

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 03 October 2016

Global Forum on Competition

INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

-- Background Paper by the Secretariat --

1-2 December 2016

This document was prepared by the OECD Secretariat to serve as a background paper for Session III at the 15th Global Forum on Competition on 1-2 December 2016.

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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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JT03405836

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INDEPENDENCE OF COMPETITION AUTHORITIES

Background Paper by the Secretariat^()*

Abstract

Agency independence from political power is a key element of an effective competition regime. Competition authorities differ from each other and they operate in jurisdictions which often have significant legal, political and cultural differences. Thus, there is no one size-fit-for-all model for independence. However, there are some safeguards which can help agencies establish an arm's length relationship with their government. This paper discusses these safeguards and focusses on issues concerning appointment and dismissal of top management, the status of the agency, resources, priority-setting and supervision, and objectives of competition law. Although these legal and structural provisions do not automatically lead to a *de facto* independent agency, they are nevertheless important determinants for independence.

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1. Introduction

1. Agency independence is a prerequisite for the effective enforcement of competition rules. It enables competition authorities to take decisions based solely on legal and economic grounds rather than on political considerations. There is extensive literature which attempts to understand the requirements of and challenges to independence. In 2014, the OECD held a roundtable on institutional design in which competition authorities discussed various aspects of independence (OECD, 2014a). Many other policy networks and organisations (such as the ICN and UNCTAD) as well as competition agencies have organised workshops and published documents. The European Commission (EC) for example in its recent Communication (EC 2014c) announced that it is considering taking further action to establish legally-binding minimum guarantees to ensure stronger independence of EU Member State's competition authorities. Moreover, many jurisdictions have implemented institutional changes over time with the aim of enhancing the independence of their competition authorities.

2. This paper discusses the major elements which ensure a stronger independence of competition authorities, such as structural independence from government, operational/functional independence as well as organisational and financial independence. It will focus, however, solely on independence from political pressures and will not address the equally important principle that competition authorities should also be independent from business interests.

3. The paper proceeds as follows. Section 2 discusses the policy reasons why independence is an important pillar of competition law and policy. Section 3 describes basic elements of *legal* independence. Section 4 addresses *de facto* independence and, finally, section 5 explores the relationship between independence and accountability.

2. Independence for competition authorities- the policy rationale

2.1 General Arguments in Support of Independent Regulators

4. There is a rich body of theoretical and empirical work on the reasons of delegation of power from central government to independent regulatory agencies. It is argued that, principals (elected officials) delegate authority to independent agencies because they have a better capacity to address some of the issues facing elected officials. Decisions on technical and complex issues can require specialised knowledge of sectors or of disciplines which may not be part of the skillset of elected officials. To overcome this difficulty, principals delegate authority to agencies with technical expertise so that the agencies can help them produce appropriate solutions (Moe 1984). At the same time, this delegation allows policy makers to focus on the more general terms of public policies and thereby enhances the efficiency of rule-making in general (Thatcher and Sweet 2002). Independent agencies are also said to provide flexibility in the application of a policy to particular circumstances and favour greater public participation (Majone 1996).

5. The delegation of authority helps to address the important issue of credible commitment to certain policies. A credible commitment problem arises when a policy maker who preferred a certain policy option at one point in time may change preferences at the time when the decision needs to be implemented (Majone 1994). The risk of inconsistency in terms of policy preferences over time can be common and may undermine the credibility of policy making (Moe and Caldwell 1994). Lack of credible commitment increases incentives for rent-seeking on the part of political actors as it creates room for manipulation of the regulatory context (Baudrier, 2001). Lack of credible commitment also decreases motivations to invest particularly in sunk assets as these investments are generally irreversible and thus very sensitive to changes in the regulatory context (Burns and Riechmann 2004). To increase their commitment capacity, principals delegate authority to independent agencies which are expected to achieve

successfully overarching policy goals without being influenced by the temporary changes in the preferences of the policy makers.

6. Delegation of powers to independent regulatory agencies also addresses the problem of political uncertainty. Political uncertainty refers to the risk of a change in the existing government by a new one with different preferences (Moe and Caldwell 1996). However success in certain policy areas requires commitments that are independent of the election cycles. In order to increase the long term impact of public policies, policy makers limit the choices of future policy makers by delegating authority to independent agencies which are supposed to be less influenced by the changes in politics (Gilardi 2008).

2.2 *The Rationale for Ensuring Independent Competition Authorities*

7. The reasons mentioned above are equally applicable to competition authorities. First of all, implementation of competition law and policy involves complex legal and economic assessments and requires flexibility in order to respond to the specific features of the case at hand and to changes in the markets in general.

8. Secondly, competition policy requires credible commitment. In fact, the need for credible commitment is higher for regulators which are directly concerned with economic activities than for those who are not. According to Gilardi (2008), investments are made over a relatively long period of time rendering them very vulnerable to changes in the regulatory framework. For this reason, the need for credible commitment and thus the need for independence are stronger for economic regulators than for social regulators. Economic regulators must be able to demonstrate and persuade investors of the stability and fairness of the application of the regulation.¹ According to the OECD Best Practice Principles on the Governance of Regulators (OECD 2014b): “*an independent regulator is important to enhance regulatory certainty and stability. This is more prevalent where the regulator is a market regulator.*”

9. In principle, competition policy is concerned with regulating the operation of all markets in a given jurisdiction. Every time a company makes a decision, it bases the decision on the existing market conditions and regulatory framework, including competition rules. It expects that competition rules will not be substantially changed and that the competition authority will apply the same rules to all parties without any preferential treatment. 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. Independence of competition authorities from the political interests induces credibility, and the enforcement of competition rules in a stable and foreseeable manner contributes to the better functioning of the markets.

10. In summary, the strong need for regulatory commitment and stability in competition law and policy makes independence a necessary condition for the effectiveness of competition authorities. Another important concern for independence is impartiality. The OECD (2012) Recommendation of the Council on Regulatory Policy and Governance maintains that ‘*Independent regulatory agencies should be considered in situations where:*

- There is a need for the regulatory agency to be independent in order to maintain public confidence;
- Both the government and private entities are regulated under the same framework and competitive neutrality is therefore required; and
- The decisions of regulatory agencies can have significant economic impacts on regulated parties and there is a need to protect the agency’s impartiality.

11. Furthermore, it is possible to conclude that more independence is required as the need for impartiality increases. In particular, when it is necessary to maintain public confidence and competitive neutrality or when an agency has the power to adjudicate between particular interests.

12. Competition authorities fulfil the three conditions outlined in the OECD Recommendation cited above.

13. First, the decisions of the competition authority must be objective and impartial to maintain public confidence in order to be a credible enforcer. Otherwise, competition authorities can never fully achieve their mandate of promoting and maintaining competition in the market place through investigations and consequent decisions or legal actions, potentially including fines. The mere existence of a competition authority should be enough to discourage companies from engaging anti-competitive conducts. This, however, requires a perception by companies, and society as a whole, that the competition authority will execute the law consistently without discrimination.²

14. Second, in principle, competition authorities deal equally with all type of companies in all kinds of industries, including state-owned enterprises (SOEs). Competition authorities must ensure a level playing field which is a prerequisite for private companies to have an incentive to compete with SOEs and to enter and invest in the markets where SOEs exist.

15. Third, competition agencies' actions may have a substantial impact on companies both in the short and the long term. A competition authority functions as a quasi-judiciary body. It embodies powers and procedures resembling those of a court of law or judge. Similar to courts, the judgements of a competition authority are usually ex post rather than ex ante or prescriptive. It receives complaints and punishes illegal behaviour through fines or criminal sanctions. A competition authority can ask a company to divest or implement behavioural changes that will facilitate entry into a market dominated by a single firm. In other words, a competition authority can profoundly affect the position of companies relative to each other in the market. These extensive powers require that competition authorities apply the law impartially. In order to do so, competition authorities should be able to decide cases solely on merit, and independent from political pressures or interferences.

16. The fact that the actions of competition authorities affect private interests has, not only an impact on the degree of impartiality that the agency needs to ensure, but also on the risk of capture. Vickers (2010) compares competition authorities with central banks in terms of risk of capture and submits that the risk of capture is greater for competition authorities than for central banks. The effects of monetary policy decisions' effects are relatively diffuse and usually do not affect a particular interest group very strongly. Competition decisions can have a significant effect on particular interests because of the size of the fines that agencies can impose the risk of exposure to follow-on damages actions and very costly commercial consequences.

2.3 *The Concept of Independence for Competition Authorities*

17. In a survey of competition authorities OECD (2003), 'greater independence' was the most frequently identified factor required to facilitate the attainment of competition law and policy objectives. Similarly, in a KPMG survey where the respondents were competition authority officials, competition lawyers and economists, as well as representatives of the business community, political independence was ranked collectively as the third most influential factor for the effectiveness of a competition regime (KPMG, 2007).³ Business and the competition authorities alone ranked political independence as the most influential factor.

18. There is a general perception within the competition community that independence from political intervention is a necessary condition for ensuring that competition delivers the intended effects for the benefit of the whole society. Independence is not in the self-interest of competition authorities; it is rather a prerequisite that enables them to take decisions solely on the basis of legal and economic considerations without being influenced by political (or business) interests.

Box 1. Independence and Effectiveness of a Competition Regime: Empirical Studies

Although it is widely accepted that independence enhances the effectiveness of a competition regime, empirical evidence supporting a positive relationship between the two is very limited. Dutz and Vagliasindi (2000) tested the relationship between the institutional effectiveness of competition authorities and the intensity of competition in the markets over a sample of 18 competition authorities. In the study, institutional effectiveness was evaluated based on three factors: i) the degree of political independence of the agency, ii) transparency and iii) the effectiveness of the appeal process based on the relevance of adjudication⁴.

According to the empirical results of the study, enforcement and institutional effectiveness are both positively related to the intensity of competition in the markets. The study also revealed that the significance of the institutional effect is higher with a magnitude of more than twice that of the enforcement effect. According to the authors, *‘this implies that factors related to institutional effectiveness are indeed critical in ensuring that competition policy has its intended economy-wide impact. The stronger link between implementation effectiveness and ease of expansion of productive enterprises suggests that building a reputation for independent, transparent and appropriate decision making can be an important pre-requisite for more effective enforcement and competition advocacy activities by national competition authorities’* (Dutz and Vagliasindi 2000).

Guidi (2011) relied on the number of investigations started and on the number of decisions taken as indicators of the efficacy of the authorities. He tested the hypothesis that the higher the independence of a competition authority, the higher the number of cases that it would investigate and sanction. His statistical analysis brought supportive results and concluded that *“formal independence turns out to positively influence the effectiveness of the authorities. This means that independence does not only yield a reputation effect but it also brings an improvement in the objective performances of the competition agencies.”* (Guidi 2011). The same author tested the impact of independence on the performance of the competition authorities by using the indicators of foreign direct investment and consumer price index. However, this time he found contradictory results and concluded that *“...the results indicate that the formal independence of a competition agency does not have any significant impact on either indicator, thus questioning the assumption that independence yields better regulatory performance”* (Guidi 2015).

An empirical study analysing the relationship between independence and effectiveness of a competition authority unavoidably needs to define what an ‘effective competition authority’ is to make comparisons across different jurisdictions. However, giving a satisfactory definition of an ‘effective competition authority’ in a comparative perspective is a remarkably complex issue. It is very difficult to choose an indicator which correctly shows the effectiveness of an agency at a certain time.⁵

Agencies, for example, may have similar effects through different types of activities and cases, or by imposing different levels of fines. However, this may not tell us very much about whether or not the competition regime is effective. A competition authority may resolve many conflicts through commitments/settlements or it may have deterred successfully new cartels by the simple fact of its past decisions. Furthermore, advocacy efforts could bring enormous benefits to the economy which may not be evident in the short term. These elements of effectiveness are very difficult to capture in an indicator.⁶

19. The independence of competition authorities has a symbolic value. *“Just as independent courts symbolise the rule of law, so a competition agency symbolises commitment to the free market”* (Wilks and Bartle 2002). The independence of a competition authority sends signals to companies about the commitment of the government to free and competitive markets. For this reason, threats to independence of competition authorities undermine its symbolic meaning and the way it is perceived by the society in general. As Thatcher and Sweet (2002) put it, *“where the delegation takes place in order to secure credible commitment, principals cannot impose many ex post controls over the agent without undermining the very purpose of delegation”*. However, for some other regulatory agencies ex post controls or interruptions of their independence may not

have a strong effect and may not impair the underlying signals to society because “*where officials delegate to increase technical efficiency, reduce their workload, or improve their information, extensive ex post controls are often more compatible with objectives*” (Thatcher and Sweet 2002).

3. Elements of legal independence

20. How to actually achieve independence is a complex issue. Competition authorities differ from each other. They operate in jurisdictions which often have significant legal, political and cultural differences. What works well in one jurisdiction may not always work well in another. Hence, it is difficult to identify a legal framework that can guarantee a minimum degree of independence for all jurisdictions.

21. The reason why competition authorities are different from each other is twofold. First, although in general competition authorities are entrusted with the enforcement of competition rules, the rules that they apply, the scope and the degree of their enforcement powers vary to a great extent. Competition authorities also differ in terms of the functions and policy areas they are responsible for. In addition to competition, some jurisdictions have regulatory functions or are responsible for the application of other policies such as consumer protection, public procurement or state aid.

22. Second, competition authorities operate in different environments. The political, social, administrative, legal and economic context in which they exist can vary largely. Similarly, political and administrative traditions and cultural norms of jurisdictions may also differ. All these factors however, play a decisive role in shaping an agency’s real attributes and status within the society.

23. Given that competition authorities face different sets of conditions, no conclusion could possibly be made on a single model that can fit all of them. Ensuring independence requires an awareness of the peculiarities of both the agency and its surrounding environment and thus is often contextual.

3.1 Indicators of legal independence

24. While there is no one-size-fits-all solution, it is widely accepted that there are some factors which can help competition agencies establish an arm’s length relationship with their governments. These factors have long been the focus of attention regarding regulatory agencies. Academics have attempted to measure the independence of regulatory authorities by developing indicators and indices of independence.

25. These indicators are generally concerned with the legal and structural aspects of agencies (see table 1). Since it is difficult to find a systematic and quantifiable indicator of *de facto* independence and the assessment of *de facto* independence would inevitably involve subjective judgements, independence indicators usually rely solely on the legal aspects of independence. The common indicators of the indexes presented in Table 1 are:

- term of the head of the agency and commissioners;
- conditions regarding the appointments and dismissals of the head of the agency and commissioners;
- source of budget;
- personnel policy;
- issues related to accountability.

26. As part of the 2013 update of the OECD's product market regulation database, a new set of indicators was produced (Koske I. et al 2016), (see table 2). The indicators of the independence index are summarized under the following headlines:

- instructions from the executive;
- staff;
- budget.

27. The ICN has created another index worth mentioning (see table 3).It includes:

- the appointment process;
- the minimal technical background required for the executive to occupy the office;
- the term of the office of the main executives;
- the budgetary autonomy;
- appeals of an agency's decisions and;
- transparency of decisions.

28. EU law stipulates a number of requirements regarding the independence of some regulatory agencies (see box 1). These requirements involve an explicit obligation for Member States to,

- grant a separate annual budget with autonomy;
- ensure that the staff are explicitly precluded from seeking or taking instructions from any other body when carrying out their tasks;
- ensure that board members can only be dismissed under specific conditions;
- allocate adequate financial and human resources.

29. However, there are no explicit requirements for the independence of competition authorities under the EU law. The EC has recently focussed close attention to this issue indicating in a Communication (EC 2014c) that similar legally binding minimum guarantees are also needed to ensure independence of competition authorities. According to the EC important aspects of independence as explicitly identified in the Communication are (EC 2014b):

- merit-based, transparent appointment procedures and clearly defined objective grounds for dismissals of the top management;
- sufficient and stable resources with a budgetary autonomy;
- rules on conflicts of interest and incompatibilities.

Box 2. Independence Requirements for Telecommunication, Electricity and Railways Regulatory Bodies According to EU Law

The current regulatory framework for the telecommunications sector is Directive 2002/21/EC⁷. Article 3 of the Directive sets out the requirements for independence: *'Member States shall ensure that each of the tasks assigned to national regulatory authorities [...] is undertaken by a competent body. Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control. Member States shall ensure that national regulatory authorities exercise their powers impartially and transparently.'*

The Directive establishing common rules for the electricity markets in the European Community is Directive 2009/72/EC⁸. Article 35 of the Directive states that *'Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member States shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority a) is legally distinct and functionally independent from any other public or private entity; (b) ensures that its staff and the persons responsible for its management: (i) act independently from any market interest; and (ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 37. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that: (a) the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and (b) the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once. The members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law'.*

The rules applicable to the management of railway infrastructure and to rail transport activities in Member States are laid down in Directive 2012/34 (of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, OJ 2012, L343, 32). Under the Article 55 of the Directive *'Each Member State shall establish a single national regulatory body for the railway sector. Without prejudice to paragraph 2, this body shall be a stand-alone authority which is, in organisational, functional, hierarchical and decision making terms, legally distinct and independent from any other public or private entity. It shall also be independent in its organisation, funding decisions, legal structure and decision making from any infrastructure manager, charging body, allocation body or applicant. It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract.. Member States shall ensure that the regulatory body is staffed and managed in a way that guarantees its independence. They shall, in particular, ensure that the persons in charge of decisions to be taken by the regulatory body in accordance with Article 56, such as members of its executive board, where relevant, be appointed under clear and transparent rules which guarantee their independence by the national cabinet or council of ministers or by any other public authority which does not directly exert ownership rights over regulated undertakings. Member States shall ensure that these persons act independently from any market interest related to the railway sector, and shall therefore not have any interest or business relationship with any of the regulated undertakings or entities. To this effect, these persons shall make annually a declaration of commitment and a declaration of interests, indicating any direct or indirect interests that may be considered prejudicial to their independence and which might influence their performance of any function. These persons shall withdraw from decision-making in cases which concern an undertaking with which they had a direct or indirect connection during the year before the launch of a procedure.'*

3.2 *Elements for legal independence of competition authorities*

30. In the light of all this research and information, this paper will focus on the following: issues concerning the top management; the status of the agency; resources; priority-setting and supervision; and the objectives of competition law.

3.2.1 Provisions concerning the top management

31. Being ultimately responsible for the decisions of the agency, the board or the agency head is very likely to be confronted with external pressures. For this reason, the protection of the decision-maker(s) from undue influence is of paramount importance.

32. Threats to the independence of decision-making can, to a certain extent, be mitigated by the way in which the board/ head is nominated, appointed and dismissed. In order to dispel any sense of undue proximity of board members to the government it is important to ensure that nomination and appointment processes are transparent, and based on objective and qualitative criteria (Alves et al 2015), (Monti 2014), (EC, 2014a), (EC 2014b), (Gal 2004), (Ottow 2015). Independent nomination committees can be an effective means of ensuring management impartiality (OECD 2016a) (see box 2).

Box 3. UK, Mexico, Israel: Role of Nominating Committees

In the UK, appointments to the Board of the Competition and Markets Authority (CMA) are made by the Secretary of State and are overseen by a Commissioner for Public Appointments who ensures that these appointed are free from personal and political patronage. The Civil Service Commission regulates recruitment to the Civil Service. Civil Service Commissioners chair the selection panels for all CMA Board appointments and the most senior tier of the CMA's executive team.

In Mexico, commissioners are appointed by a mechanism conducted by an autonomous Evaluation Committee. Through an impartial examination process, the Evaluation Committee generates a list of candidates from which the President of the country selects nominees that the Senate must consider for ratification.

In Israel, a search committee nominates the final candidates among which the Minister of Economy makes the appointments, but only after consulting with the Minister of Finance (instead of the Prime Minister as in the past selection process). The search committee is composed of 5 members: the Director General of the Ministry of Economy, the Deputy Attorney General, the Civil Service Commissioner and two representatives of the public. One of the representatives of the public, which is appointed by Director General of the Ministry of Economy, is supposed to have the qualifications of the District Court Judge or a member of the Antitrust Tribunal. The second representative of the public is supposed to be an academic with expertise in antitrust law, and s/he will be appointed by the Civil Service Commissioner.

33. A possible threat to decision-making independence is posed by a lack of security of tenure. The Court of Justice in its analysis of the premature termination of the head of the authority responsible for data protection in Hungary stated that (Case C-288/12 paragraph: 54-55),

“...the threat of such premature termination to which that authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence...That is true even where the premature termination of the term served comes about as a result of the restructuring or changing of the institutional model, which must be organised in such a way as to meet the requirement of independence laid down in the applicable legislation. Moreover, in such a situation, the supervisory authority cannot be regarded as being able, in all circumstances, to operate above all suspicion of partiality’.

As the Court put it, the sole threat of early dismissals can substantially impair the ability of a decision maker to act independently for mainly two reasons. First, the threat may lead to prior compliance with the government on the side of the commissioners in an attempt to avoid the threat in reality. Second, the mere existence of the threat can create a suspicion about the board's impartiality. However, a board has to remain above all suspicion of partiality and, therefore, that suspicion has to be avoided as it can

substantially weaken the public and business confidence in the objectivity, impartiality and consequently legitimacy of the agency.

34. It is also important that board members are appointed for fixed terms; that arbitrary termination of appointments is constrained by legislative provisions; and, that early dismissals are possible only under clearly defined and specific conditions such as disciplinary sanctions, infringement of professional secrecy, or conflicts of interests.

35. As regards the duration of the term of office, longer terms are seen by many to be more in line with the principle of independence (see table 1). In particular, terms of appointments which are longer than the term of the appointing authority are more likely to promote decision making independence (OECD 2014b). Similarly, non-renewable terms are preferable as otherwise the appointed person may tend to please the appointer in order to be re-selected (ICN 2005), (Monti 2014) (UNCTAD 2008) (Kovacic 2011).

36. The decision-making body of a competition authority can be a multi-member board consisting of a head and commissioners or a single-member board composed of just the head. Due to the plurality of its members, a multi-member board is considered to have a greater potential to resist capture and pressures. As such, a multi-member board is seen more capable of bringing a greater level of independence than a single member board (OECD 2005) (Kovacic 2016) (Kovacic et al 2012).

3.2.2 *Status of the agency*

37. The status of the authority within the government is another important element of independence.

38. The OECD Best Practice Principles on the Governance of Regulators maintains that (OECD 2014b, pp. 50-51): “In some cases it will be clear that a legally independent and structurally separate regulatory body is needed, while in others it will be a matter of judgement” and lists the following factors to take into consideration when choosing a structurally separate arrangement over a ministerial unit.

1. Credible commitments over the long term: Establishing a more independent regulator can send an important message to regulated entities about the commitment of government to objective and transparent administration and enforcement of regulation.
2. Stability: Greater distance from political influences is more likely to result in consistent and predictable regulatory decision making.
3. Addressing potential conflicts of interest: Regulatory decisions that have significant flow-on impacts for government, e.g. on budgets or service delivery, or that must be seen to be applied impartially to both government and non-government entities may be better made by entities at arm’s length from ministers and ministries.
4. Development of regulatory expertise: Where there is a need for specialist regulator expertise, which is best maintained in a specialist unit with quarantined resources.

39. As discussed in the previous section, the need for credibility, stability, impartiality and expertise is high for competition authorities and thus competition agencies meet all of the above-mentioned conditions.

40. In fact, it is widely accepted that structural separation from government provides competition authorities with greater insulation from political control. Structural separation should act as a buffer against political capture and limit the scope for political or ministerial intervention in agency activities (OECD 2004), (Alves et al 2015), (Gal 2006), (Ottow 2015), (UNCTAD 2008), (Kovacic 2011). Additionally, in the model

of a ministerial department, neither the members nor the head of the board could have a fixed term. They can be withdrawn at the will of the Minister at any time.

Box 4. Reform of the Competition Authorities of Belgium, Slovenia and Mexico

- The Belgian Competition Authority used to be a department under the Ministry of Economic Affairs. It was re-established as an autonomous authority with its own legal personality on 6 September 2013.
- The Slovenian Competition Protection Agency was established in 2013 by the reorganisation of the former Slovenian Competition Protection Office which was a part of the Ministry of the Economy. The agency is now an independent administrative authority.
- The Federal Economic Competition Commission of Mexico (COFECE) was created on 11 June 2013. It replaced the Federal Competition Commission which was subordinated within the Ministry of Economy. COFECE has a distinct legal personality and its own patrimony. The agency was given budgetary autonomy; the power to enact rules regarding administrative organisation; and, the power to file a constitutional recourse before the Supreme Court of Justice in case the Federation violates or affects its authority.

41. Many experts argue in favour of the benefits of a separate unit for the effectiveness of law enforcement activities of the competition authorities. However 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 (ICN 2002).

42. Competition advocacy activities involve efforts to help regulatory actors with rule making powers (government, the legislature and other public institutions) and to adapt regulations and policies which are unnecessarily restricting competition in the market. Different from enforcement activities, advocacy is inherently linked to the persuasive abilities of an agency and the quality of its relations with those to whom its action is addressed. For these reasons according to Kovacic et Winerman (2015): *“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...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.”*

43. Competition assessment of legislation will be most effective when it is done at the early stages. According to Jenny (2016), even when competition authorities are given the opportunity to review all of the legislations at proposal stage, they may not be successful in sensitive policy areas such as industrial policy, trade, financial and health policies as these policies are usually formulated independently at the executive level without consultation with competition authorities. For this reason he argues that (2012): *“Not being part of the executive means that independent competition authorities do not have access to a complete set of information about what competitive problems resulting from regulatory initiatives they should focus on and they do not participate in many administrative meetings where regulations are shaped”*. Along the same lines, Gal (2006) finds that subordinating a competition authority within a ministry may be beneficial if the agency is operating in a context where competition still needs to be established as a fundamental principle of the economy. She states that *“the antitrust principles were so different from the embedded ones that, to be effective, the head of the antitrust authority [Federal Antimonopoly Service in Russia] 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.”*⁹

Box 5. Institutional Design of the KFTC : Competition Advocacy

The Korean Fair Trade Commission (KFTC) is responsible for competition law enforcement; strengthening consumers' sovereignty; creating a competitive environment for SMEs; and, restraining concentration of economic power. The KFTC enforces eight laws: Monopoly Regulation and Fair Trade Act; Omnibus Cartel Repeal Act; Adhesion Contract Act; Fair Labelling And Advertising Act; Door-To-Door Sales Act; Instalment Transactions Act; Fair Subcontract Transactions Act; and the Fair Franchise Transactions Act.

The KFTC is a ministerial level central administrative body under the authority of the Prime Minister. The KFTC has a board comprised of nine members. The Chairman and Vice-Chairman are nominated by the Prime Minister and appointed by the President to serve a term of three years. The KFTC Chair is a member of the cabinet and attends the cabinet meetings on a regular base. The KFTC Chair is also a member of the Committee on Regulatory Reform and the Committee on Privatization of State Owned Enterprises. Within its own institutional set-up, the KFTC also has a department (Competition Policy Bureau) dedicated to review the regulations made by other administrative agencies.

According to Jenny (2012), the KFTC is a good example of an authority which is able to intervene effectively in the legislative and regulatory process owing to the fact that its head is a cabinet member.

44. Independence from political pressures is fundamental in order for competition authorities to develop expertise.¹⁰ Thus, structural arrangements aiming at enhancing the involvement of competition authorities with the executive (e.g. subordination of the agency within a ministry) should be designed in such a way that it does not diminish the abilities of an agency to make unbiased and professional evaluations.

45. Providing competition authorities with the power to undertake advocacy activities on their own initiatives can be helpful in increasing the engagement of the competition authorities with the regulatory processes. The ability of competition authorities to influence regulatory reforms can be enhanced by making consultations with the competition authority mandatory and creating co-operation mechanisms between competition authorities and regulatory bodies. 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 (Lowe 2008).

3.2.3 Resources

46. Sufficient staff and budget for competition authorities are fundamental preconditions in order for them to function effectively and act independently (EC 2014a). However, finding the optimal level of budget applicable to all competition authorities is also very difficult. The size of a budget is dependent on the roles that agencies play, their scope of activity, the legal context in which they operate, the size of the country, the level of the market development of the economy and so on (Jenny 2016).

47. Competition agencies are typically funded through general public revenues. Depending on its satisfaction with the agency's decision, a government can cut or increase the budget allocation depending on the agencies performance (EC, 2014a), (EC 2014b), (Monti 2014), (Alves et al 2015), (Gal 2004), (Kovacic et al 2015), (Ottow 2015). The agency, on the other hand, may tend to adapt its performance to the expectations of the government with an aim to secure its resources. Budget allocation is a critical point on which undue pressure could be exercised and where appropriate safeguards ought to be put in place. These safeguards involve:

- Competition authorities' budgets may be allocated multi-annual basis rather than annually. Multi-annual budget allocations are less contingent on short-term political considerations and therefore can make it more difficult to influence the agency (OECD 2016a).
- Sources of funding which are not entirely depending on the governments' discretion may also provide a shelter from undue political interference. A self-funded agency can avoid negotiating with the government over its resources. Some of the self-funding mechanisms involve funding through fines imposed by the agency (e.g. Portugal)¹¹; through certain taxes/contributions levied on undertakings (e.g. Italy, Turkey)¹²; and through charges for certain services such as merger filings (e.g. Canada, Austria, USA, Zambia).¹³ Relying entirely on these mechanisms, however, has limitations and may create other difficulties for the agencies. For instance, particularly during an economic crisis, the agency may fall short of sufficient funding due to a decrease of merger filings. (Jenny 2016), (Kovacic et al 2015). Collecting and retaining (all or part of) the fines can also be problematic as it may create perverse incentives for an agency to impose more fines. An agency may shift its enforcement work to cases with better prospects of high fines which could, in the long term, affect negatively their perceived legitimacy (Kovacic et al 2015) (see Box 6).
- To reduce the related risks of dependence on a single source of funding, agencies may be funded by a combination of different sources, such as a mix of general revenues, fees or fines. This arrangement can make it more difficult for any single source of funding to dominate the budget and influence the agency's activities. Agencies may also better deal with the difficulties of each source.

Box 6. Turkey and Portugal: Self-Funded Authorities with Different Approaches towards Funding through Fines

The financing of the Portuguese Competition Authority (PCA) is ensured by transfers from national regulatory authorities (NRAs), fees charged within the scope of the PCA's activities and the fines imposed. The State budget can also be used as a last resort, but, as yet, has never been used. Transfers from NRAs are the most important source of financing accounting for around 81% of the PCA's total budget. Article 35 of the PCA's new Bylaws foresees a range of contributions, between 5.5% and 7.0% of the total amount of NRAs revenues, and also sets a default rate of 6.25% of NRAs' revenues to be transferred to the PCA, in case the annual ministerial order setting out that rate is not adopted. The PCA also receives 40% of the fines imposed while the remaining 60% goes to the state budget. Funding through fines is not exclusive to the PCA but is a common practise for all administrative authorities. The courts take the final judgements about the fines: they can uphold or change (increase or decrease) the fines imposed by the PCA. In 2014, funding from fines accounted for 4% of the PCA's budget.

The Turkish Competition Authority (TCA) is funded by the state budget, tax revenues levied on certain companies and by publications. Fines used to be a part of the funding of the TCA. The article granting the right to take 25% of the fines imposed by the authority was repealed in 2003 as a response to criticisms coming from the companies that the authority tended to impose high fines for self-funding reasons. In addition, while courts can approve or reject a decision of the TCA, they cannot decide specifically on the amount of the fine which gives a wide discretion to the TCA on the level of fines. Since its creation in 1997, the TCA has not received any funding from the state and following the change in 2003, it has relied entirely on tax revenues. The tax is 0.04% of the capitals of all partnerships to be newly established with the status of an incorporated and limited company, and that of the increase portion in case of capital increase.

48. Human resources are critical for a well-functioning competition authorities. The professional staff prepare the reports on which the boards base their final decisions. A lack of good and sufficient professional staff will inevitably impair the capacity of a competition authority to act professionally which would in turn puts its independence at risk.

49. A competition authority has to invest special efforts and energy into setting up an effective human resources policy. Some of the issues pertaining to human capital of competition authorities involve the following.

- In order to mitigate the risk that the staffing process is used as a tool to unduly direct the agency, a competition authority can be provided with the autonomy to set its own recruitment criteria and employ its own staff. To overcome any kind of suspicion about impartiality of the professional staff, the recruitment process should be competitive, transparent and merit based.
- Transparent and objective selection of professional staff can also be instrumental in creating an institutional culture of independence. This culture in turn, can help foster a working environment that helps professional staff remain professional and produce unbiased assessments (OECD 2016a).
- Merit-based recruitments can help an agency to hire appropriately qualified staff. Because of the need for specialised skills in the analysis of competition law matters, competition authorities need to employ highly specialised staff. In fact, the extent to which a competition authority can act independently also depends on the degree of professionalism and expertise of its own staff. An agency capable of making sound and solid assessments is more likely to better resist political pressures.
- In addition to attracting qualified staff, an agency should also be able to retain staff on a long term basis. Keeping staff is a major concern, and challenge for competition authorities. Good competition experts are in high demand by the private sector which can usually offer more attractive compensation packages. Given the difficulty finding replacements with the necessary level of professional expertise and hands-on experience, staff turnover can have serious repercussions on the activities of competition authorities.
- It is essential that competition authorities develop their human resources policies which are capable of both attracting and retaining qualified staff. The creation of a work environment which supports and rewards professional development can help motivate staff to stay with the institution and build and accumulate the necessary professional knowledge within the organisation. It is also important to pay particular attention to non-monetary incentives as they can help to compensate for the remuneration gap with the private sector (OECD 2016a). These incentives may include a special attention to the sense of public service, a better work-life balance, more professional development and career opportunities within the organisation. The standing and reputation of the agency within society can also help to attract and retain better quality staff (Gal 2004).

3.2.4 *Priority setting and supervision*

50. Competition authorities have a wide range of responsibilities. No matter how large their resources and budget are, they will always be limited compared to the potential tasks they may wish to perform. To ensure the effectiveness of competition authorities' actions some independent priority-setting is necessary (Ottow 2015), (EC 2014b), (Jenny 2016).

51. Prioritisation involves: i) the formulation of long, medium or short-term strategic plans; ii) the allocation of resources across different areas of responsibility; and, iii) applying different degrees of priority to individual cases in the exercise of the enforcement powers (ECN 2013). There is an important link between prioritisation and independence (Ottow 2015), (EC 2014a). The ability to prioritise requires a degree of independence from undue political influence aimed at shaping the priorities of a competition authority. If such influence is allowed to take place, it can impair the impartiality and effectiveness of competition authorities.

52. Supervision by another state body may be problematic as it could constrain the ability of an agency to prioritise its activities independently. However, experiences in this area vary. For instance in the UK, the government provides the competition authority (Competition and Markets Authority-CMA) with a strategic steer, although the CMA is not obliged to follow it. According to the CMA (OECD 2014a): “[w]hilst at the time of the reforms certain concerns were raised that such a statement risked weakening the CMA’s perceived independence, the Steer is a public document setting out the Government’s high-level aims and expectations for the CMA in an open and transparent way”. In the steering document,¹⁴ it is stated that “[i]ndependence in selecting priorities, choosing the right tools for addressing problems and in making final decisions is crucial to the CMA’s success. The Steer for the CMA therefore recognises and supports this independence [...] The recent competition reforms preserve the independence of the CMA. Statements in the Steer are of a ‘have regard’ nature so as not to unduly constrain the CMA’s ability to prioritise its activities, develop improved processes or be seen as biasing its case decisions”.

53. Portugal has recently abolished an article in its Bylaw stating that the independence of the Portuguese Competition Authority (PCA) in the performance of its duties is “without prejudice to the guidelines on competition policy set out by the government... or to the acts subject to ministerial oversight”. According to PCA (OECD 2014a): “The need to comply with government competition guidelines could be perceived as lessening the PCA’s independence”. For this reason, this provision has been replaced with a new article stating that the PCA is not subject to governmental supervision and that the government cannot make recommendations or issue directives to the board on the priorities to be adopted by the PCA in carrying out its mission.

3.2.5 *The relationship between the objectives of competition law and independence*

54. The basic objectives of competition law in most jurisdictions, “...are to maintain and encourage the process of competition in order to promote efficient use of resources while protecting the freedom of economic action of various market participants” (OECD 2003). Hence, the core mission of competition law is to promote the efficient allocation of resources by protecting competition in the markets.

55. In some jurisdictions, however, competition laws also include other objectives, such as promoting small business; fairness and equity; de-centralisation of economic decision-making; pluralism; anti-inflation policies; regional development; social progress; and, poverty alleviation.¹⁵ These objectives are usually not directly related to efficiency concerns and therefore have no, or limited role, in the usual analyses done by competition authorities. The difficulty of addressing these concerns with the standard competition analysis’ tools could create room for political interference. In this respect, non-efficiency-related objectives in the competition law may have an impact on the degree of independence enjoyed by a competition authority (Capobianco and Nagy, 2016). Also “...enforcing public interest considerations may create an internal conflict of interest, particularly in those competition authorities which are overseen by a political body (e.g. ministry) as the competition assessment might require a different solution than the public interest consideration which the political body aims to promote” (OECD 2016b, p. 10).

56. In some jurisdictions, the government can overrule a competition authority’s decision on merger/acquisition cases. The basis for the government intervention may include public interests, fundamental strategic interests, industrial development, media plurality, employment, protection of national health, protection of environment and national security. While in certain jurisdictions the public interest test is conducted by the competition authority itself, in others, it is done by a sector regulator or by a separate political decision making body (e.g. a ministry). From the independence point of view, the latter method may be preferable as it is more transparent and relieves the competition authorities from political pressures (OECD 2016b).

4. De facto independence

57. In the previous section, we discussed some structural and legal measures that are likely to bring “legal (formal, statutory, de jure) independence”. However, legal independence does not always correspond with “*de facto* (actual, real, informal) independence”.

58. Although legal independence does not automatically bring about *de facto* independence, it still matters. Aspects of legal independence provide agencies with those minimum safeguards which may not prevent all political pressures, but nonetheless make it less probable. In that sense, legal safeguards empower agencies and help strengthen their *de facto* independence.

59. The divergence between formal and *de facto* independence is not peculiar to competition authorities. It also applies to regulatory agencies in general and this has long been acknowledged in the literature (Gilardi 2001, 2002), (Cuikerman 1992), (Pedersen 2006), (Gual and Trillas 2003), (ICN 2005).

60. *De facto* independence depends on various factors. One of the major determinants of *de facto* independence is the context within which a competition authority operates. A competition authority is part of the administrative system of its country and inevitably affected by its political, social, and economic conditions. In particular, unwritten political and administrative rules and traditions of a jurisdiction can play a significant role. They may decrease or increase the level of independence that is formally set in the legal texts and lead to substantial deviations in the actual practise of the agency (Kovacic et Wineman 2015), (ICN 2004), (ICN 2002), (UNCTAD 2008) (Kovacic 2011), (Jenny 2012).

61. Political institutions also matter. The literature on independence for regulatory agencies has theoretically and empirically demonstrated that regulatory authorities are *de facto* more independent in countries where the number of political actors which can constrain the power of government (*veto players*)¹⁶ is higher (Gilardi 2001). According to Maggetti (2007), *de facto* independence of agencies is also a function of the number of veto players. Their presence in a political system implies a reduction in the influencing and controlling capacity of politicians.¹⁷ Similarly, for Moser (1999) “*central banks in countries with forms of checks and balances are behaviourally more independent*”.¹⁸ In line with these views, Keefer and Stasavage (2003) demonstrate empirically that the presence of multiple veto players reduces the political influence on central banks.

62. Older agencies are expected to have more *de facto* independence. The evolution of the relationships between the agency and governments is a dynamic process. This evolution of the relations usually requires a certain period of time (Maggetti 2007). The personalities of the top management may also affect *de facto* independence of competition authorities. Executives bringing the work of their agencies into the public eye could be instrumental in giving the agencies a high profile vis-à-vis companies and society as a whole (UNCTAD 2008).

63. Finally, *de facto* independence of a competition authority also derives from its own track record. A successful enforcement record of an agency can strengthen significantly its *de facto* independence by enhancing its reputation and its status in the society (OECD, 2005) (Ottow 2015), (ICN 2002).

64. In this context, any factor contributing to the success of law enforcement and advocacy efforts would effectively help agencies ‘earn’ their own independence. At the same time, it should also be noted that there exists a chicken-and-egg problem in relation to effective enforcement and advocacy on the one side and independence on the other: lower independence deprives the agency of the tools necessary for effective enforcement and advocacy; poor enforcement and advocacy in turn, reduce the perceived legitimacy of the agency and induces lower independence (OECD, 2005), (ICN 2002).

65. The positive effect of successful enforcement and advocacy on *de facto* independence suggests a role for competition authorities in promoting independence indirectly through enhancing competition enforcement. This role is particularly evident and significant for new agencies in developing or transitional economies. They usually face many institutional difficulties (Trebilcock and Iacobucci 2010) and the responsibility to establish credibility with the general public and with the government is often entirely on them (UNCTAD 2008), (ICN 2002). For example, the existence of a solid judicial review and public support for competition would be instrumental in indirectly, but effectively, strengthening *de facto* independence of agencies in the long term.

- While accurate judicial reviews can strengthen enforcement, frequent dismissals of the agency decisions may stifle it and may result in a decrease in the perceived legitimacy of the agency (Mateus 2007, Gal 2010). To mitigate that problem, it is necessary to have a qualified judiciary system. In principle, a specialised court or specialised judges dealing only with competition appeals are more likely to develop experience and expertise and will therefore help to support effective competition enforcement.
- Public opinion which is in favour of competition is likely to help competition authorities enhance their emancipation from political interests and thereby effectively support their *de facto* independence (Gal 2004, 2006). A general public which is aware of the benefits of competition would be a natural supporter of the competition authority and would make it more difficult for the government to interfere in the activities of agency.¹⁹ Awareness of the competition rules would also be instrumental in increasing compliance of the business community which is also a key to building an effective competition regime. To this end, competition authorities should engage in activities to raise the awareness of competition law among the business community and the general public, for example, by producing publically available reference materials, documents and guidelines.

5. Accountability

66. Independence does not imply the absence of control. On the contrary, in democratic systems, independence has to be accompanied with sufficient checks and balances. Independence and accountability are the two sides of the same coin (OECD 2014b).

67. Accountability is needed in order to maintain independence in the long run (ICN 2014). It renders the independence of a competition authority legitimate and thereby helps maintaining and strengthening independence (Monti 2014), (UNCTAD 2008).

68. There are various ways to ensure accountability. The first most important mechanism for accountability is judicial review. The assessment of whether a competition authority is performing its mandate as defined by the legislature usually requires legal assessments and courts are entrusted with that. This assessment cannot be done by the general public, the legislature or the government because it requires a specialised knowledge of competition law and economics (Jenny 2012).

69. It is also worth mentioning that judicial review, apart from being a means of accountability, is an integral part of the competition law enforcement.²⁰ Judicial review completes the agency's decision-making process to such an extent that the relation between the courts and an agency resembles the relation between the adjudicating and the prosecuting parts of a competition authority (Bergman 2008). This also suggests that: "*The ultimate independent competition authority is the independent judiciary, whether that takes the form of a specialist competition court (eg the UK's Competition Appeal Tribunal) or (as in the US) the general courts*" (Vickers 2010).²¹

70. Transparency constitutes another important mechanism to ensure accountability of competition authorities. It provides a means for all stakeholders to check on the activities of the authority (UNCTAD

2008). It is important that competition authorities publish all information and documents relevant to their activities. In particular, guidelines providing details on the decision-making process, procedural issues and compliance are of vital importance. Additionally, it is also critical to issue reasoned decisions and make them publicly available. This will also make it more difficult to capture an agency which is open to the scrutiny of all stakeholders (Jenny 2012), (Gal 2004). Annual reports, parliamentary hearings and fiscal auditing are other mechanisms of accountability for competition authorities.

71. There has been an increasing interest in evaluating the performance of competition authorities.²² Performance evaluations are important elements of enhancing the systems since they help to drive improvements and build confidence in it (OECD 2016). This also applies to competition authorities.

72. However, the use of *ex post* evaluations as a way to hold a competition authority accountable is subject to debate. First, it seems difficult to reach a satisfying definition of what is an ‘effective’ competition authority. The effectiveness of a competition authority’s decision can be analysed from various perspectives, such as deterrence or net benefits for consumers or for the economy. It would be problematic to determine empirically and compare which decision is in fact more effective (Guidi 2011). Second, if evaluations measure competition authorities’ activities, then the agencies may tend to perform in certain ways which are not necessarily the most effective or necessary but mainly serve the goal of achieving a certain evaluation. As Bergman puts it (2008): “...[if] a competition authority’s budget allocation is influenced or determined by estimated consumer benefits, then the authority will have incentives to behave so that a large consumer benefit is measured. For example, the authority may disregard legal violations in low-value markets where enforcement would mainly be important because of the deterrence effect and it may be tempted to block too many mergers”.

6. Conclusion

73. The ability of competition authorities to take decisions based on legal and economic arguments rather than as a result of political influence is a fundamental principle to ensure that competition rules are applied in a sound, stable, coherent and foreseeable manner. Despite wide agreement on this basic principle, there are differences on how jurisdictions achieve independence of their competition authorities. Jurisdictions differ from each other in their political, legal, administrative, economic and cultural contexts, and most importantly, the competition rules enforced and the roles played by agencies can be quite different. Given that competition authorities face different sets of conditions, there is no single model for ensuring independence that is suitable to all competition authorities and that can guarantee an independent decision-making at arm’s length from political pressures.

74. Despite these differences, it is commonly accepted that there are some general principles that jurisdictions can rely on to provide their competition authorities with a certain level of protection against political pressures. These safeguards relate mainly to the legal and structural framework of the agencies. They include provisions concerning the status of the agency; the appointment-dismissal procedures for its senior management; the relationship between the agency and the government; and the financial and human resources allocated to the agency to perform its mandate.

75. The legal and structural measures may not be sufficient to guarantee that the agency has *de facto* independence. *De facto* independence depends on unwritten political, social and cultural norms of the jurisdiction and also derives from the agency’s own track record and reputation. Nevertheless, legal and structural safeguards are important steps in achieving independence, as they provide a certain level of protection against political pressures and means to secure an arm’s length relationship with the government. To ensure ongoing independence over time, institutional design should constantly be assessed to ensure that agencies better adapt to changes in their environment, and they further enhance their efficiency in terms of both competition law enforcement and advocacy endeavours.

ENDNOTES

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- ¹ Regulators have a more diversified set of responsibilities, such as communications, energy, transport, water, waste, consumer protection, environment and safety. A regulator is defined ‘economic’ when it is concerned with price, entry, exit and service of an industry, and ‘social’ when it deals with non-economic issues such as health and safety (Gilardi 2008).
- ² In addition to perceived independence, there are several factors that influence the degree of deterrence of a competition policy regime such as the level of fines, powers of the authority during the investigation and its financial and human resources (Buccirossi P. et al 2009).
- ³ According to the survey, the list of issues contributing to the effectiveness of a competition regime (from the most to least important) is as follows: 1. technical competence in terms of legal analysis; 2. technical competence in terms of economics analysis; 3. political independence; 4. having an effective right of appeal; 5. clarity of procedures; 6. ability of investigation/case officers to make independent, impartial recommendations to superiors 7. the regime ability to enforce effective sanctions; 8. resources available for caseload; 9. the investigative efficiency and effectiveness of competition policy; 10. speed of decision making; 11. technical competence of administrative staff; 12. the regimes principal actors ability to communicate with external constituents; and, 13. minimal burden on business.
- ⁴ Assessment of independence was made according to the frequency of decisions that the agencies have failed to take or decisions taken that have been overturned for political reasons. Transparency is analysed based on the extent to which decisions and annual reports are publicly available while appeals are evaluated on the extent to which they are judged based on economic content rather than exclusively on due process. The intensity of competition in each jurisdiction was captured by a measure of economy-wide enterprise mobility.
- ⁵ See the work (OECD 2013) presenting the new OECD competition law and policies indicators which measure the strength and scope of competition regimes in 49 jurisdictions (OECD and non-OECD).
- ⁶ The difficulty of defining a systematic indicator for the effectiveness of a competition authority can substantially limit the robustness of the empirical researches made in this area. However, with the help of the concrete performance indicator of interest rates, many researchers could find empirical evidence to support the idea that central banks independence promotes low inflation and thus independence increases the effectiveness of central banks (Franzese, 1999), (Grilli et. Al., 1991) (Alesina and Summers, 1993).
- ⁷ Directive of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services OJ 2002, L 108, 33 as amended by Directive 2009/140 of the European and of the Council of 25 November 2009, OJ 2009, L 337, 37.
- ⁸ Directive of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ 2009, L 211, 55.
- ⁹ According to Gal (2006), once the new economic order matures, it might be wise to change the institutional organisation of the Russian agency and create a more autonomous one.
- ¹⁰ Maggetti (2009) in his empirical study on the role of the independent regulatory authorities in policy making shows that regulatory agencies have become highly central, not only in the implementation phase, but also, in the entire process of policy-making including agenda setting and pre-parliamentary discussions related to their area of competence. According to him, *“the high de facto independence from political decision-makers is a necessary condition for the outcome”*. According to Wilks and Bartle (2002), the delegation of independence has actually allowed competition authorities to build up expertise and thereby they have become significant reservoirs of legal and economic specialisation.
- ¹¹ The Portuguese Competition Authority is partly funded by the fines (see Box 6).
- ¹² Italian Competition Authority is exclusively funded by the mandatory contribution levied on companies with an annual turnover above 50 million EUR since 2013. This funding system was adopted by Law Decree no. 1 of 24 January 2012 introducing a mandatory contribution for companies incorporated in Italy whose turnover exceeds the threshold of 50 million Euro. This contribution replaces previous financial resources of the ICA, i.e., public budget and merger fees. *“As a result of the new funding system, the Authority no longer needs to engage in negotiations with the Government every year to secure its financial resources, thus being reinforced in its independence.”* (OECD 2014a). The Turkish Competition Authority (TCA) is exclusively funded by funds from tax revenues levied on certain companies (see the Box 6).

13 Irrespective of the size of the transaction, the Canadian Competition Authority receives the filing fee of CAD 50 000. In Austria, the filing fee of EUR 1 500 is charged regardless of the size of the transaction. In the USA, Federal Trade Commission charges a filing fee according to the size of the transaction. In Zambia, the filing fee is set as the 0.1% of the turnover or the assets concerned (whichever is higher).

14 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245607/bis-13-1210-competition-regime-response-to-consultation-on-statement-of-strategic-priorities-for-the-cma.pdf

15 See the OECD work for example Public Interest Considerations in Merger Control (2016), Competition and Poverty Reduction (2013), Competition Policy, Industrial Policy and National Champions (2009), Competition Policy and the Informal Economy (2009).

16 Veto players refer to those individual or collective actors who have to reach an agreement to change the *status quo* (legislative/ policy) in a given country (Tsebelis 2002). There are two types of veto players: institutional and partisan (Gilardi 2001). Institutional veto players are the actors which are specified by the constitution such as the President, the Senate, and the House of Representatives. Partisan veto players are the political parties composing the government coalition (if there is a coalition). According to Tsebelis (2002), depending on the policy areas, trade unions, central banks or courts may play the role of a veto player and therefore can also be conceptualized as additional veto players in some cases.

17 Maggetti (2007) in his analysis on 16 regulatory authorities supports his thesis by empirical evidence.

18 According to Moser (1999), veto players are indeed the pre-condition of legal independence. As discussed in section 3, politicians delegate to increase their capacity of credible commitment. For Maggetti (2007), delegation has its effect only in the presence of multiple veto players. In other words, it is the veto players that protect the legal independence of agencies from being overtaken and thus it is the existence of veto players that makes the legal independence of regulatory authorities stable. This view has also been shared by Lohman (1999). For Lohman, delegation itself cannot offer a solution unless there are enough actors in the political system that can ascertain that the delegation (the legal independence of agencies) will not be removed easily. Similarly for Keefer and Stasavage (2002) “*the effectiveness of central bank independence in solving credibility problems depends on the presence of multiple veto players in the government*”.

19 According to Gal (2004), for public pressure to exist, it is particularly important to educate consumers and small and medium sized companies who are the first beneficiaries of the competition rules and the natural allies of the competition authorities.

20 In order for judicial review to be an effective counterpart of the whole decision making process, competition authorities have to be given the opportunity to defend their cases in front of the courts. According to European Court of Justice (Case C-439/08 VEBIC [2010] ECR I-12471- paragraph 58-59): “...if the national competition authority is not afforded rights as a party to proceedings and is thus prevented from defending a decision that it has adopted in the general interest, there is a risk that the court before which the proceedings have been brought might be wholly ‘captive’ to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings. In a field such as that of establishing infringements of the competition rules and imposing fines, which involves complex legal and economic assessments, the very existence of such a risk is likely to compromise the exercise of the specific obligation on national competition authorities under the Regulation to ensure the effective application of Articles 101 TFEU and 102 TFEU. A national competition authority’s obligation to ensure that Articles 101 TFEU and 102 TFEU are applied effectively therefore requires that the authority should be entitled to participate, as a defendant or respondent, in proceedings before a national court which challenge a decision that the authority itself has taken”.

21 According to Vickers (2010), judicial accountability is omnipresent for competition authorities for the following reasons: i) a competition case requires the assessment of various complex aspects such as the evidence gathering, factual inference, the relevant case law as well as rights of defense, the standard of proof and interpretation of the provisions which needs to be double checked by the judiciary; ii) the decisions of the competition authorities are not readily reversible; iii) competition law enforcement can affect particular interests very strongly.

22 See the OECD work on the ex-post evaluation of competition agencies’ enforcement decisions <http://www.oecd.org/daf/competition/Ref-guide-expost-evaluation-2016web.pdf>.

ANNEX: TABLES (1, 2, 3)

Table 1. Independence Index Indicators*

AUTHORS				
	Pedersen (2006)	Gual and Trillas (2003)	Gilardi (2001)	Cuikerman (1992)
INDICATORS	The term of the agency head/commissioners? 7 years or more (1)/4-6 years/1-3 years/no fixed term (0). Is it renewable? No(1)/yes, once/yes(0)		Term of the agency head/commissioners? Over 8 years (1)/6-8 years/5years/4years/no fixed term (0).	The term of the head? Over 8 years (1)/6-8 years/5 years/4 years/under 4 years or at the discretion of appointer (0)
	What are the provisions regarding dismissals of agency head/commissioners? Impossible or possible for reasons related to policy (1)/no specific provisions/possible at the appointer's discretion (0).	The authority is a department of government (0)	Dismissal is impossible (1)/only for reasons not related to policy/no specific provisions for dismissal/at the appointer's discretion(0)	Dismissals? No provisions (1)/only for reasons not related to policy/at legislature's discretion/at executive discretion/unconditional dismissal possible by executive (0)
	Which is the source of budget? Fees levied on regulated firms (1)/mixed/government (0)	The authority gets its funds from the fees paid by the operators (1)/from government and fees/government budget (0)	Which is the source of budget? External funding (1)/government and regulated firms/government (0)	
	Who controls the budget? Authority (1)/mixed/government(0)	The head of the authority is appointed by legislature (1)/ legislature and government/government (0)	How the budget controlled? by the agency (1)/by both the government and agency/by the government (0)	The head of the authority is appointed by the board (1)/ executive and legislative/executive/one or two members of executive (0)
	Who decides the authority's internal organisation? Authority (1)/mixed/government (0)		Who decides the agency's internal organisation? Agency(1)/ the parliament /government (0)	
	Who is in charge of personnel policy? Authority (1)/mixed/government (0)		Who is in charge of personnel policy? Agency (1)/government (0)	
	Who, other than a court, can overturn the authority's decision where it has exclusive competency? Nobody (1)/a specialized body/the government with qualifications/the government unconditionally (1)	The authority reports to no one (1)/to legislature/to the government and legislature/to the government(0)	Who, other than a court, can overturn the authority's decision where it has exclusive competency? None (1)/a specialized body/the government with qualifications/the government unconditionally (1)	
	* In terms of the items and scores some simplifications are made, not all indicators are taken.			

Table 2. Independence Index (Koske I. et al 2016)

The regulator can receive instructions/guidance from the government regarding:	no	yes, but they have to be public	yes	
Long-term strategy	6	0	6	
Work programme	0	3	6	
Individual cases/decisions	0	3	6	
Appeals	0	3	6	
Which body, other than a court, can overturn the decisions of the regulator?	none (0)	specialised body (3)	governmental/ministerial body with qualifications (4.5)	governmental/ministerial body unconditionally (6)
Is the regulator an independent body with the independence stated in the law?	yes (0)	no(6)		
How is the majority of staff recruited?	fair and open competition (0)	secondment from government bodies(6)		
Which body has the legal authority to make the final appointment of the agency head/board members?	parliament (committee) (0)	two or more government bodies (3)	one government body (6)	
Are there restrictions regarding the employment history of the agency head/board members?	yes (0)	No(6)		
May the agency head/board members hold other offices/appointments in the government/the regulated industry?	no (0)	yes, with the consent of the agency head/board (3)	yes, without restrictions (6)	
How can the agency head/board members be dismissed from office?	through court procedure (0)	through parliamentary decision (3)	through government decision (6)	
Can the agency head/board members take jobs in government the regulated sector after their term of office?	no (3)	yes, with the consent of the agency head/board or after some time (0)	yes, without restrictions (6)	
How long is the term of office of the agency head/board members?	>5 years or between 3 and 5 years and not renewable (0)	3 years or between 3 and 5 years and renewable (6)		
How is the regulator financed?	no dominant source of financing (0)	more than 70% of the budget come from services to the regulated industry or from the government (6)		

Table 3. ICN Independence Index*

Participation of Congress and legislative branch	Yes(1), No(0)
Technical background required	High (1), Low(0)
Director's tenure	
Fixed term of office	Yes(1), No(0)
Possibility of a second term	Yes(0), No(1)
Duration of term of office	Long (1), Short(0)
Budget autonomy	No(0), Yes(1)
Collective decision	Yes(1), No(0)
Appeal only to the courts	Yes(1), No(0)
Transparency	
Public session	Yes(1), No(0)
Decisions and rationales published on the Internet	Yes(1), No(0)
Public consultation	Yes(1), No(0)
Public Hearing	Yes(1), No(0)
* Not all items are taken	

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