?

⁴ Michal S. Gal, “Reality Bites (or Bits): The Political Economy of Competition Policy in Small Economies” in *International Antitrust Law and Policy* (Barry Hawk, ed., Juris. Publishing, 2002), 605

⁵ Josef Stiglitz ‘Regulation and Failure’ in *New Perspectives on Regulation* (D. Moss and J. Cisternino eds, The Tobin Project, 2009) 13, at 13 and 20. He notes as one example that ‘the financial sector in recent years actively promoted the idea that markets could be self-regulating’.

Because it may differ in accordance with the types of activities that the agency performs, and the wider conditions such as the institutional setting, in which the competition agency operates.

6. Let us start with a relatively easy case: independence in deciding a case that involves pure competition law considerations, in which the application of such considerations will increase social welfare. Interference on political grounds in such cases triggers all the malaise noted above.

7. But in the real world not all cases neatly involve pure competition law issues that nicely fall under the mandate of the competition authority. This can be illustrated by two main cases:

- **Advocacy efforts** with regard to laws, regulations, or regulatory actions that are not yet accepted or applied, that involve competition issues that do not strictly come under the mandate of the competition authority.
- A legislative or a regulatory issue which involves several aspects- only some of which relate to competition law, and in which a balance needs to be struck between **different policy considerations**. Alternatively, it might require a combined effort of several regulatory agencies in a **shared regulatory space**.

8. Such cases, it is argued, require a more delicate balance between independence and other goals, in order to ensure that social welfare is increased. Indeed, agency independence is not a binary concept, but rather is a matter of degree, to be adjusted to achieve its above-stated goals. Accordingly, several scenarios that should be carefully balanced are explored below.

2.1 Independence does not imply complete structural separation

9. One of the ways suggested to create independence is by structural separation from other governmental agencies, such as an autonomous agency that stands outside existing government ministries and does not form a part of an executive branch ministry.

10. Yet structural separation should not be taken too far. One of the most important ways that the competition authority can influence the adoption of competition-enhancing measures and create a culture of competition, is to limit the adoption of government-erected unjustified barriers to competition. Indeed, some of the strongest and most durable barriers to competition are government-made. Not only do such barriers enlist governmental powers for their protection, but they are difficult to change given political capture and arguments for governmental recognition of protected rights. The competition authority, given its unique expertise, has an important role to play in ensuring that the public interest in competition is given sufficient weight in both legislative and regulatory proceedings.

11. An agency that is too far removed from the center of power may not be able to perform this role effectively.⁶ As Lowe emphasizes, a competition authority cannot afford to be isolated or uninformed, especially if it is expected to contribute to the creation of a competitive regulatory framework. Complete structural separation may therefore not be advisable. Kovacic and Winerman explain:

"A further tradeoff exists between independence and the agency's effectiveness. One valuable function of a competition agency is to advocate that legislatures and other government

⁶ This is also recognized in the OECD background paper: "when it comes to their advocacy activities, in particular with regard to those directed at other public authorities in charge of regulation, some commentators note that a structurally separate competition authority may find itself at a strategic disadvantage."

departments adopt pro-competitive policies. Fulfillment of this function requires engagement with elected officials. A completely autonomous competition agency is unlikely to build the political relationships needed to serve as an effective advocate, or to be consulted in a manner timely to ensure that its voice will be heard in the formulation of legislative or regulatory measures".⁷

12. This may be especially important in transition economies. Russia provides a fascinating example. Russia adopted an Antimonopoly Law as an integral part of wide-scale economic reforms to move from a centralized, communist government to a more market-oriented economy. The Russian Antimonopoly Ministry was headed by a minister, who is an active member of government. This has proved to be beneficial in the early days of competition law adoption. The antitrust principles were so different from the embedded ones that, to be effective, the head of the antitrust authority had to be a strong political figure who took part in the ministerial discussions on the adoption of economic policy. Although some decisions were based on political considerations, others could not have been reached or implemented without strong political power. Once an economic order matures, however, it might be wise to change the institutional organization and create a more autonomous agency.

13. It is important to emphasize that the need to ensure that no disconnect exists between the competition authority and other branches of government does not imply that independence is not valuable. Rather a balance must be struck, with the following considerations in mind:

- An important welfare-enhancing relationship exists between independence and the ability to affect other regulatory bodies: The independence of the agency in the enforcement of competition laws, which strengthens its reputation as the protector of competition, is part of what gives it the power and public standing to engage in advocacy activities.
- Even if structural separation exists, procedures, regulations, and laws can be devised in order to ensure that the competition authority is well informed and has standing in the relevant regulatory and legislative proceedings,⁸ in order to ensure that independence does not imply a disconnect. Note however, that this implies that other parts of government should not be independent from the agency, and not vice versa.
- The competition agency should ensure that a disconnect which harms its ability to perform its job does not exist.

2.2 Independence does not imply no sharing of information and expertise

14. In some cases relevant information and expertise can be found in other regulatory bodies. In such cases, independence should not prevent the authority from requesting and making use of such comparative

⁷ Kovacic and Winerman, p. 2091. They further explain: "it may not be desirable, for purposes of agency effectiveness, to seek the greatest possible insulation from political forces. More complete forms of insulation from the political process may deny the agency the ability to be an effective advocate for competition when it uses policy tools other than litigation. Public institutions outside the competition agency take a number of decisions that determine the form and strength of competition. These include the choices by sectarian regulators regarding entry and pricing, legislative decisions about matters such as subsidies and trade protection, and actions taken by authorities at the regional and local level concerning matters such as the issuance of licenses to operate in the market. If 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" (p. 2107).

⁸ See, e.g., Michal Gal and Inbal Faibish, "Six Principles for Limiting Government-Facilitated Restraints on Competition" 44 *Common Market Law Review* 69 (2007).

advantages. Rather, institutional procedures should be created for such sharing. The converse is also true, if the expertise resides with the competition authority.

2.3 *Independence in a Shared Regulatory Space*

15. Modern governance is often characterized by a fragmented and overlapping delegation of powers to several agencies, each responsible for part of a larger whole.⁹ When multiple agencies interact in a shared regulatory sphere, coordination has significant promise as the response to the challenges faced.¹⁰

16. This is also true of cases involving competition law. A failing firm, for example, raises not only questions involving the level of competition, but also wider macro-economic issues such as employment and socio-demographics; Digital markets raise interconnected issues of competition, innovation, and privacy. The same is true with regard to many other issues. Devising efficient regulation in such settings requires a wider balance of interests, which go beyond pure competition concerns. The competition authority is, however, generally a one-trick-horse -albeit a good one in performing that trick- that focuses only on competition law concerns. In such a setting, empowering the authority to make independent decisions, which are based solely on competition law concerns, might be problematic if such decisions are given decisive weight. The most problematic situation is when the authority is given **veto powers**, de jure or de facto. In such a situation, the agency's inherently narrow point of view may lead to a sub-optimal result. Rather, cooperation and coordination are needed. Another example that requires coordination is when the remedy or sanction would only be effective and efficient if inter-regulatory cooperation is achieved.

17. Does agency independence necessarily clash with such cooperation? The answer is negative. However, a careful analysis of the interaction of these two considerations is essential. Below I offer some suggestions and observations that can guide in situation that fall within the shared regulatory space.

18. First, as noted above, where non-competition-focused considerations play an important role in the creation of an overall welfare-enhancing decision, the competition authority's decision should not be given decisive weight. Observe that such weight can be given directly or created indirectly- if procedures are such that overturning the competition authority's decision might be too costly or lengthy to be practical.

19. Second, even in a shared regulatory space, independence may have value. If the authority focuses only on one element, and submits its findings to a body with inclusive decision-making functions, then the effects on competition will be clearly spelled out and observed. This might also imply that it would be more difficult to the final decision-maker to disregard such considerations.¹¹

20. Third, even if the authority is empowered to publish a separate opinion or to reach a decisive decision- or parts thereof- where non-competition considerations are also relevant (for example, it is empowered to perform a wide market study that is not limited to competition law concerns and enforce its conclusions), it should not disregard the effects of its decisions and actions on other regulators:¹²

⁹ J. Freeman and J. Rossi, 'Agency Coordination in Shared Regulatory Space' 125 *Harv. L. Rev.* 1133 (2012), at 1134.

¹⁰ Id.

¹¹ Tamar Indig and Michal S. Gal, "New Powers – New vulnerability? A critical analysis of market inquiries," in *Competition Law as Regulation* 89 (DiPorto and Drexler eds, Edward Elgar, 2015).

¹² Id.

- The decision may affect the reputation of other regulatory agencies: Action in a shared regulatory space resembles the throwing of a pebble into a river, as it creates several widening circles of impact. The relevant ministry, or even the whole government, can be affected by the competition authority's observations or actions. An act that points to regulatory shortcomings or to policy decisions that created (or failed to lower) obstacles to competition in the market may well have a negative impact on public perceptions of the government. Such an impact might be stronger if the competition authority's actions reveal the cost that the public has paid for otherwise inefficient regulation.
- As a result, positive externalities might be created on other regulators or governmental bodies, as it re-shapes and strengthens the incentives of other regulators to act more proactively to find solutions to market failures in order to limit scrutiny (or intervention) by the competition authority.¹³
- Yet it might also lead such regulators to pressure the government to limit the powers of the competition authority or to take active yet covert steps to cut the budget of the competition authority or to harm its reputation, to ensure that its actions are not given much weight by the government or the public. Indeed, the higher the degree of independence, the higher is motivation of politicians to erode the powers of the agency. Particularly, "[i]f other public authorities believe that the competition authority is inattentive to their concerns, they are likely to find ways, directly and indirectly, to diminish the importance of its decision making role. Short-term autonomy, exercised aggressively, may provoke legislative changes that compromise that very autonomy."¹⁴
- It might also affect the willingness of other regulators to cooperate, thereby limiting the effectiveness of the regulatory actions due to the risk that important changes will not take place due to their rejection, circumvention or abandonment by other governmental agencies, and the related risk of eroding the competition authority's relative stand. This is especially true with regard to decisions which involve explaining and marketing the conclusions and convincing other governmental institutions to act upon them (such as market studies).
- Moreover, anticipating such a reaction, some competition authorities might have weaker incentives to invest in performing certain actions altogether. In other cases, they might tailor the remedies to avoid such reactions, even if this implies second-best solutions.

21. Given the above analysis, cooperation and coordination may hold promise by increasing the prospects of urging a genuine and durable internalization of the merits of competition, as well as compliance that is based on acceptance as opposed to calculation of risk and sanctions. As noted, such cooperation does not clash with independence. Rather, independence may strengthen the ability to reach an outcome, given the power it creates for the agency. At the same time, in choosing the agency's staff and management, it might be sensible to also take into account personal skills that facilitate interpersonal cooperation.

22. The benefits of coordination are, of course, contingent on the type of coordination and the initial reasons that have led lawmakers to design the specific shared regulatory space.¹⁵ For example, with regard to the first stage of a competition law action– the market analysis – competition authorities can definitely benefit from coordination, which may save information-gathering costs and generate more accurate analysis given the input of those generally involved in regulating the specific market. It also decreases

¹³ See, e.g. D.E.M. Sappington and D.L. Weisman, "Regulating Regulators in Transitionally Competitive Markets" 41 *J. Reg. Econ.* 19 (2012), at 32.

¹⁴ Kovacic and Winerman, *supra*, at 2107.

¹⁵ Freeman and Rossi, *supra*, at 1137 and 1144.

duplication and inconsistency.¹⁶ Coordination facilitates these gains while preserving the independence of each agency, which is important for productive interagency competitiveness and the ongoing operation of distinct laboratories for policy ideas.

23. In cases in which cooperation is beneficial, which tools are most efficient? Freeman and Rossi recognize three types of coordination tools: consultation, agreements and joint policymaking. Each might be advisable in different settings, dependent on the balancing to be made.

2.4 Complete Independence from Wider Considerations Is not Possible

24. Complete independence from political considerations, in the wide sense, may not be possible or warranted. This is because some of the decisions inherently belie wide political considerations. Indeed, the OECD, as noted by the OECD, 'distributional issues are inherently more political than might be considered optimal for a body that needs to be regarded as an impartial overseer devoted to advancing the general public welfare'.¹⁷ To illustrate, the decision whether to apply consumer or total welfare considerations has significant distributional effects that require a political decision.

25. The question then arises how this inherent characteristic should affect the competition agency's independence, if at all. One way to deal with this issue is by including clear(er) considerations in the competition law legislation, to direct the authority in its choices. This method does not weaken the justifications for independence. Likewise, broad policy choices should not be determined solely by the agency.¹⁸

26. Another method is the creation of a mechanism through which the government can intervene to ensure that wider public policy considerations are achieved (often termed "public policy considerations"). Once again, I would argue, the agency's independence in reaching a decision on competition law grounds should not be harmed, in the sense that it is important to ensure that competition considerations are clearly analyzed and spelled out by the competition agency, even if later they are not given decisive weight by the final decision-maker.

2.5 Review of the Competition Agency's Actions

27. So far we have assumed that the competition authority is always competent and correct. Once we relax this assumption (a situation that can happen even if the nomination of the top management is a-political), the risk arises that the agency will not act in a welfare-enhancing way. Furthermore, it is important to ensure that independence does not imply unaccountability. Casazza makes a forceful case:

¹⁶ Ibid., 1182.

¹⁷ OECD Directorate for Financial and Enterprise Affairs Competition Committee, Policy Roundtables: Market Studies (Competition Law and Policy OECD 2008), available at: <http://www.oecd.org/regreform/sectors/41721965.pdf> (accessed 2 April 2014), at 8, 218 and 234.

¹⁸ Kovacic and Winerman, supra: "A more suitable definition of independence focuses on the agency's exercising its power to prosecute cases or to enact secondary legislation, such as rules that set binding standards of conduct. Safeguards should discourage political branches of government from intervening to guide or force the disposition of investigations, cases, or rulemakings and, preferably, the initiation of cases as well. Such safeguards should not, however, prevent political institutions from offering guidance or recommendations about larger issues of policy...It would be appropriate for political authorities to offer their views more generally - for example, in a legislative hearing - about whether an agency's approach to merger review is too tolerant or too strict." p. 2098.

“[independence] has the apparent virtue of insulating agency actions from untoward political influence, but [it] also insulate[s] agency actions from political accountability....”¹⁹

28. This, in turn, requires inter-regulatory checks and balances that might counsel against complete agency independence. Indeed, most competition agencies’ decisions are subordinated to a reviewing body (generally a court). Yet to ensure that the authority can generally achieve its goals, some limitations are warranted. For example, burdens of proof and causes for action should be in such a way as to minimize interference where not necessary. Also, it is essential that the reviewing agency be, itself, an impartial and competent body, and be required to provide detailed reasoning for its decisions.²⁰

29. To conclude this part, in order to increase social welfare, competition agencies’ independence, while important, should not always be comprehensive. Checks and balances should be created, dependent on the actions to be performed by the agency, the goals to be achieved, and the conditions which exist in each jurisdiction.

3. Some Conditions for independence

30. Within the limits set out in Part II, independence should be encouraged as it serves important goals, elaborated in Part I. This Part therefore explores some of the conditions that increase independence.

31. The silver bullet that will erase all unwarranted political influences on antitrust has not yet been found. The antitrust agency is, by nature, exposed to internal political pressures, as part of our system of government. Yet the influence of political motivations on antitrust can be significantly improved by careful institutional design and social planning. The task is to find ways in which problematic political motivations can potentially be harnessed and constrained for the long-term goals of antitrust. While the efficient tools may differ from one jurisdiction to another, depending on the ideological and socio-economic environment, several tools may well fit a wide range of jurisdictions.

32. **When might the need for a competition agency’s independence be stronger?** Much depends on the checks and balances that already exist within government. Small economies usually exhibit stronger political pressures on their competition law systems than large ones, all else equal. The reason is that economic power in small economies tends to be more concentrated in the hands of a few rather than dispersed amongst many small groups. Small economies tend to be dominated by several large conglomerates that have better resources to overcome the high entry barriers that exist in many of their industries. Moreover, their economic and governmental elites are often intertwined. This reality increases the probability of lobbying, rent seeking behavior and political influences aimed at the pursuit of private

¹⁹ David Casazza, “Liberty Requires Accountability: Checking Delegations to Independent Agencies” 38 *Harvard Journal of Law & Public Policy* 729 (2015), at 730-731. See also Kovacic and Winerman, *supra*: “Complete roster of independence safeguards would come at a substantial - indeed, unacceptable - cost in accountability...the complete insulation from external influence ...would be viewed in most systems as illegitimate and unsupportable.”

²⁰ Kovacic and Winerman, *supra*, note that “The agency’s interactions with courts, for example through judicial review of the agency’s final decisions in adjudicative proceedings, helps ensure that it operates within the boundaries set by constitutions and statutes” Yet, the authors emphasize that judicial review does not fully ensures accountability. “

objectives.²¹ The same might be true for other jurisdictions as well, regardless of their size, where other conditions create a higher risk of capture, such as where high levels of aggregate concentration exist.²²

33. **How to enhance independence?** The OECD background paper focused mainly on issues concerning the recruitment and employment of top management; the status of the agency; its resources; priority-setting and supervision; the objectives of competition law, and competent review bodies. I would like to focus on a few others. I separate them into two groups: those that limit the creation of external political pressures from the outset, and those that strengthen the ability and motivation of the competition authority to confront them, while recognizing that an interrelationship exists between these two groups.

34. A general note is in place: the environment in which competition agencies operate is a dynamic one. Therefore, the authority should always be alert for institutional, economic and ideological changes, which might require the reshaping of its tools accordingly. To illustrate, should public and governmental awareness of the importance of competition law increase, the reception of tools which support agency independence may also increase accordingly.

3.1 *Tools that limit political pressures from the outset*

35. **Transparency** independence without transparency is not worth much. This includes transparency in administrative procedures and regulations, the right to appear before the enforcing bodies unless strong reasons mandate otherwise, the publication of fully reasoned decisions and, where feasible, the maintenance of a web site on which the authority publishes its decision as well as guidelines and speeches and other public statements. Such transparency reduces political pressures as it might reveal attempts to unduly affect the decision.

36. **Sanctions for interference with inquiry** Sanctions for interference in an on-going investigation and most notably the criminalization of antitrust proceeding may serve to limit political pressures on the antitrust authority. Where interference with an on-going criminal investigation is an offense, politicians might be more cautious before intervening in an antitrust investigation, unless they enjoy legal immunity.

37. **Governmental Advocacy** the competition authority has a central role in assisting governmental and other regulatory agencies to realize and analyze the competitive effects of their decisions. By changing decision makers' perceptions and understanding, it may change the range of options perceived by them to be rational and acceptable and thus prevent political pressures that otherwise might have taken place. It might be best to build a convincing case for competition by focusing on examples and success stories derived from the past experiences of one's jurisdiction as well as other jurisdictions with relatively similar characteristics.²³

38. **Public advocacy** can serve as an indirect form of government advocacy in two ways. First, it serves to increase the acceptance of pro-market policies, and thus the willingness of the government to adopt such policies in the first place. Second, public advocacy of the benefits from competition law enforcement can create public pressure on the government to change its policies. Therefore, strategies aimed at gaining public support for competition law enforcement are highly important. Public advocacy

²¹ Michal S. Gal, *Competition Policy in Small Market Economies* (Harvard University Press, 2003).

²² See, e.g., Michal S. Gal and Thomas Cheng, "Aggregate Concentration Concerns: Competition Law Solutions?" *Journal of Antitrust Enforcement* (2016)(forthcoming).

²³ Michal S. Gal, "The Ecology of Antitrust: Preconditions for antitrust Enforcement in Developing Countries" in *Competition, Competitiveness and Development: Lessons from Developing Countries* (Brusick, Alvarez, Cernat and Holmes ed., UN, 2004), 22.

should be approached, however, carefully, as the competition agency is an integral part of the government and should not operate too strongly against the government's stated policy objectives.²⁴

39. **Creating pro-competition pressures within the government** This requires a political anchor or godfather for competition law, which can be a politically strong body, such as the Prime Minister's office, or a decision-maker that is less affected by pressure groups and narrow considerations, whether because he does not need the support of interest groups for his political survival, or because his motivation to adopt a competition law is stronger than his will to give in to pressure groups. Decision makers are often best placed to think strategically about managing opposition, taking advantage of opportune moments and putting together supportive coalitions for reform. Politicians often have detailed knowledge of power relationships that could help hinder efforts to reform, and can carefully craft the content, timing, and sequence of reform in order to mobilize support and manage opposition.

40. **International Allies** External sources, such as global institutions (e.g., the OECD, World Bank, UNCTAD or the WTO) or trading parties, may sometimes serve to overcome internal political economy issues. Such external pressure is only warranted, however, when it echoes the desired socio-economic policy of the country to which it is applied.

3.2 *Tools that strengthen the ability and motivation of the competition authority to confront pressures*

41. Independence is not a stable status-quo. Rather, it is quite unique in governmental settings and there will always be pressures to attempt to limit the competition authority's independence, both within the government and external. Such groups might try to harm the reputation of the competition authority or use their influence to clip its wings. In recognizing such caveats, the competition agency should develop multiple measures, aimed at the government, the business community and third parties, which may serve to decrease the possibility that their independence should be harmed.

42. **Creating a wide basis of support** One method is the creation of a strong and educated public opinion in favor of antitrust. Such public opinion may refocus the political interests of politicians on long-term and general goals and lead to the channeling of their private aspirations in more constructive and overall efficient ways. Even if politicians may not look beyond the next election, the interests of those who chose them may be long-term and non-sector specific. Education thus has the effects of lengthening the time horizon of politicians and reducing harms to agency's independence.

43. **Publicize savings** Another tool, which some agencies already utilize, is the publication of the cost savings achieved through the application of the competition law in comparison to the agency's budget. This, in turn, reduces the likelihood that the agency's budget will be lowered for political reasons, for reasons similar to those explored in the previous paragraph.

44. **Emphasize the difference between low hanging fruits and long-term effects** The previous recommendation can further be strengthened by emphasizing the difference between low hanging fruits and long-term effects. Doing so will strengthen public recognition, because it would refocus it on long-term effects rather than on short-term ones.

45. **Investigatory tools** The existence of broad investigative powers may strengthen the agency's independence. Competition agencies need to be able to monitor markets and obtain information on the conduct of market participants if they are to be effective. To perform such tasks, the competition authority must be equipped with investigative tools that enable it to obtain the relevant information. There should

²⁴

Id.

also be a high penalty for failing to comply with investigative efforts. Without such powers, the authority will be dependent on other regulatory bodies to perform its tasks, which might be abused by others to impede its capability to act, thereby limiting its independence.

46. **Applications of sanctions and remedies** For similar reasons, independence is strengthened where the competition agency is empowered to apply sanctions and remedies for the infringement of competition law violations.

47. In conclusion, a wide set of tools may increase some aspects of agency independence, which it is warranted. Their adoption and application in practice depend on the ideological, legal and socio-economic conditions in each jurisdiction.