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Independence and accountability of competition authorities

Note by the UNCTAD secretariat*

Executive summary

A review of the concepts and practice of the independence and accountability of competition authorities shows that, even as countries have responded to pressures and learnt from the successful experience of others in setting up independent competition authorities, there is a nuanced application of these concepts across countries. Legal, administrative, political and economic factors explain differences in application and most likely make the pursuit of a single standard for independence and accountability undesirable. However, most countries recognize that it is desirable to prevent the implementation of narrow interest group goals when enforcing competition law, and to this end have put in place various checks and balances. Independence is counterbalanced by the desire for stricter standards of accountability; also, for developing countries in particular, accountability is fundamental to development. In this context, the challenge for all countries is to achieve the best balance between autonomy and control.

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I. Introduction

1. The debate on independence and accountability is an enduring feature in the creation and lifetime of a competition authority. It first appears during the drafting of a competition law and the establishment of the authority tasked with implementing and enforcing the law. Thereafter, it makes periodic appearances as the competition authority struggles first to find and then maintain a satisfactory place in the eyes of the Government, domestic public opinion and its peers. The following is a background note intended to assist member States in structuring their discussions around this topic.

II. Overview

2. Chapter III reviews the current wisdom on what constitutes an independent competition authority and the rationale behind calls for independence. Also reviewed are the criteria of accountability. In chapters IV and V, the various benchmarks used for judging independence and accountability and the principles of each are discussed, drawing on examples from various jurisdictions. Chapter VI explores some tensions around independence and accountability and the pitfalls that might arise as a result of the less favourable economic and fiscal conditions existing in developing countries. Chapter VII concludes by flagging issues for further discussion.

III. Definitions and concepts

3. There is widespread agreement that independent regulators are at the core of regulatory governance in liberalized economies and a globalized world economy. Indeed, the UNCTAD Model Law on Competition is formulated on the assumption that the most efficient type of administrative authority for competition enforcement is likely to be one that (a) is quasi-autonomous or independent of the Government, with strong judicial and administrative powers for conducting investigations and applying sanctions; and (b) provides the possibility of recourse to a higher judicial body. Other international organizations – such as the World Trade Organization (WTO), World Bank, International Monetary Fund, regional development banks and the Organization for Economic Cooperation and Development (OECD) – also recommend independent regulators.

4. It is generally accepted that decisions by competition authorities should be based on objective evidence, that those authorities should maintain a consistent respect for market principles, and that the decision-making process should be neutral and transparent. The reasoning behind this view is that sound policy outcomes are assured only when decisions by the competition authority are not politicized, discriminatory or implemented on the basis of narrow goals of interest groups. This reasoning is typically translated as a requirement for competition authorities to be insulated from undue political interference through the creation of an arm's-length relationship between the competition authority and political authorities. In practical terms, this necessitates a separation of policy implementation from policymaking and a departure from the traditional structure of the machinery of Government. Thus, Government (as represented by a minister) is compelled to cede control over day-to-day functions and decision-making to the authority. As a direct consequence, private interest groups are denied the possibility

to lobby ministers and lose the means for gaining favourable treatment.[1] Thus, the independence of competition authorities is often defined as their distinct legal personality and structural separateness from Government. Accordingly, competition authorities are often statutory bodies established by a specific act of the legislature to fulfil prescribed responsibilities.

5. In addition to prescribing the authority's structure, enabling legislation also usually gives legal meaning to the authorities' operational (also known as functional) independence by prescribing functions, powers, the manner in which members of management and staff are to be appointed, their tenure and removal, and how the body is to be financed. Likewise, how the body shall relate to the executive and legislature is often prescribed. These attributes are supposed to assure organizational autonomy and establish the arms-length relationship with political authorities.

6. The legal protection of the independence of competition authorities is common and there is some evidence of policy transfer and convergence, but there are numerous organizational formats across different countries. These divergences point to the fact that independence is a differentiated condition. What has been concluded from historical analyses (Thatcher, 2002; Cukierman, 2005; World Bank, 2000; Wettenhall, 2005; Polidano, 1999; Thatcher and Stone Sweet, 2002) is that political, legal and administrative traditions in different countries play a significant role in shaping the structure and functions of independent regulatory bodies, even as countries have responded to external pressures and learnt from the successful experience of others in setting up independent authorities. It is well known from experience with other regulatory agencies such as central banks that, even when the law is quite explicit, practice may deviate from the letter of the law. Factors such as administrative traditions or the personalities of high officials often shape the actual level of independence serving to either enhance or diminish independence. Informal norms are also known to have resulted in greater actual independence without legislative intervention. The broader location-specific context in which competition authorities are positioned is thus noteworthy, and legal independence is just one important factor that determines the actual independence of competition authorities.

7. It is generally recognized that any assessment of the independence of competition authorities must necessarily examine both *de facto* independence (what exists in reality) and *de jure* independence (what is reflected in the statutes) because measures of independence vary by country. Thatcher and Stone Sweet (2002) argue that from a political science standpoint, *de facto* independence should be understood as a dynamic process that is characterized by feedback effects between the executive/legislature and the independent institution. Independence is variable and it is often more useful to speak in terms of degrees of independence rather than absolute independence. It is possible to have more or less of it, both in formal terms and actual practice. Consequently, there is no single standard of independence which countries must adopt. Moreover, independence does not mean that competition authorities answer to no one.

8. These bodies are often created through enabling legislation, which often defines the authority's legal accountability by prescribing performance reporting mechanisms. Many competition laws oblige the competition authority to submit an annual report to the legislature and to place its reasoned decisions on public record.

[1] Efficiency improvements and the need for technical expertise in public service delivery were also motivating factors behind such reforms. In the context of liberalization, independent regulators were also seen as a way to lock in Governments to their commitment to liberalize. It is generally harder for Governments to achieve a change in legislation, as legislatures everywhere have generally shown themselves to be resistant to changing laws.

Competition laws are often drafted in such a way as to leave the implementing authority considerable room to exercise discretion. However, since the competition authority has a legal obligation to correctly exercise this discretion, it is customary for the legislature to resort to judicial review to police the enforcement actions of the competition authority. The enabling legislation will often prescribe the role and authority of the courts in the enforcement of the competition legislation.

9. Where competition authorities are accountable directly to Parliament, whether or not Parliaments have the capacity to exercise effective control becomes an issue of concern. Although the enabling legislation is an important accountability tool for Parliament, competition enforcement is technical and complex. More often than not, it has proved easier to divest administrative controls than to enforce accountability. In many countries, there is the perception that Governments have not paid enough attention to clarifying the roles and responsibilities of those at the helm of independent bodies or putting the machinery of accountability in place. These bodies are thus seen as having acquired independence without paying for it in the currency of performance.[2]

10. There is thus a trade-off between independence and accountability, with greater discretion counterbalanced by stricter standards of accountability. This trade-off is generally deemed desirable because it ensures that the competition authority does not stray from the agenda set by the legislature. Independence and accountability can also be seen as interdependent, such that where accountability is perceived to be high, there is increased willingness to concede greater discretion and independence. The opposite is also true in that, where accountability is perceived to be lacking, it can be expected that there will be increased pressure on the executive and legislature to exert control. For instance, in Australia, the review of the corporate governance of statutory authorities (also known as the Uhrig Review) – which was commissioned by the John Howard Government in 2002 and required an examination of the relationships between statutory authorities and the responsible minister – was widely seen as an effort to enhance controls on independent regulators.

11. There is mounting evidence that OECD countries that have delegated a lot of responsibility to arm's-length bodies are faced with the challenges of achieving the best balance between autonomy and control (OECD, 2002 and 2004). A few OECD countries (e.g. Australia, Canada, New Zealand and the United Kingdom) have from the late 1990s put in place umbrella legislation that defines the options for different organizational structures within the public sector and creates standards for their governance. This is aimed at mitigating the attendant risks of reduced transparency of Government for the citizen, and compromised oversight and accountability within Government, which are associated with creating independent bodies outside the core public service.[3]

12. It is thus clear that, in reality, independence is never absolute. Some would argue that the word "autonomous" is more appropriate terminology, because it reflects the trade-off between independence and accountability. It is also seen as less ambiguous as regards the fact that competition authorities are essentially public sector bodies that render a public service, often staffed by civil servants and wholly dependent on subventions from Government.

[2] OECD, 2004.

[3] It should be noted that these public sector reforms have not heralded an abolishment of independent statutory bodies or necessarily called into question the need for their independence.

IV. Description of independence

13. The previous chapter dealt with the concepts of legal (formal) independence and accountability. This chapter will review the practice across jurisdictions in awarding independence to competition authorities and managing the trade-off between independence and accountability on the basis of the various elements of independence and accountability identified in the previous chapter.

14. A competition authority that has formal independence is usually established as an independent institution not physically located in a government ministry. The trend across most jurisdictions in both developed and developing regions is to establish competition enforcement regimes comprising separate institutions that have substantial administrative autonomy from traditionally vertically-integrated ministries. This is the case in most developed economies as well as in the majority of developing countries and economies in transition. There are, however, differences in that, in some countries (for example Brazil, Burkina Faso, Panama, Tunisia and Viet Nam), the investigative arm of the competition authority is established as a department (or departments) in a ministry, and the adjudicative arm of the authority is constituted either as a separate collegiate body in the form of a board of commissioners (Brazil) or council (Burkina Faso, Tunisia, Uruguay and Viet Nam). It might be that jurisdictions differ in terms of the degree of importance they attach to awarding independence across specific functions in competition enforcement. Thus, formal independence is perhaps seen as most critical for the decision-making function and as less of an imperative for the investigative function.[4]

15. It is interesting to note that, in some cases, a competition authority might start out as a ministerial department but later gain more independence (e.g. Tunisia's council and Brazil's agencies) symptomatic of a dynamic and evolutionary process in play. There are also instances where the legal independence of the competition authority has been flouted, such as happened in Uruguay and Brazil. Uruguay has a very new authority so it is difficult to arrive at a conclusive opinion, but Brazil's Council for Economic Defence has a fair number of years of enforcement experience and, seen from that perspective, the trend suggests that the authority has been successful in maintaining its independence.

16. The degree of freedom with which the competition authority has in its daily business of enforcing competition law and taking decisions is usually interpreted to mean that the competition authority is not subject to routine direct supervision by Government and has been granted all the necessary power to fulfil its tasks. Such an authority would thus have the discretion to set its own priorities as to the identification and investigation of competition cases and the pursuit of competition complaints. It would also have the discretion to decline to investigate cases where it considers the motives of the complainant to be suspect. In this context, ministerial departments are constrained because they would be subject to ministerial priorities and political interference.

17. The unhindered exercise of competition enforcement is often also interpreted in relation to how countries choose to articulate the objectives of their national competition laws. Views differ widely on what are appropriate competition law objectives. Competition purists eschew all non-efficiency objectives because of the attendant risk of exposing the competition authority's decisions to undue influence and necessitating trade-offs between efficiency and non-efficiency goals. The developmental perspective, while accepting that efficiency objectives are a primary

[4] There may be other reasons, as discussed in chapter VI.

goal of competition enforcement, takes the view that the acute social and economic challenges that confront the developing world oblige Governments to use all policy tools to address these ills. Lewis (2001) argues that there are essentially three approaches to dealing with the trade-off between competition concerns and non-competition concerns (see box below).

Dealing with non-competition criteria

Dealing with non-competition criteria includes:

(a) Pretending the trade-off does not exist and taking non-competition criteria into account surreptitiously (i.e. cloak public interest policy in competition analysis), but this leads to a lack of transparency and proper reasoning;

(b) Vesting the final decision in a politically accountable decision-maker, but a politician may not be best placed to make such decisions, and may be susceptible to the pressures of various interest groups;

(c) Enshrining the public interest criteria in the statute and forcing the competition authority to make the trade-off, which has the twin advantages of transparency and requiring the authority to weigh and explain the consequences of the decision being made.

Source: Whish (2003).

18. A number of jurisdictions have devised different procedures to outsource decisions relating to non-efficiency considerations, usually in the form of judicial (e.g. the United States) or ministerial powers to designate exemptions. Alternatively, other jurisdictions have procedures to import non-efficiency considerations in a sanitized fashion articulated in the competition law as public interest provisions that oblige the competition authority to either apply a specific public interest test (e.g. the European Union and South Africa) or grant the minister specific circumscribed powers (e.g. Italy, Jamaica, Singapore and the United Kingdom), frequently in respect of the review of mergers and acquisitions. In many cases, public interest provisions exist in some form or another, but the competition authority or the minister refrains completely from applying them (e.g. Italy) or they are seldom activated.

19. A frequently cited argument relevant to developing countries and small economies (including developed countries) is that market-driven outcomes do not necessarily guarantee efficient and positive outcomes for consumer welfare because the origins of many competition problems in small markets are structural in nature.[5] This argument reinforces not only the idea that there might be greater reliance on public interest provisions in competition laws in developing and small economies, but also points to the greater reliance on sector regulation with significant parts of the economy not yet open to free competition. It is difficult to pinpoint any economy that is totally free of regulation. Competition authorities and sector regulators coexist under various conditions. Countries approach the question of regulated sectors differently, but some common choices include excluding some or all regulated sectors from the purview of competition law (e.g. Colombia) or awarding concurrent jurisdiction to the competition authority and the sector regulator over competition matters in some or all sectors (e.g. South Africa and the

[5] For example, Canada, in its submission at the WTO discussion on a possible multilateral agreement on competition, stated that Canadian competition policy had traditionally been tailored to reflect the country's special characteristics as a small open economy, and that it would be important to assess the implications of any such agreement for Canadian policy options.

United Kingdom). The variety of approaches can generally be classified into at least five permutations (UNCTAD, 2006). The dominant pattern of distributing competencies between regulators and the competition authority is rarely one whereby competition authorities replace sector-specific regulators. Similar to competition authorities, it is desirable that sector regulators assume obligations regarding independence and accountability.

20. It is also important to recognize that decisions on competition law priorities are not necessarily one-off because countries often adjust their national laws or priorities in line with changing circumstances, including changes in Governments. In this context, some competition laws include a dispensation for the ministry responsible for the competition policy portfolio to issue directives from time to time in the form of general policy guidelines (e.g. Pakistan, Sweden and Zimbabwe). In some jurisdictions, successive ministers have refrained completely from exercising this dispensation (e.g. Zimbabwe).

21. It is generally said that the appointment of competition officials by a minister is less conducive to independence than appointment procedures that provide for the participation of representatives of more than one government branch. In addition, it is assumed that competition officials whose terms are not renewable and cannot be removed from office except by legal procedure have less of an incentive to please those who appointed them.

22. Actual practice is varied. In some jurisdictions, the minister whose portfolio includes competition policy appoints the chief executive of the authority and the members of the commission (e.g. Denmark and Singapore). In others, the minister appoints the board of commissioners with or without endorsement from a higher authority, and the commissioners appoint the chief executive (e.g. Indonesia, Jamaica and Zimbabwe). And in others, the minister submits nominations for appointment by the country's president, prime minister, cabinet of ministers or Parliament (e.g. Burkina Faso, Costa Rica, Czech Republic, Slovakia, Tunisia, Uruguay, Viet Nam and Switzerland). Many other variations exist. For example, in Australia, which has a federal system, each State nominates a member of the commission; it is done similarly in Bosnia and Herzegovina. In the case of Albania, the Parliament, the cabinet and the presidency all nominate members to the board. Similarly, in Italy, nominees to the board of commissioners are vetted by Parliament. In Panama, nominations for members originate from the presidency and appointments are confirmed by Parliament. In Japan, the Emperor approves Parliament's appointments and dismissals of members. In most cases, even though ministers might be the appointing authority, as a check and balance, the members and chief executives cannot be dismissed except with cause stipulated by law.

23. The conditions of service of members and chief executives may be governed by public service rules (e.g. Denmark, India, Jamaica, Switzerland, Tunisia and Zimbabwe) or general labour laws. In some cases, members are prohibited from exercising any other professional or business activity or holding public office (e.g. Italy), while in some countries, members are appointed on a part-time basis and are not prevented from exercising professional or business activities (e.g. Indonesia, Jamaica, Swaziland, Turkey and Zambia), but are correspondingly often subject to conflict of interest rules. There is no uniformity across jurisdictions in the tenure of members and chief executives either. In many cases, the terms of members and the chief executive are fixed (e.g. Italy), renewable only once (e.g. Slovakia and Uruguay) or more than once but with a maximum number of years stipulated (e.g. Switzerland).

24. Many competition laws establish (a) the qualifications (e.g. a degree in law, economics or accounting) and other criteria that members should have, including in

some cases minimum age requirements (e.g. Brazil and the Bolivarian Republic of Venezuela); (b) the requirement that consumer groups and professional associations be represented on the board (e.g. Denmark, Swaziland and Switzerland) or alternatively prohibitions on affiliations to associations of any kind (e.g. Croatia); (c) the requirement for members to undergo psychometric tests (e.g. Costa Rica and Zimbabwe); and (d) that the individuals be members of the supreme administrative court, court of cassation, university professors or respected business executives of particularly high repute (e.g. Italy).

25. It is considered important to guard against the use of budgetary restrictions as a way of curtailing or penalizing enforcement. Alternative sources such as user fees or the creation of a fund through the imposition of a levy on new company registrations (e.g. Turkey) are also possible in many jurisdictions, but in others they are not permitted (e.g. Jamaica). In some countries (e.g. Australia, Peru and Zimbabwe), the competition authority is constituted as a multi-function institution that has other regulatory responsibilities from which it can derive revenue to the point that the government budgetary allocation is either nil or a small proportion of the total budget. It is thought that the award by some countries of a portion of the fines they collect in enforcement action might give the competition authority incentive to take inappropriate actions in order to augment its budget or influence the priorities of the authority in a non-optimal way. Few countries seem to take this approach.

26. It is also important to prevent the use of funding as a vehicle for capture by other interests besides politicians and the executive. Transparent funding of the competition authority helps avoid corruption and thwart the hijacking of competition enforcement by private vested interests. A process whereby the legislature allocates an annual budget to the competition authority, giving it the discretion to apportion it to various uses, is perceived to grant a high degree of budgetary autonomy to the authority. In many cases, competition authorities fall under the portfolio of parent ministries for financial, administrative and reporting purposes, such that the authority's budget request is routed through the parent ministry for approval by the finance ministry and Parliament (e.g. the Bolivarian Republic of Venezuela, Japan, Latvia, Panama, Turkey, Uruguay, Viet Nam and Zimbabwe). In other cases, the authority submits its budget request directly to the finance ministry or treasury (e.g. Albania, Bosnia and Herzegovina, Bulgaria, Colombia, Pakistan, the Russian Federation, Singapore and Slovakia). In some cases (e.g. Brazil and Tunisia), the authority's budget is part and parcel of the parent ministry's allocation and is released at the ministry's discretion.

27. In addition to enforcement functions, competition authorities have advocacy functions. Other than business and the general public, Government as a whole (including other regulatory bodies) is a key target of competition advocacy, particularly as it relates to the shaping of competition policy and bringing about market-friendly reforms throughout the economy. Accordingly, the ability of a competition authority to freely comment on and recommend improvements in public policy, regulation and legislation is another attribute by which the operational independence of competition authorities is assessed. Many laws give competition authorities the responsibility of advising the Government on the impact on competition of proposed new laws and regulations. For example, in India, the Government has the option to seek the commission's opinion when considering competition policy matters. However, the opinions of the commission are not binding on the minister. Similarly, in Tunisia, the minister may consult the Competition Council on all new proposals for legislation and any other competition matters, but the opinions of the council are binding on the minister.

V. Description of accountability

28. In most jurisdictions, legislators elect to police by judicial review.[6] It is widely held that independent judicial review of the decisions of competition authorities, whether through the regular courts or through administrative tribunals, is desirable for the sake of the fairness and integrity of the decision-making process. Most jurisdictions appear to favour a procedural review of competition cases (International Competition Network (ICN), 2003) whereby the appeal body confines itself to a consideration of the law, including a review of procedures adopted by competition authorities in the exercise of their investigative and decision-making functions, rather than a consideration *de novo* of both evidence and legal arguments. Accordingly, the intention is not for the courts to substitute their own appreciation, but to ascertain whether the competition authority has abused its discretionary powers. Grounds for review will often include lack of jurisdiction, procedural failure and error of law, defective reasons, manifest error of appreciation, and error of fact. In this context, judicial review is generally seen as an end-stage process where judgement is passed on results or actions already taken – i.e. decisions already taken by the competition authority in line with whether decision-making powers are vested in the chief executive, a board of commissioners or a separate quasi-judicial body in the form of a specialized competition tribunal (e.g. Brazil, Peru, South Africa and the United Kingdom). ICN (2003) asserts that structures of decision-making in which the investigative and adjudicative processes are strictly separated are more likely to pass muster at judicial review than are systems in which the exercise of these functions is conflated. In this context, the successful constitutional challenge of the lack of separation of the adjudicative functions from the investigative functions under Jamaica's Fair Competition Act is viewed as corroboration.

29. In the context of judicial review, it is notable that in many countries judicial review is either confined to administrative courts or the administrative court is the court of first instance (e.g. the Bolivarian Republic of Venezuela, Colombia, Croatia, Latvia, Tunisia and Turkey). In some jurisdictions, specialized competition appeal courts have been constituted (e.g. Denmark, Singapore, South Africa and the United Kingdom). There are cases in which the decisions of the competition review can be overturned by the executive in exceptional situations (e.g. Croatia). However, in the specific case of Croatia, the particular provision of the General Administrative Proceeding Act will be amended at the request of the European Commission.

30. As part of the government machinery, and utilizing public funds, competition authorities are also subject to administrative accountability in line with the rules of their countries' public sectors. In some cases, there are specific rules regarding personnel. For instance, in Denmark, there are limits on the proportion of the total budget that can be devoted to personnel costs and, in Turkey, expenditure decisions involving the hiring of new staff and travel abroad are subject to approval by Government.

31. Competition authorities are also subject to the built-in financial reporting traditions of their countries' public sectors. In this context, the role of the parent ministry and/or the ministry of finance, treasury and/or the auditor general, and ultimately Parliament, are especially important when it comes to accountability in the budgetary process. Accountability mechanisms may be present throughout the budgetary process or at key intervals (i.e. at the point of the submission of the

[6] The judiciary is subject to similar expectations of independence and accountability.

budget request, at each point when disbursement of funds is made, or at the end of the budget year, when a mandatory report on expenditure is required). In some countries, a detailed operational strategy is an additional requirement tied to the authority's budget allocation.

32. For example, the United Kingdom's Office of Fair Trading and other similarly independent bodies are required to prepare an annual statement of intent that outlines annual objectives and specific deliverables by which their performance will be measured.

33. In Latvia, the operational strategy covers a three-year period. Similarly, as part of the outcome of the Uhrig Review in Australia, the competition authority is now required to respond with a Statement of Intent to the Minister's annual Statement of Expectation[7] that outlines relevant government policies and priorities that the competition authority is expected to observe in its operations.

34. Financial audits and annual reports are the main instruments of accountability. However, some countries have recognized the need for more accountability mechanisms to cater for an assessment of the overall effectiveness and impact of competition enforcement. For example, the United Kingdom's Office of Fair Trading is subject to quinquennial reviews that are a recent requirement for all agencies and non-departmental public bodies. This is an important recognition, in particular for developing countries. Crucially, accountability for developing countries is fundamental to development. In this context, Lewis et al (2004) argue that competition authorities have to demonstrate the connection between efficiency and consumer welfare objectives, and the promotion of broader social objectives. To stand aloof from core values, objectives and concerns of society is to jeopardize the entire project of competition law and policy. Similarly, Fox (2007) argues that antitrust for developing countries must be seen in a larger context because free-market rhetoric and aggregate wealth or welfare goals is a perspective that has relatively little resonance for the great majority of the poor because of the tendency of free-market policies to disproportionately help the already advantaged.

35. On a day-to-day basis, the competition authority is accountable to its immediate clientele – the private sector, including foreign investors. However, since the enforcement decisions of competition authorities have a widespread impact on the economy as a whole, competition authorities are also accountable to the general public as consumers and interested parties. In addition, in most societies, competition authorities are subject to scrutiny for performance (outputs) from the mass media and other commentators, such as academics. In this context, transparency is a key facet of accountability. Access to information is a critical dimension to enabling various stakeholders to play their governance role effectively. To this end, it is common across all jurisdictions for competition authorities to make their final decisions – including the normative standards or guidelines that govern the investigative and decision-making functions of the authority – readily available to all stakeholders, usually through their websites and the press.

36. In the light of bilateral cooperation on enforcement activities and the emergence of international competition networks, competition authority peers increasingly constitute an additional layer of accountability, although this level of accountability can be viewed as "soft" accountability. Stakeholder surveys and peer reviews are examples of accountability instruments in this connection.

[7] The Statement of Expectation recognizes the independence of the statutory agency.

VI. Special situation of developing countries

37. The question of whether there are special circumstances in developing countries that make the concept of independent competition authorities unworkable has to be tackled. Most developing countries are not unfamiliar with the concept of independent public agencies, as such bodies were initiated through policy transfer or as part of a diverse array of reform initiatives, including privatization and civil service or public sector reorganization programmes. These reform initiatives were usually components of broader structural adjustment programmes. These types of reforms have been going on in many developing countries for decades. Of the various reform initiatives, the most common across developing country regions was that of converting civil service departments into free-standing agencies or enterprises within or outside the civil service and with a higher degree of autonomy in financial and personnel matters (Polidano, 1999).

38. Despite the apparent prevalence of autonomous agencies in many developing countries, the less favourable economic and fiscal conditions have exacerbated tensions and brought to light a number of pitfalls related to the creation of independent public sector bodies in the context of a wide gap between resource need and availability. The pitfalls are linked in the main to skills shortages, low public sector pay, risks of corruption and capture, tensions between the minister responsible for the competition policy domain and the competition authority, and weak accountability.

39. The public sector in many developing countries is generally plagued by limited human resources. One of the key short- to medium-term challenges in setting up independent competition authorities in developing countries is attracting staff that has adequate skills or the potential to rapidly acquire requisite skills. Fiscal constraints and competing developmental priorities often mean that Governments do not have the necessary flexibility to address the underlying causes (such as problems in the educational system) of the limited pool of human resources in a systematic and sustainable manner. In addition, under structural adjustment programmes, many Governments were preoccupied with the need to streamline public expenditures and reduce the size of the public sector as a means of managing fiscal deficits. Under these circumstances, creating competition authorities within government ministries can be seen as the more affordable option that allows Governments to make use of skills already available in the public sector and in which the Government has already invested, while maintaining central controls on recruitment.[8]

40. The general shortage of skills affects not only the competition authority but also the legal fraternity, the business sector, the judiciary and the legislature. Since competition enforcement is not undertaken in a vacuum, this renders competition advocacy by the authority a critical factor in gaining credibility and a constituency. For instance, it is thought that the competition authority is better able to position itself and exert optimal influence on competition policy if it shares a close relationship with Government rather than remaining at arms length. This would seem to suggest at least two things deserving closer examination: that there is a balance to be struck between total independence and some lesser degree of independence as far as advocacy is concerned, and that strict independence may not be particularly advantageous for economies in transition to a free market system. To

[8] One of the major intangible benefits available to civil servants in developing countries is access to scholarships. After training, civil servants are usually bonded to the service for a specified period of time, which has served to somewhat slow the attrition of skilled and professional staff to the private sector.

this end, a less than arms-length relationship with the various advocacy target groups, including the whole of Government, could be more conducive.

41. Crucially, the skills shortage also has implications for the independence and accountability of the competition authority, which can be compromised by a weak and uninformed judiciary and Parliament that might be unable to effectively carry out their enforcement roles. For instance, skills shortages and a lack of financial resources are among the reasons why developing countries often suffer a backlog of court cases, but the same resource constraints limit the possibility of setting up specialized competition courts. Developing country Parliaments, often comprising representatives of a cross-section of the population of which a minority may have benefited from tertiary education, may not have the capacity to analyse the reporting of the complex and unfamiliar issues around competition enforcement. Hence, a minimum level of accountability, whereby the competition authority is required to report to or through a ministry, might be seen as a workable solution to the accountability problem.

42. A related problem is the dearth of independent local expertise that developing country competition authorities can call upon from time to time to supplement in-house skills, which might be particularly relevant when undertaking, for example, market inquiries or complex investigations. Resource constraints seldom permit the buying-in of international consultants. Also, academic professors sufficiently versed in competition economics and law are few and the majority of experts in the legal fraternity are often those who act on behalf of defendants in a competition case, and their perspective may often be coloured by this point of view.

43. In most developing countries, civil servants are generally paid less than their private sector equivalents. Many developing countries have experienced declines in the real wage paid to public sector employees during recent years. In lower-growth regions such as sub-Saharan Africa and Latin America, real public sector wages declined drastically as a result of the demands of structural adjustment reforms with wage erosion and salary compression also affecting Central and Eastern Europe, the former Soviet Republics and some South and South-East Asian economies during the 1980s and 1990s.[9] The possibilities of recruiting and retaining highly qualified personnel in the public service, and especially in specialized areas such as competition enforcement, is thus negatively affected. Capable civil servants will tend to exit the public sector when their training and qualifications make them attractive to potential private sector employers. In order to find a way around these problems, independent bodies such as competition authorities are often given exceptions from the civil service regime to offer higher salary scales as well as other attractive benefits. However, this may not be a sustainable strategy given that these special privileges are still funded through fiscal revenues. For the same reason, donor-funded salary top-ups are also problematic, particularly because they can lead to “bleeding stump” arguments (i.e. Government must provide additional resources or face the unthinkable, e.g. accusations of retaliation for competition enforcement decisions or the collapse of competition enforcement). The particular situation whereby competition authorities are recipients of funding from bilateral donors raises the question of such assistance serving as a possible vehicle for diverting competition enforcement to serve foreign vested interests. There is so far no available evidence of this being the case.

44. It is often possible for independent competition authorities to supplement their budgets by levying fees for their services. Filing fees and service fees accounted for over 70 per cent of revenue receipts of the South African Competition Commission

[9] World Bank, 2000.

– reportedly one of the best funded in Africa – and financed over 64 per cent of its 2006/07 expenditures.[10] This impressive statistic no doubt reflects the size and level of activity in the South African economy and it may not be possible, at least in the short to medium term, for other lower income countries to achieve the same. In comparison, filing fees accounted for around 30 per cent of the Zambian Competition Commission's 2007 budget (also ranked among the better funded African competition authorities). The South African Competition Commission nevertheless suffers from similar constraints to other developing countries. It continues to experience high levels of staff attrition and has recently completed a pay benchmarking exercise aimed at addressing the differential between commission pay levels and those in the private sector. It has a study loan and bursary scheme in place to encourage staff to upgrade skills, and since its inception has benefited from funding from the United States Agency for International Development for staff training.

45. For various reasons – such as inadequate accounting and control measures, risk of fraud and corruption or a general reluctance to introduce what might constitute a differential tax on segments of society for public services – some Governments are wary of permitting independent bodies to raise funding from alternative sources. For example, the Jamaican Government has steadfastly denied requests from its Fair Trading Commission to levy fees for some of its services. The Fair Trading Commission is constrained in carrying out competition enforcement functions and advocacy initiatives since government subventions are insufficient. Competition authorities in developing countries are often caught in a vicious cycle whereby funding shortfalls affect not only their ability to carry out enforcement activities but also their ability to monitor the impact of their activities, and thus marshal the necessary proof of their worth and raise their credibility, facilitate accountability and provide justification for increased funding. The onus is often entirely on the competition authority to establish credibility, not only with the general public but also with the Government. In this context, initial direct political backing for competition enforcement often sets the tone for the development of future relations between the competition authority and the authorizing environment.

46. The risk of corruption and capture in developing countries is a troublesome and clichéd issue. The empirical evidence as to whether low public sector pay fosters corruption is mixed and theory does not predict that higher pay will always reduce corruption.[11] Competition enforcement, particularly in jurisdictions that draw members of the board of commissioners from the private sector on a part-time basis, raises some tricky issues relating to members' impartiality and independence. Concerns revolve around the ability of part-time board members holding senior positions in private companies to attain and maintain desirable levels of objectivity and the government–industry revolving door. This is a problem also for developed countries, but in smaller and poorer economies these concerns take on a particular significance because there is a relatively smaller pool of individuals of sufficiently high standing to choose from. There is also a greater probability of the appointment of individuals from large companies that are dominant in the economy and as such potentially more likely to fall foul of competition law. The omnipresence of large multinationals in this group adds a further wrinkle to the problem. Even where there are no incidences of impropriety, in the absence of ministerial oversight and effective accountability mechanisms, it can be difficult to manage public perceptions. For obvious reasons, competition policy in developing countries can

[10] Competition Commission, 2007.

[11] According to Polidano (1999:23), a weakening of ethical standards was reported following the creation of independent public sector bodies in the United Kingdom.

sometimes be an emotive issue and questions of "fairness" often arise; some things may be judged "unfair" by the public even if economically efficient.

47. The considerable financial resources commanded by private sector companies that may be dominant in the economy, coupled with the general environment of low public sector pay, can theoretically create conditions that are conducive to corruption. In this context, the staff of the competition authority (as opposed to the chief executive and members) may be at particular risk. However, research for this background note has not uncovered any examples of this in real life.

48. Tensions between the minister responsible for competition policy and the competition authority may arise from time to time as a result of insufficient clarity on the respective roles and responsibilities of the minister and the management of the competition authority, on how the competition authority is to be responsive to political direction, and on issues related to the streamlining of public expenditures for which the minister or another government department may be held accountable. In addition, the exceptions afforded to independent public sector bodies from the usual civil service pay scales can create gross disparities between staff on the public payroll who undertake similar tasks. Such disparities can foment discontent and can be upsetting to relations between the management of the competition authority and senior ministry officials. For example, the position of chief executive of the Zambia Competition Authority is ranked at the level of a principal secretary, yet the pay and various allowances associated with this position far exceed that of principal secretaries in Government. Indeed, the chief executive's total remuneration probably exceeds that of the minister responsible for the competition policy portfolio.

49. In all economies, competition enforcement matters generally attract a lot of media attention and consequently grant high visibility to chief executives of competition authorities. Stewart et al. (2007) make the point that examples such as George Lipimile in Zambia, David Lewis in South Africa and Allan Fels in Australia were instrumental in bringing the work of their respective competition enforcement regimes into the public eye and winning the respect and fear of business while also giving the authority a very high profile. Clearly, much depends on personalities and in this respect it is necessary to view this subject from that perspective. Certainly, the independence of competition authorities is subject to periodic assaults and the personalities of the parties on both sides play a part in determining if such assaults will happen and if they will be successful.

50. Mechanisms for accountability in developing countries tend to be weak. As already mentioned, Parliaments often do not have the necessary capacity to properly enforce accountability. There is a lack of clearly defined outcomes and indicators. Beyond making their annual reports and final decisions available to the public, there are seldom means for competition authorities to have direct consultation with or obtain feedback from citizens. Some competition authorities do not have the skills and resources to construct and maintain up-to-date websites. In this context, developing countries are enthusiastic about UNCTAD's voluntary peer reviews of competition enforcement regimes which serve not only as a mechanism for assessing enforcement impact and identifying areas for improvement, but also as an independent instrument of accountability.

VII. Observations and issues for further discussions

51. No competition authority can be completely independent from the government structure of which it is an integral part. It is impossible to identify any competition authorities that conduct their business in splendid isolation. Even competition

bodies that are part of ministries can be given substantial operational independence, but legal independence does not guarantee that the letter of the law will be respected. In reality, competition authorities can be said to lie somewhere on the continuum between splendid isolation and the total subversion of efficiency objectives to non-efficiency objectives. It would seem that all countries recognize that it is desirable to prevent the implementation of narrow interest group goals when enforcing competition law and to this end put various checks and balances in place, although nuances and differences necessarily exist across jurisdictions.

52. It is also clear that competition enforcement cannot be divorced from the broader context in which it operates, and that elements of operational independence encompass a transparent process by which non-efficiency considerations (public interest) is factored into competition enforcement decisions. For developing countries, this may be a critical accountability mechanism. Arriving at a consensus on a definition of what constitutes undue political interference and the qualitative benchmarks by which it is to be assessed is complicated, as it involves subjective judgments to a greater or lesser extent.

53. The issues examined in this background note raise a number of questions and points of interest, all of which should be considered bearing in mind the particular situation of developing countries. The difficulty in arriving at a consensus begs the question of whether it is desirable or necessary to achieve a consensus. In the context of independence being a variable, a relevant question might be whether independence can be quantified so that it becomes possible to say how much independence is enough independence. An interesting and related point for consideration would be the weight that should be attached to the overall trend in terms of the demonstrated respect for the independence of the competition authority over the period of competition enforcement experience. Another question is whether operational independence might be more or less important than legal independence for competition enforcement. Regarding accountability, the lack of separation of the adjudicative functions from the investigative functions may have implications for a number of jurisdictions that have taken the board of commissioners' approach to adjudication. It would be necessary to examine the specifics of the Jamaican case and identify if and when structures of decision-making in which the investigative and adjudicative processes are not strictly separated fail to pass muster from the perspective of judicial review. The need for more and strengthened accountability mechanisms also deserves attention.

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