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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution by Iceland

-- Session III --

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INDEPENDENCE OF COMPETITION AUTHORITIES

-- Iceland --

1. Executive Summary¹

1. This paper discusses the independence of competition authorities, with emphasis on smaller economies. It is argued that independence is of utmost importance for smaller economies, due to their characteristics (chapter 2).

2. The paper then addresses seven important ways to ensure and support the independence of competition authorities, with focus on small economies (chapter 3). 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.

3. Lastly, the state of play in Iceland is assessed. The Icelandic Competition Authority (ICA) is provided with several important safeguards for independence, whereas there are less safeguards in other areas (chapter 4). Steps could be taken to ensure the independence further. If not, the independence relies to a certain degree on the government and parliament at each time.

2. The need for independence – the case of small economies

4. Independence of advocates and enforcers of competition policy is of utmost importance in small economies. Small economies tend to have oligopolistic characteristics, with few competitors in markets, which often suffer from high barriers to entry. Under such circumstances, further concentration, collusion and abuse of market dominance, is likely to have even greater detrimental effect on competition and subsequently the economy, compared to larger economies.

¹ This paper is prepared and presented by the Icelandic Competition Authority.

5. Understandably, small economies tend to be close-knit societies, where “everybody knows everybody”. Under such circumstances the competition authority has to meet a high standard of impartiality. It must also be seen as independent, to maintain public confidence.

6. A close-knit society often involves a fair degree of interconnectedness between political policy making and industry interests. This can pose a serious threat to the independence of the competition authority and poses a risk that the competition authority may become overly “cornered” in its enforcement and advocacy activities.

7. Like in larger economies, implementation of competition policy in smaller economies is occupied with legal and economic assessments, where a competition authority must be equipped to advocate and enforce in a manner that is consistent, in an ever changing economic environment. A prerequisite for successful competition advocacy and enforcement is that the competition authority itself enjoys a high degree of stability, in terms of experience, know-how and overview. This enables it to cope with the fast changes of markets and business activities, as well as developments of legal and economic theory.

8. A stable implementation of competition policy requires both credible commitment and impartiality, as outlined in the OECD background paper “*Independence of Competition Authorities – From Designs to Practices*” (DAF/COMP/GF(2016)5). Investors are less likely to invest in markets and business managers are less likely to make innovative and reasonable decisions if a stable competition policy and impartial enforcement is not ensured. At the same time, consumers will not enjoy the benefits of effective competition if these key ingredients are not in place. For this reason, independence of competition authorities from political interests is vital, not least in small economies.

3. Ways to ensure independent competition advocacy and enforcement in a small economy

9. Independence of competition advocacy and enforcement requires a range of safeguards, in order to be fulfilled. According to the experience of the ICA the following safeguards are among the most important:

10. Firstly, the competition law itself must be based on a long term political commitment to a stable competition policy. This entails well framed objectives, and a permanent and universal understanding on behalf of governments and political parties of the need for a stable competition law. That means that rules of substance, the toolbox and rules concerning the structure of the competition authority are only changed after careful considerations and preparations, where possible amendments are matched against the underlying economic policies. The opposite would for example be ill-founded or frequent amendments, taking solely into account industry interests and failing to view the big picture.

11. Secondly, it must be ensured that the competition authority is provided with the necessary means to have a clear focus on competition policy. In general, multifunctional agencies are less likely to have this clear focus, as they are supposed to ensure the fulfilment of several, diverse policies, compared with single functional agencies, which are only responsible for the competition policy. This does not mean that a multifunctional agency cannot be independent, but it requires special safeguards as regards issues like conflicts of interests and the organisational structure of the authority.

12. Thirdly, the heads of competition agencies must enjoy a certain level of protection against political involvement in the advocacy activities and the enforcement. This means for example that the board or the heads of agencies should be protected from the threat of losing their job if their decisions on prioritisation and enforcement are not in line with the short term political sentiment. Rules on the term of appointment of the board or the head of the agency and conditions regarding dismissals can provide for a certain degree of protection in this regard. Transparent conditions regarding the appointments of the board

and the head of the agency are also important, to ensure an appointment based on the professional qualifications rather than political stance.

13. Fourthly, it must be ensured that decisions of the competition authority cannot be reviewed and changed by a political body, such as a ministry. The existence of a competition appeals committee, tribunal or other judicial review is an important prerequisite for independence. It also ensures a necessary degree of accountability.

14. Fifthly, an independent competition authority should have sufficient and stable resources with a budgetary autonomy. That means that the authority should be provided with a stable budget which will enable it to fulfil its duties and to run a competition policy that fits with the long term goals of the economy.

15. Sixthly, a competition authority should be as transparent as possible in its activities. The duty to be transparent provides for a certain level of independence. Transparency makes it more difficult to reach decisions that appear to favour special interests, rather than being based on well-founded arguments. At the same time transparency ensures a necessary degree of accountability.

16. Last but not least, the independence of a competition authority can be supported through oversight at international level, for example at the OECD or the European Union. Oversight, peer reviews or guidelines at international level are of vital importance. As described in chapter 2, the independence of competition agencies in smaller economies tends to be more vulnerable than in larger economies. International principles on the definition of independence and how to ensure it would be vital in this context.

4. State of play in Iceland

17. The institutional design of the Icelandic Competition Authority (ICA) contributes to a certain level of independence. The safeguards to ICA's independence are mainly the following:

- The Icelandic Competition Law ensures an arm's length approach in the relationship between the ICA and the ministry responsible for competition. The Minister of Industry and Innovation appoints the Board of the ICA with a four-year term. The Board is responsible for hiring the Director General, not the Minister, as in the case of most other public authorities. With this setup the Director General, responsible for decisions and day-to-day operations, receives his mandate from the Board, not the Minister. This is important to safeguard the independence of the Authority.
- The existence of the Competition Appeals Committee is meant to exclude any political involvement in decisions. This entails that the Minister does not review decisions. The Appeals Committee is appointed by the Minister following a nomination by the Supreme Court. Committee members are therefore not chosen on political grounds. The Appeals Committee has a very broad mandate, as it can review both procedural issues and the merits of a case. The rulings of the Appeals Committee can be brought before the general courts, both on behalf of the parties to the case and on behalf of the ICA.
- The structure of the authority ensures a clear focus on competition policy, which strengthens its independence. From 1993 until 2005, the Competition Authority was multifunctional as it was responsible not only for enforcement of competition law but also consumer legislation, such as laws on unfair trade practices and market transparency. In 2005 the legislator changed the institutional design to become a single functional one, with an authority which is solely

responsible for competition matters. Furthermore, a one pillar institutional design was adopted, with a single administrative body, instead of a two pillar system, with an independent council and an authority at the first instance. Experience has shown that the new structure has provided the means for stronger advocacy and enforcement. At the same time it has helped the authority to maintain a certain level of independence. (For further details on the institutional design of the ICA, see DAF/COMP/WD(2014)94, *Roundtable on Changes in Institutional Design of Competition Authorities – Note by Iceland.*)

- Iceland's participation in the European Economic Area includes that the ICA enforces the prohibition rules (collusion and ban on abuse of a dominant position) of the EEA-agreement. This is done in close cooperation with the EFTA Surveillance Authority (ESA). ESA ensures that the investigations and decisions of the ICA provide for an effective implementation of the EEA-agreement. If the ICA would not be able to do that, due to its lack of independence, ESA could step in and initiate its own investigations.

18. The level of independence has, however, its clear limits. The ICA is a part of a broader public system and does not enjoy an absolute independence. The four most significant limits to the independence are the following:

19. Firstly, the Minister appoints the members of the Board of the ICA, for a term of four years (the normal term of government is four years). There are limited rules in place on the procedures for choosing the board. The appointment can be used to facilitate changes in the operations and priorities of the Authority.

20. Secondly, the ICA is subject to the normal budgetary system, where the budget for each year is prepared at ministerial level, and decided upon in the Parliament. Furthermore, according to recent law changes, the Minister is able to transfer budget appropriations to and from the authority, within a fiscal year, based upon his priorities. The budgetary system therefore reduces the independence of the ICA significantly.

21. Thirdly, the Competition Law is decided upon in the Parliament and changes to the Law can of course affect the independence of the Authority. Traditional procedures on the preparations of law amendments do not ensure that the bills are only presented in the Parliament after careful considerations and preparations, where possible amendments are matched against the public interest that is at stake and the underlying economic policies.

22. Fourthly, the ICA is of course accountable for its operations. On the one hand, accountability is ensured through judiciary review and transparency of priorities and decisions, that also contributes to the independence of the ICA. On the other hand, accountability is ensured through reporting to the Minister and Parliament. Discussions related to the accountability through these channels can affect the independence of the Authority.

23. These limits to the independence of the ICA are to a certain extent normal in a democratic society. However, 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.