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**Model Law on Competition (2010) –
Revised chapter IX¹**

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Model Law on Competition (2010) – Revised chapter IX

The Administering Authority and its organization

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COMMENTARIES ON CHAPTER IX AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATIONS

Introduction

1. Chapter IX. *The Administering Authority and its organization* deals with the institutional design and composition of the competition policy regime. While the wording of Chapter IX could be understood to refer to the establishment of the administering authority only, it covers a broader institutional framework of the competition-policy system, including the respective role of, and the interaction between, the government, the court and the competition authority.
2. An appropriate institutional framework is a prerequisite for the effective enforcement of competition laws. While much debate has focused on substantive issues – for instance, appropriate rules for merger review, abuse of dominance, and cartels – relatively little attention has been given to institutional and procedural concerns. Where a well-formulated antitrust law is adopted, however, insufficient attention to institutional and operational aspects could result in a poor performing antitrust regime. With this recognition, there is growing emphasis on the institutional and operational considerations.
3. In shaping the institutional framework of a competition-policy regime, there are several fundamental questions for the institutional planner to address:
 - (a) Which body is responsible for investigative and enforcement activities? Is it part of a ministry, an agency under the auspices of a government minister, or a fully independent agency?

- (b) Which body is in charge of making the first decision on antitrust cases? Is it the enforcement agency, a separate adjudicated body or the court?
- (c) To what extent is judicial review of competition decision applied? ²

4. The crux of the first question is whether or not the enforcement body should be awarded independence from Government (i.e. a Government minister). It may be the case that jurisdictions differ in terms of the degree of importance they attach to awarding independence to competition authorities. In fact, a number of countries have decided not to establish an independent competition authority, but to implement their competition policy through a dedicated ministerial department.

5. However, there is growing consensus that it is desirable to establish independent agencies with responsibility for competition enforcement. The trend in most of the competition authorities created in the recent past (usually in developing countries and countries with economies in transition) is to award them as much administrative independence as possible. This feature is very important, because it protects the Authority from political influence.

6. The latter two questions are about the allocation of decision-making responsibilities within the administrative and judicial systems. In this respect, a key issue is whether or not to integrate the investigative and adjudicative functions within an enforcement agency. Given that the institutional design greatly depends on the specific State's context, there is no single model that is optimal for all countries. While the successful constitutional challenge to the lack of separation of the adjudicative function from the investigative functions under Jamaica's Fair Competition Act appears to support the separation, the recent United Kingdom Government's plan of the merging of OFT and CC points in the opposite direction.

7. In most jurisdictions, it is customary for the legislature to adopt judicial review to police the enforcement and decisions of the competition authorities. It is widely held that independent judicial review of the decisions of competition authorities, whether through regular courts or through specialized adjudicative bodies, is desirable for the sake of the fairness and integrity of the decision making process.³

8. As noted above, there are a number of design choices available for the institutional framework. In most jurisdictions, the structure of the competition regime and the allocation of decision-making responsibilities within the administrative and judicial systems generally fall into one of three structural models:⁴

- (a) The bifurcated judicial model – the Authority has investigative powers, and must bring enforcement actions before courts of general jurisdiction, with rights of appeal to general appellate courts;
- (b) The bifurcated agency model – the Authority has investigative powers, and must bring enforcement actions before specialized competition adjudicative authorities, with rights of appeal to further specialized appellate bodies or to general appellate courts;
- (c) The integrated agency model – the Authority is empowered with both investigative and adjudicative functions, with rights of appeal to general or specialized appellate bodies.

² Trebilcock M and Iacobucci EM (2010). Designing competition law institutions: values, structure and mandate. 41 *Loyola University Chicago Law Journal* 455.

³ For additional information, see the note by the UNCTAD secretariat entitled "Independence and accountability of competition authorities". TD/B/COM.2/CLP/67. 14 May 2008.

⁴ See Trebilcock and Iacobucci, *supra* note 1: 459–464.

9. Each of these models involves certain trade-offs. For instance, the bifurcated agency model may improve the quality of decision-making by concentrating adjudication in a small group of specialized and expert judges. On the other hand, this model may be unacceptably resource-intensive where courts of general jurisdiction provide a ready alternative, and may also raise natural justice or due process concerns if access to general courts is limited. The integrated agency model may be the most administratively efficient enforcement scheme, but it raises significant due process risks which must be safeguarded against.

10. Many member States have adopted variations on – or combinations of – these basic structural models. For instance, a common arrangement is for the Authority to enjoy both investigative and adjudicative functions in relation to mergers and concentrations, but only an investigative role in relation to restrictive trade practices and abuses of dominance, with courts or specialized tribunals undertaking the adjudicative function.

Alternative approaches in existing legislation – Institutional design of competition regime

Country or group of countries	
Bifurcated judicial model	
Australia	<p>The Australian Competition and Consumer Commission (ACCC) is responsible for investigating infringements of the Trade Practices Act 1974 (TPA) and may institute legal proceedings in the Federal Court against businesses that it believes have contravened the TPA.</p> <p>The Federal Court is empowered to hear and determine competition matters.</p>
Jamaica	<p>Jamaica's Fair Trading Commission has the power to carry out investigations in relation to the conduct of business in Jamaica to determine if any enterprise is engaging in practices that are in contravention of the Fair Competition Act.</p> <p>Upon application by the Fair Trading Commission, the Supreme Court may (a) order the offending person to pay to the Crown such pecuniary penalty not exceeding \$1 million in the case of an individual and not exceeding \$5 million in the case of a person other than an individual; or (b) grant an injunction restraining the offending person from engaging in anti-competitive conduct; see Article 47 of the Fair Competition Act.</p>
Bifurcated agency model	
South Africa	<p>The South African institutional system for competition law enforcement comprises three bodies: the Competition Commission, the Competition Tribunal and the Competition Appeal Court.</p> <p>The functions of the South African Competition Commission, pursuant to section 21 of the South African Competition Act (the Act), include investigating anti-competitive conduct in contravention of Chapter 2 of the Act; assessing the impact of mergers and acquisitions on</p>

	<p>competition and taking appropriate action; monitoring competition levels and market transparency in the economy; identifying impediments to competition; and playing an advocacy role in addressing these impediments.</p> <p>According to section 27 of the Act, the South African Competition Tribunal may:</p> <ul style="list-style-type: none"> (a) adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in this Act; (b) adjudicate on any other matter that may, in terms of this Act, be considered by it, and make any order provided for in this Act; (c) hear appeals from, or review any decision of, the Competition Commission that may, in terms of this Act, be referred to it; and (d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act. <p>Decisions of the Competition Tribunal may be appealed to the Competition Appeal Court.</p>
Chile	<p>The Fiscalía Nacional Económica (FNE, or National Economic Prosecutor) is the Chilean competition enforcement agency, which investigates competition infringements and brings cases before the “Tribunal de Defensa de la Libre Competencia” (TDLC, or the Competition Court) or other courts of law as a party.</p> <p>The TDLC is an independent court of law that has jurisdiction on competition matters, with adjudicative powers, subject to the supervision of the Supreme Court of Justice</p>
Integrated agency model	
European Union	<p>The European Commission is empowered to investigate and adjudicate potentially anti-competitive practices and mergers that may affect trade between EU member States. See Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, and Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.</p>
China	<p>Article 9 of the Anti-Monopoly Law of the People’s Republic of China provides that the State Council shall establish an Anti-Monopoly Commission, which is responsible for organizing, coordinating and guiding the anti-monopoly work, and that the composition and working rules of the Anti-Monopoly Committee shall be established by the State Council.</p> <p>Besides, Article 10 stipulates that the Anti-Monopoly Enforcement Agency designated by the State Council (hereinafter referred to as the Anti-Monopoly Law</p>

	Enforcement Agency under the State Council) shall be responsible for the anti-monopoly law enforcement work. The Anti-Monopoly Law Enforcement Agency under the State Council may, as required by the work, empower corresponding agencies in the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government to be responsible for anti-monopoly law enforcement work, according to this Law.
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1. The establishment of the Administering Authority and its title.

11. The centerpiece of the competition policy regime is the competition authority which is usually called the Competition Commission or the Competition Council.

12. The independence of the competition authority in relation to its decision-making is at the core of regulatory governance. The Model Law on Competition has been formulated on the assumption that the most efficient type of administrative Authority is probably one which is a quasi-autonomous or independent body of the Government, and which has strong powers for conducting investigations and applying sanctions, etc., while at the same time providing for the possibility of recourse to a higher judicial body.

13. To shield the Authority from outside interventions or influence, a number of the jurisdictions (the Slovak Republic, Hungary, the Republic of Korea and Turkey) have established an independent competition authority physically separated from traditional government ministries. Where the structural independence is not fully established, the authority may have functional independence in its decision-making. In some jurisdictions (Germany, Greece and the United Kingdom), where the authority falls under a government minister (usually the Minister of Economic Affairs, the Minister for Industry and Trade), it is able to make decisions without approval of the minister concerned. In other countries (Brazil, Burkina Faso, Tunisia and Viet Nam), where the investigative arm of the competition authority is established as a department of a ministry, the adjudicative arm of the authority is constituted as a separate collegiate body in the form of a board of commissioners (Brazil) or council (Burkina Faso, Tunisia and Viet Nam).

14. An interesting observation is that, in some jurisdictions – for instance, the Republic of Korea and Brazil – a competition authority started out as a ministerial department but has later gained more or full independence. This suggests that a dynamic and evolutionary development strategy can be a practical approach in establishing the authority.

15. It should be emphasized that the independence in decision-making also requires budgetary and personnel independence. Budgetary independence ensures that funding does not become a tool for influencing the Authority's decisions. Personnel independence requires that the Authority's staff be employed by the Authority itself, rather than by a government ministry. The level of independence enjoyed by the competition authorities of member States varies.

16. In some jurisdictions, such as Colombia,⁵ Peru⁶ and New Zealand,⁷ there has been a merging of different bodies into one body empowered with all functions in the areas of

⁵ In addition to competition issues, the Superintendency is responsible for administration of the following legislation: patents, trademarks, consumer protection, chambers of commerce, technical standards and metrology. See Article 3 of Decree 2153 of 30 December 1992 on the Superintendency of Industry and Commerce.

⁶ According to Article 2.1 of Legislative Decree No. 1033, the National Institute for the Safeguard of Competition and the Protection of Intellectual Property (INDECOPI) is responsible for the implementation of legislation relating to the following areas: competition, anti-dumping and subsidies,

restrictive business practices, consumer protection and corporate law. Vesting a single Authority with a broad regulatory mandate may assist with maintaining integrity and coherence in enforcement policy.

17. Alternatively, some countries, such as China and the United States, have opted for several agencies exercising either separate or overlapping enforcement jurisdictions. While this is administratively complex, overlapping jurisdictions may ensure more rigorous enforcement, by making it harder for industry to influence or capture the Authorities.

18. In addition, some countries also permit private enforcement, and, in some cases, actively incentivize it (for example, treble damages actions in the United States). Private enforcement enables those most affected by anti-competitive behaviour to take action of their own volition, rather than relying on the Authority, which may be resource-constrained or have different enforcement priorities.

II. Composition of the Authority, including its chairmanship and number of members, and the manner in which they are appointed, including the Authority responsible for their appointment.

19. The number of members of the Authority differs from country to country. Under some legislation, the number is not fixed and may vary within a minimum and maximum number, for example in Switzerland⁸ and India.⁹ Other countries state in their legislation the exact number of members, for example Algeria, Argentina, Brazil, Bulgaria, Costa Rica, Côte d'Ivoire, Malta, Mexico, Panama, Peru, Portugal, the Republic of Korea and the Russian Federation. Other countries, such as Australia, have left the choice of the number of members to the government/responsible minister.

20. There are a number of appointment methods employed by different countries. In many countries, for instance, Japan, Indonesia and Ukraine, the law leaves the appointment of the Chair and the members of the Commission to the highest political authority (e.g. the president). In other countries, such as Zambia and Zimbabwe, the law provides that a senior government official is designated to make the appointments. In some countries, such as India and Malta, it is obligatory to publish the appointments in the official gazettes, for public knowledge. Some legislation establishes the internal structure and the functioning of the Authority, and establishes rules for its operation, whereas other legislation leaves such details to the Authority itself.

consumer protection, advertising, unfair competition, metrology, quality control and non-tariff barriers, bankruptcy procedures, trademarks, patents, plant varieties, appellations of origin and transfer of technology.

⁷ The Commerce Commission is an independent Crown entity established under section 8 of the Commerce Act 1986. It enforces legislation that promotes competition in New Zealand markets and prohibits misleading and deceptive conduct by traders. The Commission also enforces a number of pieces of legislation which, through regulation, aim to provide the benefits of competition in markets where effective competition does not exist, for example in the telecommunications, dairy, electricity, gas pipelines and airport sectors. See <http://www.comcom.govt.nz/about-us/>.

⁸ According to Article 18 (2) of the Federal Act on Cartels and Other Restrictions to Competition Act, the Competition Commission has between 11 and 15 members.

⁹ According to Section 8 (2) of the Competition Act 2002, the Commission shall consist of a Chairperson and not less than two and not more than ten other Members to be appointed by the Central Government.

III. Qualifications of persons appointed.

21. Successful competition law enforcement requires a broad range of skills to come together: legal expertise, economic expertise, public administration skills, regulatory enforcement experience and specific industry knowledge. Ideally, the members of the Authority should collectively demonstrate a high level of expertise in these areas.

22. Several laws establish the qualifications that any person should have in order to become a member of the Authority. For example, in Brazil, members of the Administrative Economic Protection Council are selected from citizens reputed for their legal and economic knowledge and unblemished reputation.¹⁰ In Pakistan, members of the Competition Commission must be known for their integrity, expertise, eminence and experience for not less than 10 years in any relevant field, including industry, commerce, economics, finance, law, accountancy and public administration.¹¹

23. To avoid any possible conflict of interest, many legislations state that the member (and staff) of the Authority should not have interests which would conflict with the functions to be performed. In India, for example, a person should not have any financial or other interest likely to affect prejudicially his functions. In Germany, members must not be owners, chairmen or members of the board of management or supervisory board of any enterprise, cartel, trade industry association, or professional association. In Hungary, the president, vice-presidents, Competition Council members and other civil servant staff members of the competition Authority may not pursue activities for profit other than those dedicated to scientific, educational, artistic, authorial and inventive pursuits, as well as activities arising out of legal relationships aimed at linguistic and editorial revision, and may not serve as senior officials of a business organization or members of a supervisory board or board of directors.¹²

24. Some countries appoint representatives of stakeholder industries, associations (e.g. professional or trade associations) or groups (e.g. labour groups/unions) to the membership of the Authority. This has the advantage of importing direct industry experience into the Authority, but conversely may become a conduit through which industry can unduly influence enforcement policy.

IV. The tenure of office of the Chair and members of the Authority, for a stated period, with or without the possibility of reappointment, and the manner of filling vacancies.

25. The tenure in office of the members of the Administering Authority varies from country to country. At present, members of the Administering Authority are appointed in Mexico for 10 years, in Italy for 7 years, in Hungary for 6 years, in Armenia and Indonesia for 5 years, in Argentina for 4 years, in Brazil for 2 years, and in other countries, such as Switzerland, for an indefinite period. In many countries, members have the possibility of being reappointed, sometimes, however, only for a single time.

¹⁰Article 4 Federal Law n° 8884 of 1994 on the Competition Defense System.

¹¹ Section 14 (I) 5 of the Ordinance XVI OF 2010.

¹² Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices. Article 40 (1).

V. Removal of members of the Authority.

26. Administrative independence requires that the members of the Authority be protected from removal from office for political reasons. In general, therefore, members of the Authority should be removed before their tenure expires only for cause.

27. Legislation in several countries provides an appropriate Authority with powers to remove from office a member of the Administering Authority that has engaged in certain actions or has become unfit for the post. For example, becoming physically incapable is a reason for removal in Japan, Serbia, South Africa and the United Republic of Tanzania; becoming bankrupt, in Japan, Malawi, Malta and Singapore; and being absent from duty except on leave for a specified period, in Australia. In Mexico, commissioners can only be removed “for a duly substantiated serious” failing in the obligations that one acquires as a member of the Administering Authority. Another cause for removal is being sentenced to disciplinary punishment or dismissal, for example in Hungary.¹³ The procedure for removal varies from country to country.

VI. Possible immunity of members against prosecution or any claim relating to the performance of their duties or discharge of their functions.

28. In order to protect the members and officers of the Administering Authority from prosecution and claims, full immunity may be given to them when carrying out their functions. In Pakistan, for example, the Authority and any of its officials or servants have immunity against any lawsuit, prosecution or other legal proceeding for anything done in good faith, or intended to be done, under Pakistani competition law.¹⁴

29. Immunity from lawsuits should not prevent affected citizens or companies from taking legal action against the Authority itself (rather than its members) for alleged breaches of the law or excesses of authority.

VII. The appointment of necessary staff.

30. There are variations in the way that staffs of the Administering Authority are appointed. In some countries, the Administering Authority appoints his own staff. In others, the government has this power. As mentioned earlier, administrative independence requires the Authority to have the power to appoint and employ personnel. Consequently, countries that emphasize independence allow the Authority to appoint and employ its own personnel.

¹³ Article 34/A of Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

¹⁴ Article 46 of Ordinance XVI of 2010.

Summary of common practices in designing the Administering Authority and its Organization

- The competition Authority is established physically separated from traditional government ministries.
- Where the structural independence is not fully established, the Authority is allowed to have functional independence in its enforcement activities.
- The Authority is also awarded budgetary and personnel independence to insulate government influence through funding and the appointment of staffs.
- The members of the Authority are protected from removal from office for political reasons or prosecution relating to the performance of their duties.
- The members of the Authority are required to have no interest that would conflict with the functions to be performed.