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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution by Belgium

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Ms. Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division
Tel: +33 1 45 18 77, Email: lynn.robertson@oecd.org.

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INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

-- Belgium --

1. Introduction

1. Article 5 of Regulation 1/2003¹ 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 require the Member States to have an *independent* national competition authority². Independence is nevertheless seen as a key condition for legitimacy, and legitimacy for effectiveness³. It is therefore also one of the main issues in the European Commission's efforts on the strengthening of NCAs, launched in 2014⁴, with an extensive public consultation in 2016⁵ and on which conclusions are expected later this year.

2. Independence and the BCA

2. The BCA is set up since 2013 as an independent administrative authority with its own legal personality⁶.

3. In the successive reforms of the Belgian competition authority, all parties in government and most in opposition were moreover united to insist on a genuine separation between the investigative and decision making powers. They saw the prosecutorial model as existing e.g. in Ireland and Scandinavian

¹ Council Regulation (EC) No 1/2003 of 16 December 2002, OJ 2003 L1/1.

² See e.g. for telecom article 3(2) of Directive 2009/140/EC of 25 November 2009, OJ 2009 L108/33.

³ Several NCAs list it explicitly among their core values. See e.g. the Dutch ACM ACM, *Concept strategie autoriteit en markt*, 3. Subject of public consultation: <https://www.acm.nl/nl/publicaties/publicatie/11298/Concept-strategie-Autoriteit-Consument-en-Markt/>), the Bundeskartellamt (<http://www.bundeskartellamt.de/wEnglisch/GeneralInformation/GeneralInformation.php>.) and the French Autorité de la Concurrence (http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=167&id_article=1078). The Autorité adds that within the authority *'l'instruction est menée en toute indépendance par les services d'instruction'*³. See on independence, legitimacy and effectiveness further J. Steenbergen, 'Some reflections on legitimacy, accountability and in independence' in N. Charbit and E. Ramundo (eds), *William E. Kovacic Liber Amicorum: An Antitrust Tribute Volume II*, Institute of Competition Law/Concurrences, Paris, 2014, 93-100.

⁴ See further the *Communication from the Commission - Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* (COM(2014) 453, 9.7.2014); and *Commission Staff Working Document SWD (2014) 231 - Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, (SWD(2014) 231/2, 9.7.2014). See also A. Italianer, 'The independence of national competition authorities', contribution to the conference organized by the Austrian competition authority on 12 December 2014 (<http://www.en.bwb.gv.at/Events/Seiten/Competition-Conference-2014.aspx>).

⁵ See for a report on the responses: http://ec.europa.eu/competition/consultations/2015_effective_enforcers/Summary_report_of_replies.pdf.

⁶ Article IV.16, §1 Code of economic law (CEL).

countries as the only acceptable alternative to the (present and previous) models where decisions that may imply sanctions are taken by a body that is functionally independent from the officers in charge of investigations.

4. It is structured in the present authority by a separation between the Investigation and Prosecution Service (*auditorat*) 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 upon proposal by the Investigation and Prosecution Service, as well as interim relief cases. Competition Colleges are composed of the president and two assessors to be designated on a case by case basis in alphabetic order (subject to conflict of interest checks and availability) from two lists of ten (depending on the language of the case) and who have been appointed for a renewable mandate of six years by the same procedure as the members of the board⁷.

5. Independence can, as illustrated by any comparison of institutional structures of NCAs, be achieved in different ways. Key is therefore not so much a specific institutional model, but the effective independence in practice.

3. Independence for what, from whom and how?⁸

3.1 *Independence: for what?*

6. It is in the first place important that the agency is independent when it takes decisions in individual cases, especially when imposing sanctions. This is achieved in the BCA by its abovementioned institutional status and structure.

7. And it is not much less important that the agency can decide independently on the opening of cases given the burden and sometimes already adverse publicity an investigation implies for companies. This is achieved in the BCA by the fact that cases are opened by the Competition prosecutor general, after hearing the Chief economist⁹.

8. It is less clear to what extent secondary rules (implementing regulations of the competition law, guidelines, best practices, etc.) and priorities should be defined by the legislator, by the government, by the agency, or in cooperation between two or more of these actors. One may e.g. provide that regulations are issued by the government after hearing the agency, and guidelines and priorities by the agency after hearing the government and/or parliament. The Belgian competition rules provide that secondary legislation (i.e. legally enforceable rules) is determined by the government (e.g. a change of the thresholds for merger control), but mostly by the minister (e.g. notification forms, the conditions to obtain copies of files, the modalities for paying fines etc.), or by the minister after hearing the authority (a change of the deadline for a second phase merger control procedure¹⁰). Guidelines, best practices and priorities are to be determined by the Board of the competition authority¹¹.

⁷ Articles IV.21 and IV.22 CEL.

⁸ This text draws on J. Steenbergen's contribution to the session on *Resources, capacity and independence of national competition authorities of the 21st annual Competition Law and Policy Workshop* at the European University Institute, Fiesole 4 June 2016; and J. Steenbergen, 'Some thoughts on legality and legitimacy' in D. Edwards, J. MacLennan, A. Komninos (eds.), *Ian Forrester, a Scott without borders, Liber amicorum*, Concurrences, New York, 2015, vol. II, 329-336.

⁹ Article IV.26, §2 (3^o) CEL.

¹⁰ Block exemptions (but here have never been Belgian block exemptions because EU block exemptions are declared applicable also in cases that do not affect trade between Member States in article IV.4 CEL) can

3.2 *Independence from whom and how?*

9. For the acts for which it should be independent, the agency must be independent from the government. This is achieved in the BCA by its abovementioned institutional status. The president, the competition prosecutor general and the members of the Competition Colleges may not accept any instructions in respect of the cases they deal with¹². The Board (the president, the competition prosecutor general, the chief economist and the general counsel)¹³ must submit to the minister every year a memorandum on its priorities, but it is not bound by his comments (and successive ministers declined to make any in deference the BCA's independence). The power of the government to overrule the prohibition of a concentration was abolished in the 2013 reform (and had never been used before).

10. It should be equally independent from industry and various pressure groups. See in respect of the BCA the abovementioned prohibition to accept instructions.

11. 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. In the BCA the members of the Board and the members of the Competition Colleges are appointed by the government for a renewable mandate of six years (the mandate of the president can only be renewed once), and the members of case teams may only accept instructions from the competition prosecutor general or the prosecutor designated as the case officer¹⁴.

12. The operating rules should protect professional secrecy and avoid the participation in the decision making of officers with conflicts of interests. In the BCA, the president, the competition prosecutor general, the chief economist, the general counsel, the members of the Competition Colleges and all members of staff have the strictest form of professional secrecy obligation sanctioned with criminal sanctions. They may only use information for the purpose for which it was given.¹⁵ Strict incompatibility rules apply to the members of the Board and the staff. Rules are more flexible for the members of Competition Colleges who are not full time, but they cannot be designated to sit in a Competition College in case of conflict of interest¹⁶.

13. Effective and independent enforcement requires a genuine ability to act. The agency must therefore have a sufficient and stable budget of which it should be able to dispose without preliminary authorisations by government.

be issued by the minister after hearing the opinion of the Commission for Competition in the central council for enterprises (Centrale Raad voor het Bedrijfsleven/conseil Central de l'Economie, a consultative body with the employers', employees' and consumer representatives) (see e.g. articles IV.5, IV.7, IV.43, IV.45 §8, IV.62 §6 CEL).

¹¹ Article IV.25 CEL.

¹² Articles IV.18, IV.22 §4 and IV.26 §5 CEL.

¹³ It may be noted that the Board is in charge of the management of the institution and the issuing of guidelines. It may never discuss pending cases because the president is not allowed to discuss cases that have not been submitted to the Competition College.

¹⁴ Articles IV.17 §1, IV.24 §2, IV.26 §1 and IV.27 §3 CEL.

¹⁵ Articles IV.34 and XV.80 CEL. Infringements can be sanctioned with fines between EUR 250 and EUR 100000 and jail sentences from 1 month to 1 year.

¹⁶ Articles IV.37 and IV.38 CEL. See also the Code of Ethics for Competition College members: http://www.abc-bma.be/sites/default/files/content/download/files/2014_charte_ethique_assesseurs.pdf.

14. This touches upon the main challenge to our ability to act.

15. The BCA receives from Parliament at the proposal of the Government an annual dotation and it has a Service level agreement with the Ministry of Economic affairs determined by Royal Decree for services such as housing, IT support, HR, accounting and financial support services¹⁷. The dotation is, as for all federal institutions, since one year subject to an annual reduction as shown in the table in footnote. The BCA considers that its resources as voted in Parliament or due under the SLA do as such allow the BCA to function effectively.

16. The BCA is, however, not free to use its resources because it is, after three years, still not enabled to recruit or promote staff. A draft Royal decree on which the agency, the Minister of economic affairs, the Ministry of economic affairs and the unions reached agreement one year ago (after prolonged opposition of the unions to earlier proposals) awaited at the time of drafting (summer 2016) still the consent of the Ministers for Budget and Civil Service before submission to the Government and the Council of State, and the provisional launching of urgent recruitments requested by the Minister of economic affairs remained blocked by the Inspecteur de Finances.

4. Independence and accountability

17. Independence should not be confused with a lack of accountability which would also affect legitimacy. Authors rightly insisted on the need to make accountability and independence mutually supportive¹⁸. Credibility, accountability, independence and effectiveness are often mentioned more or less together in the search for benchmarks for good regulation¹⁹.

18. 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 without undue restrictions of independence, provided Parliament shows reasonable restraint in respect of the budget when inclined to criticise the authority. The BCA must publish its decisions in the *Moniteur* and on its website²⁰. To its own surprise the obligation to publish annual reports was abolished in the 2013 reform, but the BCA does publish its annual report and presents it *inter alia* to the Commission for Competition in the Central Council for Enterprises (Centrale Raad voor het Bedrijfsleven/Conseil Central de l'Economie, a consultative body with the employers', employees' and consumer representatives).

19. As indicated above, it is less clear to what the extent the need to balance independence and accountability requires e.g. that secondary rules (implementing regulations of the competition law, guidelines etc.) and priorities for the authority's enforcement, or advocacy efforts should be defined by the legislator, by the government, by the agency, or in cooperation between two or more of these entities. Before issuing guidelines, the BCA sometimes organises a public consultation, and it always asks for the opinion of the abovementioned Commission for Competition. Projects are also discussed in stakeholders

¹⁷

Dotation in K EUR:

2016	2017	2018	2019
6 524	6 394	6 266	6 144

The services to be provided under the SLA are evaluated at approx. 1.8 million EUR.

¹⁸

G. Majone, 'Europe's democratic deficit: the question of standards', *European Law Journal*, 1998, 5-28.

¹⁹

See for a recent survey e.g. the PhD thesis of S. Keegan, *Legitimacy in the EU single market: the role of normative regulatory governance*, PhD thesis at the University of Edinburgh 2013, e.g. 56-54

²⁰

Article IV.66 §2 CEL. In practice the full text is only published on the website. The full text includes the written submissions to the Competition College *in extenso*.

lunch forums organised by the BCA and/or in seminars organised the Brussels School of Competition, the VSMR/AEDC (association for the study of competition law), the association of competition lawyers or the Belgian competition law review (TMB/RCB).

20. There may be many ways to achieve accountability, but the key factor is, as Judge van der Woude indicated among others, that competition law and policy need the support of a broader base of stakeholders than the experts of the competition community²¹.

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

21. 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. Lawyers are generally convinced that they should be independent from each other in infringement cases, but they may have different views in respect of 1st phase merger control procedures. Economists seem to be rather uninterested or tend see the distinction as a source of inefficiencies. And stakeholders are mostly, but not always, more in line with the lawyers. We refer to par. 2 of this response in respect of the BCA and Belgian political opinion.

²¹ See in this sense e.g. R. Wesseling and M. van der Woude, 'The lawfulness and acceptability of enforcement of European cartel law', *World Competition*, 2012, 573-598.