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The Independence of National Competition Authorities

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The Independence of National Competition Authorities

Ladies and Gentlemen,

To start off with, I would like to thank Theo Thanner for the invitation to speak at this conference, the Competition Conference Team for their organisational work and Karl Jurka, - in advance- for moderating the panel.

I am pleased to be the guest of the Federal Competition Authority.

The *Bundeswettbewerbsbehörde* (BWB) is an active member of the ECN and a committed enforcer of competition rules. We applaud your legislative efforts in the area of enforcement tools, which have brought Austrian law into greater alignment with the ECN Model Leniency Programme.

Today I would like to discuss the independence of national competition authorities. In the past ten years, the NCAs have become a pillar of enforcement of EU competition rules. We take this for granted now, but ten years ago this was by no means certain. The NCAs have boosted the enforcement of the EU competition rules which are being applied on a scale that the Commission could never have achieved on its own. This is a great achievement. But we can still do more. There are some areas where challenges persist. Notably, in the independence of NCAs.

Together with the NCAs, the Commission considers it essential that competition authorities are independent, properly funded and adequately staffed.

We have made this clear in our Communication on 10 Years of Regulation 1/2003 that we issued this summer.

And there is broad agreement within the ECN on the importance and the need for minimum guarantees of independence.

Two models for institutional design.

A point I would like to make is that independence is a key requirement regardless of institutional design. In Europe, Member States are free to choose the institutional set up of their competition authorities. In practice, we have essentially two models for institutional design: firstly the administrative model, where a single administrative authority investigates a case and takes enforcement decisions subject to judicial control. Secondly the judicial model, where an administrative authority carries out the investigation and then brings the case before a court for a decision on substance, sanctions or both. The majority of Member States have opted for the administrative model.

Irrespective of the model followed, all authorities should be able to apply the EU competition rules effectively and independently.

Legitimacy, credibility, efficacy

It is widely accepted that competition authorities should be independent when exercising their functions.

NCAs should be impartial. Their decisions should be free from external influence, and should solely be based on the application of competition rules, supported by legal and economic arguments.

NCAs should be neutral. They should not advantage or disadvantage businesses based on ownership or nationality.

Being able to function without the threat of interference from political authorities and vested interests is a cornerstone of the rule of law. Independence is also a precondition for the effective functioning of NCAs.

The unfettered capacity to conduct investigations, unbound by political or business or other ties, is essential for the legitimacy, credibility and efficacy of NCAs.

NCAs have to be independent in order to be legitimate. Lack of independence affects the acceptance by society of the NCA's authority to enforce the law. If politicians, society or the parties being investigated have doubts about the independence of NCAs, they could

call into question its actions, its investigations, the fines it imposes and the policies it proposes.

Doubts about independence may even affect the legitimacy of competition law as such. If people doubt that competition enforcers are playing by the book, this will undermine their own willingness to play by the rules.

A parallel here is tax morale. There is a direct relationship between trust in public authorities and the willingness to pay taxes. If there is trust, people are more willing to pay their taxes. Corruption, on the other hand, undermines the readiness to pay taxes. To coin a phrase: for good "competition morale", we need independent, legitimate authorities.

Doubts about independence also undermine the credibility of the NCA, in other words, the faith placed by society in the NCA as a sound and rigorous enforcer. If wrongdoers do not believe that an NCA represents a credible body for law enforcement, this will weaken the deterrent capacity of its enforcement efforts. Enforcement action taken by an authority which is not perceived as acting independently will carry much less weight. Companies may also not be willing to cooperate with such an enforcer, they may not be willing to apply for leniency if they do not believe that the authority will consider its application purely from a competition perspective.

Lack of independence also affects the efficacy, or effectiveness of NCAs, their capability to enforce the law. For instance, if NCAs do not have enough resources, or do not have enough control over their own resources, they will not be able to properly conduct investigations.

Legitimacy and credibility are intangible words that represent trust in public institutions. And even "effectiveness" is quite an abstract term.

Just to point out these are not theoretical issues, allow me to be more concrete. We have come across a number of practices that seem to go against independence. A first such practice is the direct government influence over appointments and dismissals. Governments should not make appointments to NCAs without proper qualifications. Nor should they dismiss or transfer heads of NCAs for not following the government line, for pursuing investigations that are politically unwelcome, for not sharing the same priorities, or for criticising government proposals.

A second such practice is staff rotation of NCAs following elections. In one member state the NCAs board changed after every election, leading to a politicization of the NCA, a lack of continuity and lack of stability in competition enforcement.

A third such practice is the misuse of NCA budgets by governments to gain leverage or as retaliation measure when decisions do not please them, for instance, by reducing or limiting budgets, freezing on recruitment, or refusing to reimburse costs or by delaying payments for participation within the ECN.

A fourth such practice is formed by intrusive investigations into NCA's decision making by governments, even where the decision of the authority was upheld by the competent court.

Thankfully, such practices are quite isolated. The majority of NCAs do function independently and many have safeguards in place to protect them from undue influence. But even so, not all NCAs have adequate resources. Some still are under some form of government supervision, others lack budgetary autonomy. Another problem is that there is nothing to prevent Member States from removing safeguards that currently exist. Lack of independence remains a cause for concern, which is why we have identified it as a priority in our Communication on 10 years Regulation 1/2003

Basic requirements for independence

In our Communication we have listed the basic requirements for independence.

Let me divide these into three:

People, priorities and budget

First of all, NCAs should have control over the *people* they appoint. NCAs should be able to recruit their own staff, based on their own specific needs, and should draft clear guidelines to prevent conflicts of interests. Appointments to the management and board should be made on merit, backed by clear and transparent appointment procedures. Dismissals should only be made on objective grounds, guarded by clearly defined rules. The NCA leadership and staff should not take instructions from anyone; NCAs should answer in the first place to the law.

Second, NCAs should have unfettered discretion to choose which cases to investigate and which sector inquiries to conduct. It should be up to NCAs to decide which cases to investigate. NCAs should be able to take decisions, find infringements and impose fines on the basis of legal and economic arguments, independent from other considerations

Last but certainly not least, NCAs should have control over their own budgets. This first of all means that NCAs need sufficient and stable resources to be able to pay for their own personnel, accommodation, investigations, etcetera. Second of all, this means that NCAs should have budgetary autonomy, the power to decide how they spend their own budgets.

Control over their own budgets allows NCAs to set their priorities and to plan enforcements actions. It allows NCAs to plan inspections, without having to request ministries for funding every time they raid a company or participate in an ECN meeting. But then, I don't have to explain this here in Austria. In its Country Specific Recommendations for Austria, the Council has been urging the Austrian government since 2013 to strengthen the resources of the Austrian Competition Authority. If I am well informed, however, no action has so far been taken in this direction.

Convincing the BWB about the importance of budgetary autonomy is like preaching to the choir. So let me in my sermon move on to two other priorities identified in the Communication: the importance of enforcement and investigative powers.

To be effective, independence is not enough. NCAs also need a full set of enforcement powers. There is no point in an authority having guarantees of independence if it does not have the powers at its disposal to effectively enforce competition. We explained this in detail in the Communication on Ten Years Regulation One, in which we explicitly stated that NCAs should have effective investigation and decision-making powers, and that they should be able to apply deterrent sanctions.

In its Country Specific Recommendations in the 2011 – 2013 period, the Council recommended the Austrian government to strengthen these powers. This view was shared by the Commission. And in the past few years, we have indeed seen that the powers of the BWB have become stronger. It now possesses powers such as to the power to request information and the power to seal premises and ask questions during inspections

This is a positive development, but does not go far enough, because – and here I come full circle -you need budgetary autonomy and adequate resources to effectively use enforcement powers.

An NCA without independent resources cannot carry out its tasks effectively, even if it does have enhanced powers. It may not, for instance, be able to carry out simultaneous inspections, which significantly undermines the surprise factor.

Lack of resources will also make it difficult to carry out advocacy activities, which help to promote a competition culture and are key to reaching out to businesses and consumers. I've mentioned a couple of practices that should be avoided – But I would prefer to focus on more positive developments.

Recent success stories

Several Member states have bolstered the independence of NCAs and increased their resources, in the context of financial assistance given to programme countries, or following Country Specific Recommendations in the European Semester.

Belgium now has a fully-fledged independent NCA. Until September 2013, the investigative part of the NCA was a department within the Federal Ministry of Economy, while an administrative court took the decisions. Initially, the discussion in Belgium favoured an even less desirable result, namely the full integration of decision-making powers into the Ministry. But in part thanks to the European Semester Recommendations for Belgium, the Belgian government made a different choice and placed both investigation and decision making powers in an independent administrative body outside the Ministry.

In Greece, too, we have seen progress. The Greek parliament passed a new competition law in 2011 providing for the appointment by the Parliament of the President and Vice President of the NCA. Also, their mandates will be decoupled from the electoral cycle, which will help to depoliticise the competition authority. In some countries, such as Greece and Ireland, the NCAs have been able to hire more personnel, which increases their ability to enforce competition rules.

The future

We are well aware that no system can guarantee full independence in practice, but it is possible to put safeguards in place to protect against most forms of undue or inappropriate influence. We are not advocating a one-size-fits-all single model of a competition authority. Member States should be able to choose which system best fits them, provided it delivers effective enforcement. But it is clear that a well-designed competition authority must have minimum guarantees of independence in place. Now, we must look to the future.

The OECD round table on institutional design is now also looking at independence from government as a key factor in the institutional framework of competition authorities, which underlines its importance as a priority.

The European Semester, too, underlines independence as a key requirement. Country specific recommendations have proved a useful tool and helped to increase independence of NCAs in several countries. However, these are recommendations. We lack the hard legal basis to ensure that all NCAs are independent and sufficiently funded. We've made it clear in our Communication that we want independent NCAs, and also why we want them. The next step is to answer the question *how* to best achieve independent NCAs.

What measures do we need to take to guarantee the independence of the NCAs? What steps do we need to take to make sure NCAs have sufficient resources?

We are currently undertaking a fact finding mission to examine these question in detail, and will use the answers to decide what we need to do to best achieve our goals.

So, in conclusion, I hope that I have been able to make clear it how much importance we attach to the independence of NCAs. But just in case you are not yet convinced, let me, to end my speech, point out an important fact.

Independent authorities are not the exception, but the rule. In related policy areas, such as telecoms, energy and railways, EU law stipulates a number of requirements regarding independence and the financial and human resources of the national supervisory authorities.

It is high time we give the NCAs the same guarantees that other sectors benefit from.

