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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Summaries of contributions

-- Session III --

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This document reproduces summaries of contributions submitted for Session III at the 15th Global Forum on Competition on 1-2 December 2016.

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

Please contact Ms. Lynn Robertson if you have any questions regarding this document [phone number: +33 1 45 24 18 77 -- E-mail address: lynn.robertson@oecd.org].

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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

-- *Summaries of contributions* --

Abstract

This document contains summaries of the various written contributions received for the discussion on "Independence of competition authorities - from designs to practices" held during the 15th meeting of the Global Forum on Competition in Paris, France (1-2 December 2016, Session III). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

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ARGENTINA*

Argentina has had antitrust legislation for almost a century. However, Argentina's first competition authority, the National Commission for the Defense of Competition (the "CNDC" for its Spanish acronym) was created in 1980 with the enactment of Act 22,262, as an administrative body in charge of the enforcement of the Argentine competition law, within the scope of the then Secretariat of State for Trade and International Economic Negotiations. Consequently, the CNDC didn't have autonomy in order to perform as an independent body.

Act 25,156 replaced Act 22,262 in 1999, following the 1994 amendment of Argentine Constitution and created the National Tribunal for the Defense of Competition ("TDC") as a decentralized body within the scope of the then Ministry of Economy, Works and Public Services, which was supposed to replace the CNDC. However, the TDC was never put in place and the CNDC ended up being under the direct political control of the Secretariat of Commerce, due to certain administrative rulings enacted during the Kirchners' administrations.

Act 26,993 enacted in September 2014, modified certain aspects of Act 25,156 and ended with the possibility of putting in place the TDC, establishing the Executive Power as competition enforcement authority.

Since the end of the Kirchners' administration, new rules were put in place to normalize the enforcement of competition law in Argentina. Following that premise, during August 2016, the CNDC drafted a new competition bill, which establishes the creation of an independent authority, the National Competition Authority, with sufficient powers to adopt its own decisions, control its own budget, and function without interference from political authorities. The draft bill also sets forth the creation of a Secretariat of Anticompetitive Conducts Investigation and a Secretariat of Economic Concentrations, as well as a Competition Advocacy Under-Secretariat. The draft bill aims at protecting the future NCA against forms of undue or inappropriate influence of central administrations.

BELGIUM

Article 5 of Regulation 1/2003 requires Member States to have a national competition authority empowered to apply the articles 101 and 102 TFEU, but unlike in sector regulations, EU law does not require (yet) the Member States to have an *independent* national competition authority.

1. Independence and the BCA

The BCA is set up since 2013 as an independent administrative authority with its own legal personality, with a separation between the Investigation and Prosecution Service in charge of the opening of cases and investigations (as well as settlements and simplified merger control procedures), and the Competition Colleges in charge of final decisions, as well as interim relief cases.

2. Independence for what, from whom and how?

2.1. *Independence: for what?*

It is in the first place important that the agency is independent when it takes decisions in individual cases. And it is not much less important that the agency can decide independently on the opening of cases. It is less clear to what extent secondary rules (implementing regulations of the competition law, guidelines, best practices, etc.) and perhaps even priorities should be defined by the legislator, by the government, by the agency, or in cooperation between two or more of these actors.

2.2. *Independence from whom and how?*

For the acts for which it should be independent, the agency must be independent from the government, industry and various pressure groups. Independence requires that all who are involved in the handling of cases can only accept instructions from officers who are appointed for a sufficiently long term of office and on terms and conditions that allow them to feel independent and to be perceived as being independent. The operating rules should protect professional secrecy and avoid conflicts of interests. And effective and independent enforcement requires a genuine ability to act. This requires a the ability to dispose of an adequate and stable budget.

3. Independence and accountability

Independence should not be confused with a lack of accountability which would also affect legitimacy.

The obligation to publish decisions and an annual report seem minimum conditions for organising meaningful accountability. The adoption of budgets by Parliament after hearing the authority may be another way of organising accountability, provided Parliament shows reasonable restraint in respect of the budget when inclined to criticise the authority.

4. Independence, due process, and the institutional design of competition authorities

One of the more delicate issues, and one on which consensus seems unlikely, is concerned with the question whether the decision makers in individual cases should also be independent from the officers who decide on the opening of cases and who direct the investigations.

BRAZIL*

The Brazilian Competition Defense System (SBDC for its acronym in Portuguese) has undergone significant changes over the past years, which necessarily reflect on CADE's autonomy as the Brazilian antitrust authority and as one of the institutions composing the SBDC. With the new competition law, the SBDC, which was previously composed of three authorities, was reformed in two organizations. As the Brazilian competition authority, CADE is a federal, decentralized unit (*Autarquia*) linked to the Ministry of Justice and divided in three main bodies. The Administrative Tribunal is the authority's adjudicative body. The General Superintendence is CADE's investigative body, headed by the General Superintendent and, immediately below his authority, by two Deputy-Superintendents, one being responsible for anticompetitive conducts and the other for mergers and unilateral conducts.

The authority has strategically strengthened its ties with the Public Prosecution Services and Comptroller Offices at the federal, state and local levels. CADE has also approached several regulatory agencies in various economic sectors as means to articulate competition and regulatory policies with the purpose of preventing institutional conflicts that may derive from the overlapping of legal competencies. With the consolidation of the ties between CADE and the regulatory agencies, the latter will tend to employ their technical expertise on their respective sectors in service of the maintenance of a competitive economic environment. these strategic partnerships are meaningful, since they bolster the authority's investigative capabilities beyond the resources available to the agency by providing the exchange of information between public authorities that investigate illicit activities involving several wrongdoings – and among them, anticompetitive conducts.

BULGARIA

The submission surveys the guarantees for independence of the Bulgarian Competition Authority, as provided for in the Law on Protection of Competition. The Commission for Protection of Competition has been established as an operationally independent authority. The National Assembly appoints and dismisses its members. The amendment to the Competition Act of 2015 introduced a new provision, establishing the selection procedure to be public. The transparency of the process of selection is of great importance as it allows the civil society to react accordingly. The law contains provisions aimed to guarantee the impartiality of the members during the decision making process.

Nevertheless, the formal independence needs to be further enhanced by the integrity, professionalism and expertise of the competition board members and administrative staff. The day-to-day work of the authority should be transparent. The powers vested in the competition authority should be exercised in a responsible and consistent manner. The latter would help build better reputation of the institution. Investment in the staff's expertise is also a crucial element for achieving the overall goal of independence. Well-trained competition law professionals are not only able to resist political interference, but are also prepared to elaborate appropriate and pro-competitive policy options to be adopted by the policymakers.

The paper concludes that a competition authority cannot achieve independence once and for all. The process is rather continuous and requires constant efforts to protect the authority's integrity and reputation by preventing or rejecting any forms of pressure or unlawful influences.

CANADA

Canada's current institutional arrangement for competition policy and law enforcement has been in place since 1986. It is a bifurcated system, with the Competition Bureau investigating competition matters, which can then be brought before the courts or a specialized tribunal, the Competition Tribunal, for adjudication. The Public Prosecution Service of Canada is responsible for the prosecution of criminal offences under the *Competition Act* (the "Act").

The Bureau is an organization within Innovation, Science and Economic Development Canada ("ISED"), a department of the federal government. It reports to ISED on administrative and financial matters, but makes independent decisions for the enforcement of the Act. The Act sets out the role of the Minister of ISED and other Ministers with regard to competition enforcement and advocacy matters. In particular, the Ministers of Finance and Transport can assume jurisdiction over certain mergers in their respective sectors.

The Bureau is led by the Commissioner of Competition (the "Commissioner"), who is appointed by the federal Cabinet, on the advice of the Minister of ISED. For such appointments, selection criteria are developed to reflect the needs of the organization and the specific qualifications required for the position. Commissioners are appointed to a five-year renewable term.

In Canada, the legal and cultural framework results in a high degree of *de facto* independence in the Bureau's enforcement work. This arrangement assures stakeholders that competition law enforcement decisions will not be based on changing political priorities, but on an impartial investigation. At the same time, it provides accountability to the public that the Bureau operates in a manner consistent with the public service values of impartiality and sound stewardship of resources.

CHILE

The institutional design of the competition authority in Chile is two-fold: it encompasses the Tribunal de Defensa de la Libre Competencia (“**TDLC**” or “**Competition Tribunal**”), and the Fiscalía Nacional Económica (“**FNE**” or “competition agency”). In this regard, Chile has a prosecutorial enforcement model where the FNE is an administrative agency that conducts the investigations and then prosecutes the case in an adversarial setting before the TDLC, an independent court. In particular, the Competition Tribunal is a specialized judicial body, subject to the supervision of the Supreme Court of Justice.

In this context, the competition law regime in Chile hinges on the concurrence of different institutions (Competition Tribunal, Supreme Court and a competition agency), which strengthens the independence of each one and thus, increases check and balances.

Regarding the FNE, the legal mechanisms concerning appointment and removal of its head, the National Economic Prosecutor, guarantees the FNE’s independence vis-à-vis government. Moreover, the FNE is independent during its decision-making process, and during enforcement of the Competition Law. Likewise, as stated in the law, neither the Executive nor the Legislative branch can veto or overrule decisions concerning its investigations.

With regard to the TDLC’s independence, it is independent in terms of governance since it is not subject to the supervision by any Ministry or governmental entity. With regard to the appointment of the Competition Tribunal’s members, it entails a public, clear and transparent process that ensures that nomination is based on merits rather than on political considerations. It is noteworthy that TDLC members can only be dismissed in certain limited and prescribed circumstances stated ex ante in the Competition Law. Furthermore, Chilean law encompasses safeguards regarding potential conflicts of interest that may affect the TDLC’s judges, which were reinforced during the last legal reform in August, 2016. Finally, procedural safeguards as well as an in-depth judicial review conducted by the Supreme Court of Justice guarantees independent and objective decision-making.

COLOMBIA*

The Superintendence of Industry and Commerce (Superintendencia de Industria y Comercio-SIC) is an administrative entity which makes part of the executive branch. It is a technical entity with administrative autonomy, with its own legal personality and administrative, financial and budgetary independence (Decree 2153/1992 and Law 1157/2007). Although the SIC is formally attached to the Ministry of Commerce, Industry and Tourism, in practice, it has de facto independence.

The SIC is not under any supervision of the Ministry of Commerce, Industry and Tourism or the government. Neither the Ministry nor the government instructs the SIC or gets involved with its functioning. The functions of SIC regarding Competition (substantially and procedurally) are set by the legislator, this is, the Congress of the Republic. Despite the great advances on the legal framework for the independence of the SIC, the fact that the Deputy Superintendent for the Protection of Competition is appointed and removable at will by the Superintendent still remains as a challenge.

According to Decree 1817/2015, the term of the Superintendent of Industry and Commerce is equivalent to the term of Colombia's President (which represents a fix term of four years). The Deputy Superintendent for Competition, on the other hand, is appointed and can be removed at any time by the Superintendent. A significant part of the employees of the SIC are public servants, so they only can be removed for reasons set in Law.

The SIC is autonomous to decide which cases should or should not investigate. This decision is made based, principally, on the criteria established in the Colombian competition regime (market efficiency, competition protection and consumer wellbeing). The SIC also has budgetary autonomy. So, the SIC plans and proposes its own budget, which is studied by the Government and incorporated afterwards in the National General Budget.

COSTA RICA*

The independence and autonomy are fundamental elements in order to achieve a better performance. The Competition Authority of Costa Rica is going through a process of implementing some necessary changes.

The main challenge that the agency is facing is to achieve autonomy and administrative independence in making decisions regarding the performance of its human resources. The Commission can not hire its own staff. Its professional staff is provided by the Ministry of Economy.

Although the Commission has no budgetary independence, there is no political incidence with respect to decisions that the body can make in the exercise of its powers to investigate or stop conducting investigations.

It should be noted that the Executive Branch decided to promote a legal reform of Law No. 7472 . The proposal envisages the creation of the Administrative Tribunal of Competition, as a fully decentralized body under the Ministry of Economy, Industry and Commerce (MEIC). This project is granting legal instrumental status to the organ, thus strengthening its functions and powers to achieve independence in a broadest sense.

CZECH REPUBLIC

The Czech Office for the Protection of Competition (“CCA“ or “the Office“) is a central state administrative body established with the aim to promote and to protect the competition in the Czech Republic. The Office’s powers are set as i) the creation of conditions that favour and protect competition, ii) the supervision over public procurement procedure, iii) the monitoring of possible state aid and also iv) the supervision over the abuse of significant market power in the sale of agricultural and food products. The Office follows unitary administrative model that means the same administrative authority investigates potential violations and brings the case to an end by taking a final decision and imposing a remedy.

We can distinguish several key safeguards of the Office’s independence. First of the all it is the structural detachment from political influence, provided especially by strong position of a Chairman. Both the President and the Government of the Czech Republic are partially engaged in the process of Chairman’s appointment. Such arrangement prevents the appointment of a candidate close to one of particular political party. The time bound mandate and strictly defined framework of the Chairman’s dismissal also strengthen independent position of CCA.

The Competence Act (No. 273/1996 Coll.) requires the Chairman’s impartiality. Following this principle, the Chairman can’t be a member of a political party or political movement when exercising his mandate to ensure the formal political independence.

Another feature of structural or rather organisational independence of the Office is represented by professional staff, which is selected only on basis of objective and qualitative criteria since the Act on Civil Service has come into force (2015). The implementation of Civil Service Act has also brought new ways of evaluation of performance of civil servants, objectively reviewable remuneration and justified duration of an employment relationship in civil service.

The decision-making power is another important safeguard of the Office’s independent status. The government is not competent to instruct the Office in any case. The Office issues the first instance decision, which can state an offense and may also impose a fine, as one of the types of administrative penalty. Each appeal against the first instance decision shall be decided in the second instance by the Chairman. The final decision of the Chairman shall be reviewed by the independent Administrative Court after the action is brought.

The only imperfection of independent position of the Office might be represented by the government’s opportunity to influence the annual overall amount of the Office’s financial resources. Nevertheless the existence of separate budget chapter shall be considered as a feature of the financial independence of the Office. Moreover the government is no more authorized to interfere in aspect of remuneration of civil servants after the systematization (i.e. legally binding arrangement) of official positions is approved.

As a safeguard against the risk of so called “agency capture” we can mention restriction for the management and also employees of the Office to pursue business or other remunerative activity, and to be a member of management or supervisory bodies of undertakings, or their duty of confidentiality even after they have left the Office.

The only one unresolved issue is the absence of legal provision that would exclude the Office from subordination to the government. It is because truly independent administrative bodies (In Czech Republic there are only two such authorities) are expressly excluded from the range of government’s decrees via

certain *lex specialis* and therefore these authorities are bound only by generally binding regulations. In relation to the independence of the Office, such provision does not exist. There are two possibilities to approach this issue however both may result into contradictory outcomes. Either the status quo is maintained, leaving the Office's position "relatively" independent or the Office initiates incorporation of explicit exclusion of the Office from the reach of government's regulatory power. Nevertheless legal experts believe such expressive exclusion would bring the violation of constitutional law because Article 67 of the Constitution of the Czech Republic provides that the Czech Government is supreme executive body with no exceptions thereof.

EGYPT*

The Egyptian Competition Authority was established in 2006, one year after the adoption of the Law number 3 for the year 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices (hereinafter the Competition Law Act). Located in Cairo, the ECA is affiliated to the Prime Minister – who delegated his powers to the Minister of Trade and Industry – and enjoys the status of a public juristic personality.

ECA has an independent budget similar to the model of public service authorities, composed of appropriations designed in the State General Budget. Additionally, the budget is supplied with grants, donations and other resources accepted by the Board of Directors as well as revenues from fees payable to the ECA for the services it renders.

With regard to its activities, the ECA remains accountable to the Prime Minister of Egypt (delegated the Ministry of Trade and Industry) and is under obligation to present annual reports to the Parliament.

The relationship with the Competent Minister is sufficiently distant provided that, as a body with public juristic personality, ECA can take actions against other governmental bodies and has an individual standing in debates before the Parliament. However, a practical impediment for ECA; is the administrative procedural affiliation, which makes it difficult to hire qualified personnel, in addition to limiting the usage of outside experts.

The Board is the central administrative and decision-making body of the ECA with extensive competencies, but without the competence to impose fines for the violation of competition rules, which fall in the exclusive competence of the “economic courts”.

As the management body, the Board drafts regulations with regard to the organization of the work within ECA and sets out the financial and administrative rules pertaining to its employees (Article 15). It recommends employees to be granted the status of law enforcement officers, giving them extensive powers of investigation including the right to review records and documents as well as to obtain information and data from governmental and non-governmental bodies (Article 17).

The ECA is represented by a Chairperson with distinguished expertise and appointed for a renewable term of four years. As part of the board, the Chairperson has administrative functions in the scope of coordination and supervision of the ECA’s activities.

EL SALVADOR

It is well known and theoretically supported that effectiveness of a competition authority is affected by its degree of independence and the coherence among its resources –financial and human- and its objective. An authority that lacks independence, be it in law or in fact, will hardly meet the expectations the public -including businesses, citizens, and politicians- have over the promotion and protection of competition. Therefore, independence constraints complicate the attainment of the expected benefits of effective competition law enforcement over welfare and economic efficiency.

El Salvador's Competition Superintendence (SC) performs its attributions independently, in law and in fact. The SC holds administrative and decisional independence. The agency was created by the Competition Law as a Public Law Institution, with legal personality and its own patrimony, and given technical character and administrative and budgetary autonomy for the exercise of its powers and duties. Among others, the Competition Law empowers the SC to autonomously determine its internal regulations and organization.

The professionalism and technical expertise of the competition agency staff are also essential to guarantee its actual independence. Provisions in El Salvador's Competition Law (CL) contribute to safeguard the SC independence from the start, that is from external ties interference and unscrupulousness when appointing officials and hiring employees. Other provisions in the CL contribute to protect effectiveness and independence in the day-to-day duties of the Board of Directors and the SC employees, and to assure the confidentiality of business, commercial and official information in the SC records, declared as such.

To fulfill its mandate the SC makes use of its knowledgeable staff, with technical and empirical expertise in competition and on the matters of their specialty. The SC's highest authority, the Board of Directors, has among its attributions to decide cases and to apply sanctions pursuant the CL. Duly reasoned decisions concerning investigations of anticompetitive practices and merger requests analysis are reached after a thorough legal, factual and economic assessment. Regarding competition advocacy, an essential task of competition authorities in developing countries, the SC by Law is independent to determine its public training strategy to promote a competition culture and its success at implementing is constantly increasing.

The public version of the products of the SC enforcement and advocacy work are available in the agency's website, including all final decisions, news, press releases, and the various free-of-charge services offered by the SC. The Website is complemented by a transparency gateway, in which public information is available, social media accounts, and an ICN-WB Competition Advocacy Contest winner App (casosenlinea.sc.gob.sv) that allows its users to read main facts of a case or a market study and its public policy recommendations in less than three minutes.

Competition agencies must continuously preserve its administrative and decisional independence as well as its accountability from the design of its legal framework to its enforcement. Competition authorities, even if administratively and decision-making independent, regularly function with public funds. Consequently, it is expected those might be accountable in front of the government and the citizens, whose taxes fund the agency, about the appropriate use of its budget and its annual results. Transparency allows the citizens and the government to monitor the competition agency's effectiveness and scrutinize its degree of formal and actual independence. Moreover, this enables the citizen to form its independent opinion without having to rely exclusively on the agency's discourse. Regarding transparency and accountability, among others, the SC publishes its annual report and its accountability report of the acts

performed in a twelve months period. Complimentarily, the SC is subject to the periodic inspection and monitoring of its operations and accounting by an in-house auditor, to visiting independent audits, and to project related auditing. To this day, the SC has outstandingly trump audits.

Note: SC final note: It is worth mentioning that a great variety of circumstances, acts and/or considerations can occur and those might not necessarily be considered in this contribution. Consequently, this document is illustrative and for its nature it shall not be considered as binding for any act of this institution, staff and authorities including investigations and Decisions issued and/or to be issued. Nothing in this document shall be understood as prejudging the analysis the SC and/or its staff and authorities could perform in specific cases or as an institutional statement. Finally, the SC does not necessarily endorse the reviewed bibliography. [SC, October, 2016]

ESTONIA*

The Estonian Competition Authority (ECA) was established in the year 1993 when the former Price Authority within the administrative area of the Ministry of Finance was reorganised to become a supervisory authority over competition, officially named the Competition Board.

ECA's independence has been recently enhanced by subordinating it to the Ministry of Justice, instead of the Ministry of Economic Affairs and Communications as was the case previously. Although the Ministry of Economic Affairs and Communications elaborates and implements the state's economic policy and economic development plans in most regulatory sectors, including energy, postal, transport sector (and previously also in the field of competition protection), which initially made it easier for ECA to participate in the policy making and setting of general priorities in these sectors, the main disadvantage for the competition supervision was that the ministry (precisely Minister of Economic Affairs and Infrastructure) exercises also the share-holder rights of state-owned enterprises. These enterprises are usually big infrastructure, energy and transportation companies and have often dominant position in the market which relates to their main area of activity. At the same time the Estonian Competition Authority will have to exercise supervision over the compliance of their activities to competition law requirements, despite that the state owns all the shares in these companies. The main problem we have encountered in the past in regards to the Ministry of Economic Affairs and Communications was related to the fact that the ministry was also the shareholder of the majority of Estonian state-owned enterprises. As the above mentioned state-owned enterprises were under the area of governance of the same Ministry as ECA, the enterprises tried to use their good relationship with the Ministry and their position to influence our activities on some occasions. In addition, sometimes the Ministry also made proposals to ECA to analyse some sectors of economy or markets which were under interest of the Ministry. After ECA was transferred last year to the area of governance of Ministry of Justice we feel that we have more formal independence in our activities concerning state-owned enterprises.

ECA is funded exclusively from state budget. We feel that it would benefit ECA's activities if more monetary resources were made available for it, including some form of funding from private sector in relation to activities which can be directly attributable to specific undertakings. There are already ongoing discussions in the level of the Ministry of Justice regarding possible additions to the funding model of the Competition Authority.

It enhanced the effectiveness of ECA's activities if ECA would have explicit right provided for in law to periodically set its supervision and enforcement priorities regarding the economic sector and specific cases. The transparency and thereby the legitimacy of ECA's activities can be further increased by providing for a requirement to present the annual report of its activities in front of the Parliament. It would also be helpful to provide for a clear mechanism of participation of ECA in legislative processes which result or might result in the adoption of legal provisions or acts having substantial impact on the competition in any markets.

GEORGIA *

Establishment and effective functioning of the Competition Agency of Georgia is envisaged by the EU-Georgia Association Agreement. The Association Agreement underlines the importance of undistorted competition for the trade relations between its signatory parties and establishes the obligation to enact and maintain respective laws and regulations which effectively address anticompetitive agreements and abuse of dominant position on the market. For this purpose, article 204.2 of the Agreement envisages the establishment of the competition authority in Georgia, which would enforce competition legislation. Georgia introduced significant amendments to the law on “Free Trade and Competition” in March 2014, based on which the Competition and State procurement agency was divided into two legal entities, and by the Government Resolution No 288 dated 14th April 2014 the new Competition Agency was established (hereinafter Agency). This decision marked a turning point, as a formally independent competition agency was for the first time introduced in the country. The Agency is accountable only to the Prime Minister of Georgia.. It should be noted that the principles of the EU law are followed by the Georgian legislation, but a number of issues, notably, in terms of procedural aspects and the powers of enforcement requires improvement. The Order of the Chairman of the Competition Agency N199 of December 16, 2015, “On Approval of the 2016-2018 Training Plan for the Agency” was issued exactly for this purpose. It aims to increase efficiency of the newly formed Agency, to raise public awareness with respect to competition policy issues, to train Agency staff and to enhance their qualification.

ICELAND*

Independence is of utmost importance for smaller economies, due to their characteristics. The Icelandic Competition Authority is provided with several important safeguards for independence. There are seven important ways to ensure and support the independence of competition authorities, with focus on small economies. These are:

- long term political commitment to a stable competition policy,
- the authorities' clear focus on competition policy,
- rules concerning appointments, terms and dismissals of boards and heads of competition authorities,
- non-political reviews of decisions,
- stable and sufficient resources,
- transparency in prioritisation and decisions of the authorities and
- oversight and guidelines at international level, concerning independence of competition authorities.

Steps could be taken to ensure a more permanent independence that is less susceptible to political influence. If not, the independence relies to a certain degree on the government and parliament at each time.

INDONESIA*

The term of independents based on Law No. 5 Year 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition (Law No. 5/1999) explicitly stipulated in Article 30 paragraph (2) which states "The Commission shall be an independent institution free from the influence and authority of the Government and other parties". This provision indicates that structurally, the Commission has a guarantee of independence in Law No. 5/1999 either from the elements of executive, legislative, judicial, as well as from the pressure of political parties or business practitioners.

However, there are several obstacles which are faced by the Commission, especially in the interaction with government party. There are several government regulations on the national and local level that violate the Antimonopoly Law in principle, but given that there are exceptions in the provision of Article 50 letter a) Law No. 5/1999 which states that "...excluded from the provisions of this law shall be the following: actions and or agreements aimed at implementing applicable laws and regulations...". Therefore, the Commission tries to coordinate with the Coordinating Minister for the Economic Fields to ensure that the Ministries' policies related to the fields of economy, like trade and industry, give more attention to the principle of fair competition.

Operationally, the Commission independently determines its institution's organizational structure . For this matter, besides the establishment of Presidential Regulation, institutional regulation related to main duties and functions of institutional organization is also established in order to improving performance and working procedure of the organization, as well as cooperation between institutions and ministries in the national and local level. Basically, the regulation is regulating the organizational structure, promotion of position/rank and the duties and functions.

In performing their duties both in making policy (commission regulation) as well as law enforcement (decision), the Commission has full autonomy from Law No. 5/1999. The government needs to establish strategic steps plan in managing its state. The establishment of state strategic plan is stated in a Law of National Medium-Term Development Plan. This law will be stipulated once in every five years in the beginning period of presidential tenure.

The government cannot do any interventions on the process of examination and stipulation of the decision which usually is executed along with an administrative sanction. The government cannot intervene both the legal proceedings of competition cases or lawsuits as well as any things related to investigation, examination and verification until the stipulation of case decision which allegedly violates Law No. 5/1999.

JAPAN

The Antimonopoly Act (hereinafter referred to as the “AMA”) is a basic rule for economic activities. Thus, it needs to be enforced continuously and consistently by a neutral and fair organization that is free from any political influences. In Japan, the independence of exercise of authority of respective commissioners who make collectively decisions on law enforcement by the Japan Fair Trade Commission (hereinafter referred to as the JFTC) is clearly stipulated in the AMA. Moreover, certain independence is also realized in terms of employment and education of officials.

In practical aspects, the JFTC independently makes decisions without any interference from other administrative bodies etc., regarding enforcement of cases of violations of the AMA and reviews of business combinations.

Sector regulatory agencies carry out enforcement and application of a business law in that business sector, while the JFTC can exercise its authority set forth in the AMA independently of the regulatory agencies, because the AMA is basically applied to all of business sectors. In fact, the JFTC has enforced the AMA in a variety of business sectors, such as agricultural, automotive and financial business sectors.

For the purpose of promoting competition in regulated sectors, the JFTC has conducted survey on competition policy issues in the sectors and expressed its viewpoints toward ministries and agencies in charge of the regulations as advocacy activities.

In addition, clarification of the JFTC’s views on the application of the competition law in advance would lead to preventing unjust intervention by other bodies into its case judgement, and enhancement of independence can be expected as a result. In this point, the JFTC has been drawing up guidelines on the application of the AMA and conducting positive public relations activities.

KAZAKHSTAN*

In June of this year, the competition authority of the Republic of Kazakhstan has marked its 25th year of work. From the first days of Kazakhstan's independence, competition policy is being paid with special attention from the Head of the state and the government. Initially, the policy of development and fair competition has been prioritized in economic development of Kazakhstan.

Also, it is worth noting that the antimonopoly organ has had its own ups and downs during its political existence coherently with the changes in competition legislation and politics of Kazakhstan. It started its work as a state committee on supporting new economic structures and restrictions of monopolistic activity under direct management of the President (the exceptional status for a state authority in terms of political structure of Kazakhstan). Later, it was lowered in status to that of subordinate organ to first agency of strategic planning and reform, responsible for industrial policies and then came back to the central government becoming subordinate to the Ministry of industry and trade in 2007. However, in 2014, the Committee on regulation of natural monopolies and protection of competition at the ministry of national economy of the Republic of Kazakhstan (later as Committee) and the antimonopoly organ came back to the subordinate position under the Ministry of national economy of the Republic of Kazakhstan. In turn, the antimonopoly committee in the structure of the ministry of national economy of the republic of Kazakhstan is authorized to take independent decisions within its area of competence directed at implementing competition policy in the Republic of Kazakhstan.

Subsidies for the antimonopoly organ of the Republic of Kazakhstan come from republican budget of the Republic of Kazakhstan. The competition authority's budget is planned independently within limits of 3 year-periods set by the ministry of national economy of the Republic of Kazakhstan. With that in mind, there can be amendments made to the approved 3-year budget.

Moreover, the ministry of national economy of the Republic of Kazakhstan will oversee the execution of the budget plan of the committee.

LATVIA

Structure and budget

The Competition Council of Latvia (the CCL) is a governmental institution of direct administration, supervised by the Ministry of Economics (hereinafter – supervising ministry). The CCL has an investigative and decision making body (a Board consisting of 3 members) under one roof. Directions regarding the initiation of the investigation, and decision taken, shall not be given to the Board neither by the supervising ministry nor other persons. The CCL shall also not coordinate its opinion with a higher institution.

The Chair of the Board is also Head of the authority. Board Members are recruited by the supervising ministry and approved by the Cabinet of Ministers. The mandate of the Board Members (also the Chair) can be renewed once. With regard to selection of the Board Members, until now there have been different procedures applied by the supervising ministry without any certainty for Board Members whether their mandate will be approved for the second term.

The annual budget for the CCL for 2016 is 1,07 million euros. The CCL has 49 employees per 1 January 2016. For comparison, according to the 2016 Global Competition Review data, among the 39 World's top competition authorities the CCL has the lowest budget. Overall the CCL remuneration is not competitive, even when compared with wage levels within the ministries or other regulatory or law enforcement agencies.

Efforts made by the CCL to obtain full independence

Since 2012 the CCL has advocated for full independence from the executive branch and there have been many discussions with the supervising ministry without any result. However, the CCL's independence proposals still remain on the agenda of the CCL. Thus, in 2016 the CCL has submitted to the supervising ministry two proposals:

- for gaining additional powers to enforce and challenge laws and governmental and municipal acts, if they infringe competition rules and are discriminatory (proposal on application of Competition Law/enforcement actions against public administrative bodies).

Currently the legal status and regulation does not make the opinion of the CCL binding to public institutions. Competition distortions created by public administrative bodies require not only advocacy but also an effective enforcement tools for prevention of the distortions. An effective application of Law regardless of the legal status of body (private or public) should not only ensure a fair play of the competition rules but also provide a greater confidence and trust that the CCL decisions are impartial to all parties.

- for strengthening capabilities of the authority (proposal on sufficient financial resources and autonomous budgeting). The proposal is aimed to obtain an exceptional status outside the civil service system as other independent authorities have (the Public Utilities Commission, the Financial and Capital Market Commission, etc.). The amendments also provide for discretion of the Parliament to decide on the budget request of the CCL. In addition, it foresees that the remuneration at the CCL would be set at the level comparable to other independent authorities being outside the unified wage grid.

Moreover, the CCL has also expressed support for the concept of a possible merger of the CCL and the Public Utilities Commission of Latvia. The authority regards that as a logical solution taken into account that competence of both institutions in certain sectors is quite similar. The Public Utilities Commission is a completely independent body whose budget is comprised of contributions from members of regulated market.

Other factors being of great significance/value for independent work of the competition authority

Accountability, professionalism, neutrality increase the reputation of the authority and rise to certain extent its *de facto* independence. High professional ability is important along with independence and accountability in decision making, in order to exclude any possible political or other external interventions.

Personal independence of the Board Members, appointment of them in transparent selection procedure. A higher standards for authorities which have been recognized as *quasi-court* have to be set, versus those authorities what carry out only investigations. Selection of representatives of the Board Members must be based on professional criteria. Appointment of the Members should be done both by Government and Parliament, as well as dismissal of the Members should be limited only to *cause majeure* cases. Evaluation of the tasks fulfilled by the Head of authority has not to be done only by supervising ministry or other body what represents executive branch.

Sufficient financial resources, autonomous management and budgeting tools. The competition authority has to have autonomous rights to plan, to submit and to defend the annual budget before the Parliament. Autonomous management tools have to be full responsibility of the Head of the authority:

- to flexibly plan budget spendings, without a constant approval from the supervising ministry,
- to make independent decisions on the number of employees, procedures of the organization, new employment positions within the authority,
- to determine the remuneration (comparable at least to other law enforcement and regulatory institutions), etc.

And, even without a full independence, the CCL strictly follows the rule that the degree of independence of a competition authority lies in its capacity to enforce its decisions in an independent manner and to foster a clear dialogue between all stakeholders.

LITHUANIA

The Law on Competition of the Republic of Lithuania explicitly establishes the independence of the Competition Council. The Law states that when performing its statutory functions the Competition Council is free and independent in its decision making. The Competition Council is established as a stand-alone body and is not a part of a ministry.

The Competition Council is an integrated agency, i.e. the Competition Council both investigates cases and takes enforcement decisions, and has the right to impose fines. However, in the case against a CEO of an undertaking which has been found guilty of anticompetitive agreements or abuses of dominant position, the Competition Council has to establish the CEO's role in the undertaking's antitrust infringement and then has to refer the case to the Vilnius Regional Administrative Court with a request to impose sanctions.

Within the Competition Council, the investigative and decision-making functions are separated. The administration of the Competition Council carries out investigations, while the board of five Council members adopts decisions.

The Law on Competition was revised in 2012 and it has clarified the Competition Council's accountability.

The Competition Council is a budgetary institution financed from the Lithuanian state budget. Total dependency on budget allocations decided each year by the Government and the Seimas (the Parliament of Lithuania) causes a risk that activities of the Competition Council may be influenced or otherwise undermined by reducing its budget. Possibilities of alternative sources of funding – such as, for example, funding from undertakings – are being explored.

The Competition Council has a decision-making autonomy. It has been strengthened by amendments to the Law on Competition allowing the Competition Council to prioritise its activities.

The Competition Council is accountable for its activities to Seimas, but in practice the Chairman of the Competition Council has also meetings with the President of Lithuania and the Prime Minister and informs them about the Competition Council's activities.

An additional and important aspect of Competition Council's accountability is the fact that its final decisions can be appealed. The courts enjoy a wide discretion when conducting judicial review.

The Competition Council also increases transparency and accountability by publishing information about its activities.

MEXICO *

The autonomy concept may have different meanings depending on each jurisdiction and the particular constitutional and administrative setting. However, one can normally say that by means of granting autonomy, the State aims to assign specific responsibilities to bodies that are deemed more suitable to perform them.

Recently, and as a part of a strategy to improve overall public governance, Mexico has created more autonomous bodies in different policy areas.¹ This trend indicates the need that these institutions should serve with independence, regardless of political considerations.

In light of this, the Mexican competition authority was born fully autonomous in 2013, and was vested with the responsibility of promoting and protecting the competition process in all markets except telecommunications and broadcasting, the latter is responsibility of the Mexican Federal Institute of Telecommunications (IFT).

From the Federal Commission of Economic Competition's (COFECE) perspective, independence is not a goal in itself. Instead, it is one of various factors needed to effectively accomplish its constitutional mandate. Thus, this autonomy ought to be soundly exercised so as to use it as vehicle for change and success.

In the case of COFECE, the constitutional autonomy (which includes various dimensions of autonomies as already mentioned), together with sufficient powers, resources and transparency/accountability mechanisms, have allowed in combination to implement sounder enforcement and advocacy measures to promote and protect free market access and competition in the markets. Consensus is being shaped in the sense that constitutional autonomy has allowed the Mexican competition authorities to better make use of their tools.

Nevertheless, the achievements in recent years were not constructed overnight. Successful public policies are built from incremental improvements over time. Throughout more than twenty years, the former CFC and now COFECE experienced a continuous process of professionalization and institutional strengthening. COFECE has to build up its institutional foundations as well as its technical capabilities in order to be up to the challenge.

It is critical to stress that the constitutional autonomy granted to COFECE should not be misconceived as isolation. On the contrary, close collaboration and exchange of technical information is necessary to build a common front and promote a coherent, comprehensive and effective competition policy. From our experience, the lack of competition in the markets often comes from barriers and obstacles imposed by the public authorities.

A number of complex challenges remain. The biggest we can foresee is to continue meeting the expectations derived from the constitutional reform. To achieve this, COFECE shall not only maintain independence but also take decisions that clearly respond to the public good.

¹ Central Bank (BANXICO, 1994), National Electoral Institute (INE, 1989), National Commission of Human Rights (CNDH, 1999), National Institute of Statistics and Geography (INEGI, 2008), Federal Commission of Economic Competition (COFECE, 2013), Federal Institute of Telecommunications (IFT, 2013), National Institute for Education Assessment (INEE, 2013), Federal Institute of Transparency, Access to Public Information and Data Protection (INAI, 2014), Council for Evaluation of Social Development Policy (CONEVAL, 2014).

NORWAY

In Norway, the Norwegian Competition Authority's independence in individual cases is secured by law. Even though the Authority can be ordered to deal with a case, it can not be instructed as to decisions in individual cases. Nevertheless, the Ministry for Industry, Trade and Fisheries is the appellate body for the NCA's merger decisions. Moreover, when the current Norwegian Competition Act was enacted in 2004, one of the features implemented was that the NCA's decisions to intervene in mergers could be reversed by the government based on public interest considerations.

However, as a measure to enhance the NCA's independence, an independent competition complaints board will be established. The board will be the appellate body for all decisions by the NCA, in mergers as well as cartel and abuse of dominance cases. At the same time, the possibility to reverse the NCA's decisions based on public interest considerations will be abolished. The proposals were adopted by the Parliament (Stortinget) in 2016 and will be implemented in the spring 2017.

In this contribution, some important aspects of agency independence will be discussed in relation to the NCA's operational and legal framework. Since the degree of agency independence also is a function of professional independence, measures to assure this is also discussed.

PERU²

Indecopi is a multi-purpose agency, enforcing laws from different bodies, such as free competition, consumer protection, advertising and unfair competition, intellectual property, among others.³ It is governing by a multi-member board that is appointed by the Executive Branch for a fixed five-year term, renewable once. Dismissal could apply in case of a serious cause.

Besides, Indecopi's law stated that Indecopi has an independent legal status of internal public law and enjoys functional, technical, economic, budgetary and administrative autonomy. The broad mandate of Indecopi, on the one hand has helped to protect the autonomy and independence of the Agency in all these years, since it makes it difficult to capture, given that a multi-purpose agency provides a more elusive target for any industry group, but on the other hand demand an important level of coordination and economic resources for its proper operation.

Under this scheme, the agency of competition is one of the functional bodies of Indecopi. Being the National Competition Authority in Peru the Commission for the Defence of Free Competition (the Commission) and its Technical Secretariat. In general terms the Technical Secretariat is in charge of the investigation of possible wrongdoing and to perform Market Studies, while the members of the Commission decide on issues related to the determination of culpability, the imposition of fines and the actions of advocacy for competition. The Competition Tribunal, the second administrative instance of Indecopi, review the appeals to decisions of the Commission, and rules on requests for clarification, extension and amendment.

In general, the Commission enjoys technical autonomy and independence, that not only is set in Indecopi's law, in practice the Commission has developed mechanisms to isolate themselves from political pressures. For example, the members of the Commission are appointed by the Board of Indecopi by a fixed five-year terms, renewable once and dismissal apply only in case of a serious cause. Two additional factors have strengthened the Commission's autonomy in all these years. The fact that the period of tenure of its members has not relationship with the period of the presidential mandate as is the case of the Board of Indecopi, despite that both have a five-year term, and its reputation, Indecopi and its Commissions are identified by economic agents as "island of efficiency" with authentic autonomy of political power.⁴ That is why its decisions and cases have always been enforced. Being the Competition Tribunal and the Judicial Court Specialized on Competition the only ones that issued opinions under the review of appeals on decisions of the Commission.

Although Indecopi is attached to the Office of the Prime Minister, it does not receive pressures from the Executive Branch, in fact, the Commission has received the endorsement from this branch to promote its advocacy initiatives. The constraint to its independence comes from the economic resources, despite that Indecopi is self-financing with user fees and fines that collects, due to its broad mandate, the budget is insufficient for the proper defence of free competition in the country, requiring an additional source of funding. So, there is no doubt that the Agency has been able to exert its autonomy in all these years, however there are still certain elements of its institutional design that could be improved in order to further strengthen the Commission autonomy and independence.

² This contribution was prepared by the Economic Studies Management of Indecopi.

³ Other areas of enforcement are bureaucratic barriers; antidumping and subsidies; and bankruptcy proceedings.

⁴ The Commission staff is its Technical Secretariat, which decides on the recruitment policies of its own staff, under the Public Service Law.

PORTUGAL

Since 2003, competition law enforcement is entrusted to the PCA, as the single administrative authority with the mission of promoting and protecting competition.

The new PCA's Bylaws of 2014 have not changed the institutional model of competition enforcement in Portugal.

The PCA is, from the outset, an independent entity, acting with a high degree of autonomy.

Even if no fundamental institutional changes were introduced in the 2014 PCA's Bylaws, some guarantees of independence and autonomy of the management of financial and human resources were enhanced, in accordance with the Framework Law on Regulatory Authorities.

According to its current Bylaws, the PCA is an independent administrative entity which is endowed with administrative, financial and management autonomy, as well as with organic, functional and technical independence.

There are, however, some challenges remaining, mostly due to the last years' economic context. Those challenges mainly regard limitations on the PCA autonomy to recruit staff and manage its human resources.

ROMANIA

Romanian Competition Law establishes RCC as an independent government authority with legal personality. It is the central institutions for all matters concerning competition law and policy in Romania. Beyond its enforcement mandate, it is heavily involved in many matters involving questions of competition policy, including the evaluation of proposed laws and regulations, and it has over time acquired additional mandates, such as unfair competition, national contact point on state aid and rail transport supervision.

Over the almost 20 years since its establishment, the Romanian antitrust authority and the national competition policy itself have undergone a series of reforms that incorporated international best practices, corrected sub optimal institutional designs and brought about improvements in governance, efficiencies, transparency and decision making. Nowadays, RCC has succeeded in establishing a good reputation among stakeholders, including other parts of the government, business associations and the private bar. It is generally considered one of the most professional and best performing government authorities in Romania, second only to the Central Bank.

RUSSIAN FEDERATION*

Independence is a characteristic that was paid particular attention in the course of creation of the Russian competition authority more than 25 years ago, and this question remains in the FAS Russia's focus until today. The desire to achieve independence from external pressure is related first to the institutional and legal position of the authority, as well as its internal organization, including recruitment and budget formation principles. The Federal Antimonopoly Service of the Russian Federation (the FAS Russia) exercises its functions in accordance with the Decree of the President of the Russian Federation No.636 "On the structure of the federal executive government bodies" dated May 21, 2012.

The Government of the Russian Federation regulates the activity of the FAS Russia. The activity of the Federal Antimonopoly Service is guided by the Constitution of the Russian Federation, federal constitutional legislation, federal legislation, Decrees of the President and the Government of the Russian Federation, international agreements of the Russian Federation. Within its terms of reference, determined by the current legislation of Russia, the FAS Russia is an independent entity. Absence of political pressure on the FAS Russia is ensured by the fact that the authority is directly subordinated to the Government of the Russian Federation, but does not make a part of it. On the one hand, it determines the status of the authority that is different from the status of the federal ministry. On the other hand, as the FAS Russia controls the relevant activity of authorities, this fact ensures the FAS Russia acts independently as an antimonopoly authority while bringing cases against authorities, primarily against federal ones.

SERBIA

Competition authorities around the globe operate in very diverse socio-economic, political and cultural environments and may be entrusted with different tasks (antitrust and mergers policy, consumer protection, state aid, etc.). However, one characteristic which is considered important for them all and towards which they (should) strive, so as to have a fully meaningful role, is independence. While independence of a competition authority can be analysed from different perspectives, a broad consensus exists with regard to the fact that such independence may be *de jure* or *de facto* (and at best, both). This paper will examine some aspects of independence of the Serbian competition authority- Commission for Protection of Competition of the Republic of Serbia.

In the first part, the paper will give a brief recount of the history of the Serbian competition authority, placing it in the context of the relevant legal framework. In the second part, the paper will demonstrate that the Serbian competition authority has sound legal prerequisites for independence (structurally, financially and otherwise) and that those prerequisites do not only exist in the hypothetical realm. The third part of the paper will focus on matters which are important for the *de facto* independence of any competition authority, such as transparency of work, enforcement record and relation with other institutions, based on the example of the Serbian Commission. In the last part, the paper will give concluding remarks, as well as provide a reminder that any (formal or factual) competences depend on the manner in which they exercised and that any complex and systemic task, such as ensuring free market competition and raising the awareness of the need thereof in a society, is a long-term and ongoing process.

In that sense, the Serbian competition authority, with a little over 10 years of existence, intends to continue protecting competition on the Serbian market by maintaining the acquired reputation and level of professional commitment, while taking on further activities in the field of harmonisation with the EU *acquis*, promoting the leniency programme and raising awareness of the competition law and policy, as well as the general competition culture in Serbia.

SINGAPORE

CCS was established as an independent statutory body on 1 January 2005 with the ability to both investigate and adjudicate possible infringements of the Competition Act (Cap. 50B). The purview of CCS, applies to the activities of all businesses including government-linked companies, save for activities either exempted or excluded.⁵ Decisions of CCS can be appealed on the merits to the Competition Appeal Board and subsequently on points of law to the Singapore High Court.

There exists only limited scope for Ministerial direction in relation to CCS's decisions and to date this has not been exercised. The Competition Act empowers the Minister (Trade) of Ministry of Trade and Industry, to exclude conduct from the section 34 prohibition (anti-competitive agreements) or section 47 prohibition (abuse of a dominant position) where he is satisfied that there exist exceptional and compelling reasons of public policy why they should not apply or where he is satisfied that the exclusion is necessary to avoid a conflict with an international obligation of Singapore.⁶ The Minister is also empowered to exclude mergers from the section 54 prohibition where it is in the "public interest" which is defined as "national or public security, defence and such other considerations as the Minister may, by order published in the gazette prescribe".⁷ To date, the Minister has yet to exercise his powers to apply public considerations to competition matters.

The application of the Competition Act has been left to CCS to independently administer and enforce. Case examples that highlight the independence of CCS, are the *SISTIC* case⁸ and the commitments given to CCS by *EM Services*⁹. For its enforcement role, CCS is given broad powers to investigate, adjudicate and impose sanctions on undertakings that engage in activities that transgress the provisions of the Competition Act. CCS does not do so without due process. In built within the Competition Act are various statutory safeguards to ensure the proper exercise of its powers. Furthermore in practice, CCS has sought to administer the provisions of the Competition Act in an open and transparent manner. For example, CCS's provides detailed reasons for its decisions that can be found on CCS's public register.¹⁰ While a relatively young institution, CCS has established robust processes to ensure its independence, integrity and impartialness in discharging its responsibilities.

⁵ Conduct can be excluded from the section 34 prohibition where there exist net economic benefits and from the section 54 prohibition where there exist net economic efficiencies. Excluded regulated industries include piped potable water, waste water management, scheduled bus services, rail services, cargo terminal operations, armed security services, media, clearing houses activities, gas, electricity, telecommunications, and ordinary letter and postcard services.

⁶ Competition Act, Third Schedule, paragraphs 3 and 4.

⁷ Competition Act, section 2(1).

⁸ *Re Abuse of a Dominant Position by SISTIC.com Pte. Ltd.* [2010] SGCCS 3 and *Re Abuse of a Dominant Position by SISTIC.com Pte. Ltd.* [2012] SGCAB 1.

⁹ CCS Media Release, "CCS Investigates Restrictive Industry Practices in the Supply of Lift Spare Parts in HDB Estates", 14 July 2016.

¹⁰ CCS's Public Register can be found at www.ccs.gov.sg/public-register-and-consultation/public-register.

SLOVAK REPUBLIC*

The Antimonopoly Office of the Slovak Republic (hereinafter “AMO”, “Office”) is a Central State Administrative Body. The AMO has decision-making autonomy. The government is not allowed to supervise or to impose strategic guidance on AMO. Decisions of the AMO could be reviewed just by court. AMO has the autonomy from government in setting its enforcement priorities, i.e. to choose which cases to investigate.

According to Slovak legislative system the Government is not empowered to decide which cases, market studies etc. the AMO should or should not investigate, or to overrule a decision (e.g. determine criteria according to which the competition agency may exceptionally authorise otherwise prohibited concentrations motivated with reference to “relevant general interests of national economy”).

AMO also independently recruits its own staff and it independently decides on the career progress of the Office’s staff and on the termination of the working relationship. However, this is also limited and regulated by the Act on Civil Service which provides further conditions. For instance, any increase in number of employees is strictly regulated and is subject to approval.

Under our opinion requirement for de jure independence are satisfied, at least there never has been problem in the past or presence or doubts of de jure independence of the AMO. Concerning the sources of the AMO we could identify space for improvement in the area of personal and financial sources and technical equipment. The AMO mostly covers the basic competences and it is difficult to find sources for further development.

In comparison with some other authorities within the Slovak Republic our budget experienced the decreasing trend, despite the increasing number of cases. Although we understand the decrease where it is a question of a measure throughout the whole public sector with regard the regulation of public spending. On the other hand, the trends in competition policy, demand for quality economy analysis and technology effecting competition enforcement are developing much faster. Thus budget not reflecting this trend could affect the enforcement of competition law, as we have to focus on the most urgent/priority cases and problems, and we do not have sufficient capacity for the rest. It is also important to note that AMO is not passive and tries to solve the lack of technical sources or personal sources also through the cooperation with other authorities, such as Universities, public agencies. Via different cooperation agreements we try to cover the lack of resources by involving universities (academics) in analytical work or using technical device with state IT agency . This could help, however, it cannot be considered as general solution and it cannot be done on regular basis due to sensitivity of the open investigations Therefore, it is not a way to build a solid competition enforcement team but just a complementary measure.

SOUTH AFRICA*

South Africa's competition authority consists of the Competition Commission of South Africa (CCSA), which is the investigative and prosecutorial arm, the Competition Tribunal of South Africa (CTSA), which is the adjudicative arm and the Competition Appeal Court (CAC), which hears appeals from the CTSA. Competition matters can also be appealed to the highest court in the land – the Constitutional Court of South Africa – if the competition matter raises a constitutional issue.

The independence of the competition authority derives from (1) the Constitution of the Republic of South Africa (no. 108 of 1996) which in sections 33 and 34 provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, “another independent and impartial tribunal or forum”; (2) the legislation that established and guides it; (3) the institutional design of the authority as a whole; and (4) the internal practices of the individual agencies within the competition authority.

Previously the CCSA and CTSA fell within the ministry of trade and industry, like their predecessors, but in 2009 came under the ministry for economic development (EDD). The role of the ministry is principally in policy and legislation, as well as the appointment process.

The CCSA is enjoined by statute to be “independent and subject only to the Constitution and the law,” to be impartial and “perform its functions without fear, favour, or prejudice” as detailed below. Also, other officials and institutions of national, provincial, and local government are instructed to assist the Commission to maintain its independence and impartiality.

The CCSA, CTSA and CAC have each developed internal practices that safeguard their independence respectively and examples of these practices are listed below. But perhaps one of the most important and far reaching safeguards is the role of the media in competition proceedings in South Africa. The media's keen interest and participation brings transparency and accountability to the competition process. The CAC's hearings are also public and the media regularly attend the more significant competition law cases being heard there.

SPAIN*

There has been some controversy about the CNMC's institutional design. , the quality of the institutional design of the CNMC as reflected in the legislation (de jure independence) is basically sound. Broadly speaking, the new model of the Authority ensures in principle greater independence and greater accountability to the Parliament and to society. The CNMC is a legally independent and structurally separate regulatory body from the ministries. This should be a good design to prevent political capture. The President and the members of the board are proposed by the Minister of Economy and vetted by a parliamentary committee to ensure their independence and ability. Any candidates that are considered unfit can be vetoed by an absolute majority vote of the committee. This is the first instance in Spain of this kind of parliamentary control over governmental appointments. The President and the members of the board are appointed for fixed staggered non-renewable terms of six years. The terms of the appointments are longer than the term of the government. There is no governmental supervision; neither can the Government Issue directives or even make non-binding recommendations to the board. Asking for or receiving instructions from the government is strictly forbidden.

However, the assessment is not equally positive regarding some areas where independence is certainly lacking or at least hampered. Criteria for the selection of the board are not publicly available, and therefore it is up to the Minister of the Economy and the parliamentary committee to interpret what is meant by the law when it talks about "ability" of the candidates, and this lack of a minimum standard makes it harder to check the validity of the candidates. Minimal technical background should be required for the candidates to occupy the office of President or commissioners. a. The CNMC is funded by a separate allocation in the state budget. In the three years in which the CNMC has proposed a budget to the government, it has been approved with no conditions attached. However, we would like to make several comments in this regard:

- The budget allocation can in principle be reduced cut or increased depending on the authority performing more or less according to the government's preferences; therefore, even if the present funding scheme is maintained, the CNMC's budget should be allocated in a multi-annual basis, reducing the possibility that political considerations might affect the budget.

- Acknowledging the problems posed by alternative financing schemes, a better solution could be to set the budget as a constant percent of GDP.

SWEDEN

The Swedish Competition Authority enjoys significant autonomy in the carrying out of the tasks assigned to it, not only as a result of the legal, structural and administrative framework within which it operates, but also as a result of the measures which the authority itself takes to bolster its de facto independence.

The formal independence of the authority is ensured by constitutional and administrative safeguards, as well as the fact that the Authority is structurally and physically separated from government. The SCA's commitment to openness and transparency, its policy for prioritization of its enforcement activities, and its efforts to engender confidence in the authority, contribute to the SCA also operating with de facto independence.

At the same time, the administrative model applicable to the SCA ensures that the authority can be held accountable for its actions.

This written contribution outlines the different factors which contribute to the SCA's formal and de facto independence. Furthermore, the contribution considers the interplay between independence and accountability, and outlines recent initiatives within the EU to enhance the independence of national competition authorities.

CHINESE TAIPEI

The independence of Chinese Taipei's competition authority, the Fair Trade Commission (FTC), has been strengthened through a series of changes in its organizational design since its establishment in 1992.

Prior to 2012 government reform, Article 28 of the Fair Trade Act (FTA) provided the legal basis for the FTC to "carry out its duties independently in accordance with the law and may dispose of cases in respect of the fair trade in the name of the Commission". The functional independence was ensured by an odd number of Commissioners with fixed terms, and no more than half of them from the same political party, stipulated by the Organic Statute.

With the government restructuring reform in Chinese Taipei, the concept of "independent agency" was defined expressly in the Basic Code Governing the Central Administrative Agencies Organizations, and the FTC was regarded as one of the second-level independent agencies under the 2010 Organization Act of the Executive Yuan. The status of the independence was further enhanced by the "Organic Act of the Fair Trade Commission" which was enacted on the February 6, 2012, particularly in terms of nomination and appointment process.

The 2015 amendments to the FTA guaranteed the FTC's decision-making independence. The most important change in this amendment is that any concerned party can appeal the FTC's decision to the administrative court for judicial review, rather appeal to the Appeal and Petition Committee of the Executive Yuan. This change helps maintain the professionalism and credibility of the FTC as an independent agency and prevent unnecessary administrative intervention.

With regard to the source of annual budget, apart from funding from the central government, the FTC was given right to set up its own fund under Article 47-1 of the FTA to support its effective operation. The fund mainly comes from 30% the sanctions imposed by the FTC under the FTA and it can only be used strictly for specific purposes.

UKRAINE

Ukrainian legislation provides for a high level of legal guarantees of the independence of the Antimonopoly Committee of Ukraine as a body of state protection of business competition. According to Article 1 of the Law "On the Antimonopoly Committee of Ukraine" the Committee is a state body with special status whose activity is aiming at assurance of state protection of competition in the sphere of business and public procurements.

The Antimonopoly Committee of Ukraine is collegial body which shall be established to include the Chairman and eight State Commissioners. As the rule, it is more difficult to influence the collegial body rather than the sole leader in order to make any politically motivated decisions.

The financing of the Antimonopoly Committee of Ukraine is carried out at the expense of the state budget. Amount of allocations from the state budget for the maintenance of the Committee is established as a separate line in the state budget by Parliament every year.

The Law of Ukraine "On the Antimonopoly Committee of Ukraine" envisages the considering complaints and cases arising in connection with violation of the legislation on protection of economic competition and holding investigations into these complaints and cases, adopting orders and decisions on them, verifying and revising decisions on cases as the exclusive powers of the Antimonopoly Committee of Ukraine. The performance of these powers by other public authorities is not allowed.

The Cabinet of Ministers of Ukraine has no authority to give instructions to the Committee to take certain steps in the process of monitoring the legislation on protection of economic competition compliance. However, the government appeals to the Committee on possible non-compliance with the legislation on protection of economic competition in the markets conducted by relevant entities. Nevertheless, the Committee makes the final decision on the existence of signs of violations of legislation on protection of economic competition and on the measures to be taken in accordance with law.

Control over the legality and validity of the Committee's decisions is performed by courts to which any decision of the Committee may be appealed.

UNITED KINGDOM

In the United Kingdom, the independence of the Competition and Markets Authority (CMA) is enshrined in statutes, and further supplemented by robust processes established by the CMA to maintain this independence. The independence of the CMA is vital for its ability to make markets work well for the benefit of consumers.

The CMA's independence enables it to choose and priorities its work and select the method and tools it uses to achieve its objectives. The CMA is free to initiate own market studies and inquiries, as well as freely determine which cases to pursue.

The CMA's accountability is multi-faceted and includes accountability to stakeholders and the government. As a non-ministerial department, the CMA is accountable to Parliament for its use of public money and to the courts including the Competition Appeal Tribunal (CAT) for its decisions. Decisions of the CMA are appealable to the CAT – such appeals may be subject to a full “merits review” or “judicial review”. Every year, the CMA publishes an annual plan, which it put before Parliament, and a Performance Management Framework.

UNITED STATES

In the United States, two agencies have responsibility for enforcing the federal antitrust laws: the Department of Justice's Antitrust Division ("Division") and the Federal Trade Commission ("FTC"). The particular statutes they enforce differ somewhat, as does their institutional design. The Division is a component of the Department of Justice, an executive branch agency. The Division is led by an Assistant Attorney General ("AAG") who is nominated by the President and confirmed by the Senate, and serves at the will of the President. As part of the executive branch of the federal government, the Division is subject to direction from the President, who is head of the executive branch. That said, the Division has long benefitted from substantial independence in its law enforcement mission. Intervention from outside the Division is virtually nonexistent. The FTC is an independent agency with a dual mission to protect consumers and promote competition. It is led by five Commissioners, who are nominated by the President and confirmed by the Senate. No more than three Commissioners can be members of the same political party. Commissioners can be removed only for inefficiency, neglect of duty, or malfeasance in office, which has never happened. Neither the President nor Congress has the authority to make or change any specific FTC decision.

BIAC

The Business and Industry Advisory Committee (“BIAC”) of the Organization for Economic Cooperation and Development (“OECD”) is pleased to submit this paper on the important issue of the independence of competition authorities. This paper builds on BIAC’s prior contributions, including *BIAC Submission to OECD Roundtable on Changes in Institutional Design* (“Institutional Design”).

Businesses contemplating pro-competitive transactions require substantive and procedural certainty and transparency in the merger review process, as do businesses developing commercial strategies and interacting with the competition authority in respect of their conduct.

In BIAC's view, the independence of competition authorities is a critically important aspect of this certainty and transparency, and ultimately affects the legitimacy of a country’s competition law. Indeed, the importance of independence of competition authorities from political interference can hardly be overstated. The independence of competition authorities, in terms of their institutional design, accountability, decision-making and the substantive considerations they are required to apply by competition legislation, all play an important role in ensuring the independence of the authority and the legitimacy of its decisions.

In BIAC’s view, not only should competition agencies be designed so as to ensure their independence and legitimacy, but it is critical that they also implement best practices to ensure that they operate with an adequate degree of independence from both government and business. As a corollary to independence, the institutional structure of agencies should include effective checks and balances to ensure objectivity in competition authorities’ practices and judicial oversight. Adequate funding and consistent, professional application of competition norms with due regard for procedural fairness to third parties as well as those directly involved will ensure not only consistency and transparency, but important political and economic legitimacy of an authority’s enforcement decisions.

Competition authorities must make consistent decisions based on their transparent review processes and established competition norms, avoiding extraneous non-competitive considerations.

BIAC believes that implementing a multi-faceted approach focusing on institutional design, appropriate accountability measures, consistency and transparency in decision-making and process and an appropriate substantive legislative framework will practically diminish the likelihood of government or other political interference, with attendant benefits for the consistency, transparency and economic benefits of a pro-competitive legal and regulatory framework.

CUTS¹¹

It is a well-known fact that free markets have the potential to contribute towards the economic development of a country. However, the flip side of the story is the omnipresent looming danger of market failure caused by the inefficient working of dominant entities. Hence, regulation of the market becomes essential, even more so for developing nations such as India which have to ensure social development alongside economic growth.

Efficient regulation of the market ought to emanate from an authority which is free from the vice of vested interest and political control. To be truly independent from the government, not only must the regulator be an independent statutory authority, it must also be financially, institutionally and operationally independent from the government. In India, post the liberalization reform period of 1990's, the need for regulation and establishment of independent regulators was realized and a decade later, the Competition Act, 2002 established the Competition Commission of India (CCI). The CUTS brief paper attempts to analyse the independence of the Indian regulator of competition on the benchmarks of institutional, financial and operational independence.

A simple analysis of the Competition Act and its subsequent amendments portray that institutionally and financially, the CCI relies heavily on the Line Ministry. If the structure of the commission is analysed closely, the Line Ministry governs the selection and removal process of the members of the regulator and certain sections of the Act confer unbridled power with the Ministry to exempt certain sectors from application of the law in "public interest". Although, an amendment in 2007 altered the selection procedure significantly by introducing a selection committee, the Line Ministry still has a meaningful say in the process. Financially, the commission is dependent wholly on grants by the Line Ministry which could result in unnecessary hindrances its effective functioning. Fortunately, on the operational side, the Commission is relatively independent and the intrusion of the government is negligible. The Act has significantly protected the operational and decision making functions of the Commission through checks and balances provided by the independent judicial branch (The Competition Appellate Tribunal and eventually the Supreme Court).

The way forward for the Indian competition regime is to shift the accountability of competition regulator to a Parliamentary Standing Committee. This would make the regulator accountable directly to the legislature instead of the line ministry. The allocation of budget and funding should also directly originate from the legislative process. Finally, it is suggested that the appointment procedure ought to be more transparent and politically demotivated. These reforms would ensure that the independence of the Competition Commission of India is maintained and protected.

¹¹ Contribution by Udai S. Mehta and Parveer Singh Ghuman