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**Second Meeting
Of the
Latin American Competition Forum
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INSTITUTIONAL CHALLENGES IN PROMOTING COMPETITION

Note by the OECD Secretariat

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I. Introduction

1. The first session of the second annual meeting of the Latin American Competition Forum will discuss *Institutional Challenges in Promoting Competition*. Institutional challenges include various factors that prevent a competition authority from performing its duties in the most effective way like insufficient institutional and budgetary independence; overlapping jurisdiction with other regulators, or unclear division of responsibilities with other regulators; relations between the courts and competition authorities; insufficient investigatory or enforcement powers; and other factors that hamper the effective operations of the authority like insufficient resources or difficulties attracting and retaining qualified staff. Competition authorities also face challenges beyond institutional issues, such as in advocacy and communications or, more broadly, from the lack of competition culture. This second category of challenges will not be discussed until the third session of the meeting.

2. Latin-American participants have been invited to submit written contributions on the most important institutional challenges their country faces. Seven countries have submitted such contributions: Argentina, Chile, Colombia, Jamaica, Panama, Paraguay and Venezuela¹. The issue of institutional challenges in promoting competition has also been discussed in the recent OECD peer review of competition law and policy in Mexico². This report assesses the development and application of competition law in Mexico since 1998, updating an earlier review³.

3. During the meeting, following a brief introduction by the OECD Secretariat, Argentina, Mexico and Panama have been invited to give a presentation. The main part of the session will be devoted to a general discussion in which all participants are invited to share their experiences of institutional challenges.

II. Independence of the Competition Authority

4. The independence of competition institutions is an issue that has been widely discussed among competition experts, *inter alia* in the OECD Global Forum on Competition, where a

¹ Contributions are available at www.iadb.org/res/competition and will also be made available at www.oecd.org/competition.

² Competition Law and Policy in Mexico: An OECD Peer Review (2004), available at www.oecd.org/dataoecd/57/9/31430869.pdf.

³ Background Report on the Role of Competition Policy in Regulatory Reform in OECD, Regulatory Reform in Mexico (1999), also published as Wise, M., Review of Competition Law and Policy in Mexico, OECD Journal Competition Law & Policy, vol. 1, no. 4, p. 43 (1999). See country reviews under subtopic www.oecd.org/competition.

session in the meeting in February 2003 addressed the optimal design of competition agencies⁴. Those discussions seemed to indicate that the independence of a competition authority is a complex issue, which is not simply a function of the formal organisational status of the authority or its place in the governmental administrative structure. On one extreme, a status of total independence would be unconceivable, given that a competition authority is part of the administrative apparatus of government. On the other hand, undue interference from the political level – or indeed from other stakeholders – in individual cases of law enforcement or on advocacy initiatives would seriously harm the justness, transparency and credibility of the authority's action.

5. There are several ways in which the independence of a competition authority may be influenced – direct as well as indirect ones. Direct ways to limit the independence include higher levels of government giving instructions on how to deal with an individual case, or overruling the decision of the authority on political grounds. An indirect influence limiting the authority's independence may be exerted through the nomination of the Head and other leading officials of the authority or – in particular – through removing them from office. The budget process may also have the effect of limiting the authority's independence. Thus, the total budget envelope may have an effect on the capacity of the authority effectively to perform its tasks and will consequently be discussed later in this note. However, if changes in this envelope are perceived to reflect a reaction to the authority's position in individual cases, independence will certainly be hampered. Similarly, a budgetary mechanism that prevents the authority from using resources within the total budget frame in a way it sees fit may have the same effect.

Institutional independence

6. The contribution from *Argentina* states that the process for nominating the President and the four Members of the Commission for the Defence of Competition constitutes an institutional situation that is less independent than the one foreseen for the Tribunal for the Defence of Competition – the latter institution still not being created. In *Panama* the succession of political groups in the administration of the State with different economic orientations has endangered the institutional integrity of the competition authority. The attacks on the integrity of the organisation include both questioning the necessity of competition policy as such, and mechanisms for removing officials from the authority. And in *Paraguay* there is a lack of transparency in the selection of Members of the Competition Commission.

Economic independence

7. While most of the contributions quote the total level of funding as a factor limiting the authority's ability to perform its tasks in an appropriate manner, there are no concrete examples of budgetary mechanisms that create a situation of dependence. However, in *Argentina* the

⁴ The background note for this session is available at www.oecd.org/dataoecd/58/29/2485827.pdf and country submissions can be found at www.oecd.org/competition by following links to the Global Forum on Competition. Among other relevant topics dealt with in February 2003 GFC, the reader can find papers on Competition Policy in Small Economies. Relevant work in the February 2002 Forum include work on Competition Policy and Economic Growth and Development. Secretariat and country papers (including from Mexico) can be found on the challenges faced, the arguments heard against competition law and against various aspects of competition policy, and arguments for different kinds of competition regimes. There is also on the Website of the February 2002 GFC a study of an OECD Economics Department study on “The impact of competitive product markets on the overall health of OECD Members' economies”.

Commission draws upon resources from the budget of the Ministry of Economy and Production allocated on an annual basis, which excludes budgetary autonomy. The competition authority of *Panama* is largely financed by transfer of funds from the central government budget, supplemented by donations and loans from international organisations.

8. In general, competition authorities receive the major part of their budgetary resources from the State budget. However, the mechanisms for allocating these resources to the authority may vary. For instance, a process where the legislator allocates an annual budget to the authority, giving it discretionary power to use it for various purposes, is perceived to grant a high degree of autonomy. On the contrary, mechanisms where the authority depends on detailed decisions by the responsible Ministry for current expenditures would imply a lesser degree of independence. In order to explore ways to enhance autonomy, alternative sources of funding are sometimes discussed like allowing the competition authority to keep fines imposed, to charge fees for notifications or complaints, or to charge fees for other services provided, for instance reports that are published. However, such alternative sources of funding may provide incentives that influence the priorities of the authority in a non-optimal way, like focussing on the number of notified cases rather than on their anti-competitive effects.

Suggested questions for discussion

- *What are participants' experiences of different mechanisms to impede a competition authority from performing its duties independently? Are there other ways in addition to direct instructions, overturning the authority's decisions, nominating officials, removing officials from office and 'rewarding/punishing' the authority through the budgetary mechanism?*
- *How does the competition authority's place in the administrative structure influence independence? Is there a trade-off between being influenced and being able to influence as part of competition advocacy?*
- *What effects have been observed on competition law enforcement and competition advocacy as a result of a lack of independence?*

III. Overlap with Other Regulatory Agencies

9. Although some sectors, like the financial sector, mostly have been subject to regulation by specialised institutions for long, the number of sector regulators has increased with the liberalisation of network industries. Typical examples of such sectors are telecommunications, electricity and other energy sectors, postal services, and various transport sectors. Some countries have assigned the task of sectoral regulation to the competition authority, but most separate these functions organisationally. As pointed out by *Panama*, there may equally be strong arguments for extending the tasks of the competition authority to include consumer protection. There are different ways to organise the interrelation between the competition authority and sector regulators. The power to enforce competition law is normally the sole competence of the competition authority, but not always. In some countries there are overlapping powers, and in others the regulated sectors are exempted from the competition authority's power to apply competition rules. In order to avoid conflict between competition law enforcement and the application of sectoral regulation, some countries have adopted detailed rules on competences, procedures and priorities, and others have arranged for close consultation and co-operation between the respective institutions. In other countries there is a situation of more or less open conflict between authorities and regulatory frameworks.

10. Several contributions quote problems with the interrelation between the competition authority and sector regulators. In *Argentina* there is no jurisdictional overlap, but practical experience shows that it is sometimes unclear whether a problem, such as a complaint on a possible anti-competitive practice, falls under the jurisdiction of the competition law or the regulatory framework of a specific sector. In merger cases the competition authority is obliged to ask for the opinion of the relevant regulatory body, and some *ex officio* investigations into specific economic sectors have been requested by the regulatory agency.

11. The contribution from *Colombia* reports on difficulties related to the large number of rules that regulate economic activities and competition in various markets. Also the large number of institutions engaged in the application of such rules present a major problem. As a consequence, there are grey zones where market actors rest uncertain about the competent authority to address in a specific situation.

12. In *Panama* the competence of the competition authority to investigate restrictive practices in any economic sector is clearly defined by law. However, also sectoral legislation may include rules on competition, although in a more vague and superficial manner. When sectoral regulators apply competition rules contained in special legislation, the competition authority may supplement such decisions by enforcing competition law.

Suggested questions for discussion

- *Do sector regulators have competence in parallel with the competition authority to apply competition rules contained in either the competition law or in sector-specific legislation? Are any sectors exempted from the competition authority’s power to enforce competition law?*
- *Do the relations between the competition authority and sector regulators present particular problems and, if so, what kind of problems?*
- *Are there rules or procedures in place to overcome upcoming conflicts between the duties of the competition authority and sector regulators?*

IV. Relation to the Judiciary

13. The competition authority’s relation to the judiciary is influenced by several factors like the general judicial system and traditions of the country, whether competition cases are adjudicated in general or specialised courts, and the sharing of competences between the authority and courts of justice. Thus, countries take different approaches to the competition authority’s powers to take decisions in application of competition law, as well as to its role of a prosecutor bringing competition cases to the judiciary⁵.

14. In many countries there is a general perception that too many competition cases are rejected by the courts of justice. Competition authorities normally see this as a result of judges not being sufficiently acquainted with the specificities of competition law and analysis – or with economic legislation at large. From the judges’ perspective, on the other hand, competition authorities are sometimes perceived to lack the necessary skills successfully to present and prove their case. A somewhat different argument claims that the rate of successfully adjudicated cases should not be too high, as that would be a sign of competition authorities not being prepared to test the limits of the law’s applicability or to develop competition analysis and principles.

⁵ Relevant work on this issue can be found at www.oecd.org/dataoecd/34/41/1919985.pdf “Judicial Enforcement of Competition Law” (1997).

15. *Argentina* has remarked that neither the competition authority, nor the Secretariat of Technical Co-ordination, have rights to take action as parties before the courts. Consequently, in cases decided by the competition authority and appealed before a court of justice, the final judgement may fail to take into account the defence of competition.

16. The contribution from *Jamaica* describes the specific problem of the double role of the Fair Trading Commission, having both powers of adjudication and powers of investigation. A ruling by the Court of Appeal in 2001 found that any decision by the authority executing both these powers would be in breach with the principles of natural justice. As a result the Commission has been, and still is, prevented from investigating cases through hearings.

17. *Panama* reports a specific problem related to a model of preliminary hearings aiming at simplifying the oral proceeding. However, judges and litigation attorneys have not assumed their role as active supporters of this model and as a result there has been substantial delay of the process.

18. *Jamaica, Panama* and *Venezuela* have touched upon the issue of judges' understanding of competition problems. According to the experience of the Fair Trading Commission of Jamaica, courts have interpreted the competition law in a questionable way and there are significant limitations in comprehending complex economic analysis. In Panama the competition authority has included officials of the tribunals of justice in its training programmes, in particular with a view to enhance the understanding of economics. Another challenge in Panama has been to limit the judgement of competition issues to courts specialised in this area.

Suggested questions for discussion

- *Are there structural problems in the adjudication of competition cases, for instance relating to (i) the allocation of powers and competences between the authority and the court system, (ii) the role of general courts and specialised courts, or (iii) the number of instances and the role of the final instance?*
- *Is the proportion of competition cases rejected by the judiciary too high and, if so, what could be done to resolve this problem at the level of (i) the competition authority, and (ii) the courts of justice?*

Remedies for Private Parties

19. Most competition laws provide in some fashion for the direct participation by private parties in enforcement of the law. It is understood that some businesses and consumers are affected more directly than others by any given anticompetitive conduct, and many laws provide the means for those parties to pursue their remedies for these harms directly. There are obvious benefits to participation by private parties in enforcement of the competition law. The specific harms from competition law violations are more likely to be redressed. Further, these "private enforcement officials" enhance and complement the competition agency's limited resources. More generally, involvement by the private sector in competition law enforcement promotes greater respect for the law and for competitive markets.

20. In general, there are two types of procedures by which private parties can pursue remedies under competition laws: by participating formally in the enforcement proceedings of the competition agency through the submission of complaints or petitions and the submission of evidence and analysis; and by prosecuting private lawsuits in national courts against violators. In a system based on the former, private parties may have extensive rights to petition the

competition agency and to submit evidence to it, to require a formal response from the agency, to require the agency to initiate an investigation or proceeding in the petitioner's behalf and to participate formally in the proceeding, and to appeal from an adverse decision by the agency. In the second type of system, that based on private suits in court, private complainants do have rights to petition the competition agency and to present evidence to it, but they must otherwise pursue their remedies in a private lawsuit against the wrongdoer. They have no rights to intervene in or otherwise to interfere with an action by the competition agency.

21. There are both benefits and potential drawbacks to both types of systems. In a system based on participation in competition agency proceedings, the costs to the private petitioner are relatively small, and the petitioner benefits from the agency's expertise and investigative tools. On the other hand, depending on the discretion that the competition agency has in dealing with private complaints, such a system may unduly divert the resources of the agency to private disputes, limiting its ability to bring cases *ex officio*, and it could interfere with the efficient decision making process within the agency. A system based on private court cases avoids these problems while still encouraging participation by private parties in competition law enforcement, but it can introduce others, including imposing higher costs on private parties in order to pursue their remedies and the filing of frivolous cases in court.

22. A survey of OECD countries showed that few rely exclusively on one of the two models described above; in most cases the systems are hybrids, incorporating elements of both. The survey showed that there are common elements to all countries; however, including rights for private parties to petition the competition agency and to provide evidence and analysis to it, and to pursue private remedies actively either through participation in competition agency proceedings or in court, or both.

Suggested questions for discussion

- *Are private parties active in pursuing remedies to competition law violations in your country? If not, do you think that such participation should be encouraged, and if so, how should that be done?*
- *Do private complaints interfere with your agency's ability to institute investigations and cases ex officio and/or with the efficiency of your agency's operations? If so, how can the problem be remedied?*

V. Powers of the Competition Authority

23. The effective powers of a competition authority depend upon or are influenced by a large number of factors. The starting point is obviously the competences laid down in competition law or other rules like Government decrees. Such rules may give rights to demand information for the investigation, to impose sanctions, or to order certain actions to halt or remedy anti-competitive behaviour. Outside the law enforcement area, rules may provide rights for competition authorities to require consultation or opinions from other bodies of government. Rules may also define the competition authority's duties and scope of activities.

24. A competition agency's enforcement powers broadly fall into two categories: (i) investigative or information gathering powers, and (ii) sanctioning and remedial powers. An investigative toolkit should include the following powers:

- to conduct dawn raids or other types of unannounced visits to business offices for the purpose of examining and securing documentary and electronic (on computers or other electronic devices) evidence;

- to require the submission of documentary and electronic evidence to agency officials apart from dawn raids, by both the subjects of an investigation and third parties;
 - to require businesspeople – both subjects and third parties – to submit to oral examination to answer questions or provide statements, subject to legal and constitutional safeguards;
 - if the competition law provides for merger control, powers to be notified of and to acquire information about possibly anticompetitive mergers, in timely fashion sufficient to permit the imposition of adequate remedies against harmful mergers;
 - in the case of cartel investigations, a leniency programme, or similar programme designed to encourage co-operation with an agency investigation in return for lessened sanctions.
25. An agency's remedial powers should include powers:
- to impose fines in cases involving hard core cartel conduct and especially harmful abuses of dominance; maximum fines should be sufficiently large to provide a deterrent to such conduct and to encourage co-operation with agency investigations;
 - to impose fines for failure to comply with a lawful order of the agency or for wilful destruction or withholding of evidence;
 - to impose remedial orders in cases involving abuses of dominance, restrictive agreements and anticompetitive mergers, both forbidding such anticompetitive conduct and requiring affirmative actions designed to remedy the harm caused by the conduct and to prevent its recurrence;
 - in merger cases, to prevent consummation of anticompetitive transactions;
 - in abuse of dominance and merger cases, to impose structural relief, including divestiture of assets or, in the extreme, the break-up of a dominant firm.
26. Given the regulatory framework for the competition authority, available resources set limits to the performance in practice. These resources include not only the budget in pecuniary terms and the number of staff. Skills, training and experience of staff have a major impact on what the authority is able to produce and the quality of its work. Sometimes access to external expertise can – at least partially – compensate for those competencies that are not available among permanent staff.
27. Finally, the status of the competition authority – how it is perceived by the general public, by the business community and by other government and regulatory bodies – has a significant importance on how effectively it will be able to perform its duties. This may be most obvious in the competition advocacy area, where success is more related to the power of persuasion than the power of decision. However, also the fight against anti-competitive practices depends much upon the access to information on possible infringements of the law, something that is clearly related to how the competition authority is perceived by economic operators and the general public. Factors having an impact on the status of the authority include the political support, the general competition culture in the country, the perceived independence of the competition authority, the quality of its work and its integrity.
28. Most of the contributions received indicate that the lack of sufficient resources prevents the competition authority from performing its duties in the most effective way. This in its turn limits access to qualified staff. *Argentina* states that a group of professionals specialised on mergers should be created when additional resources are available. Similarly, subject to the availability of resources, there are plans to establish a group of professionals specialised in tests and other investigation methodologies. *Jamaica* has problems retaining qualified staff for more

than three years due to current salary levels and is unable to train existing staff as a result of budget constraints. High staff turnover is a problem also in *Panama* and *Venezuela*. In Panama, the authority makes efforts to meet this challenge through a selection process, planned training and a quality assurance model.

29. *Jamaica* refers to problems making its voice heard in relation to the legislative process. The Commission may be invited to comment upon new laws being contemplated, but has not been successful in initiating such consultations with other branches of government.

30. Transparency and predictability are important characteristics of a powerful and respected competition regime. *Panama* recalls the need for clear rules, guidance and public hearings to this end. The need to strengthen transparency is also addressed among the recommendations of the peer review of *Mexico*.

31. *Venezuela* describes specific problems in making the competition law enforcement effective in all parts of the country. As a result of the current centralisation of competition institutions to the capital of the country, economic operators in remote parts – in particular smaller enterprises victimised by competitive restraints – find it difficult to get the protection that the competition law should offer.

32. Several contributions refer to the lack of both political and public support for competition. *Paraguay* mentions in particular the current confusion between competition policy and the policy on ‘disloyal competition’.

Suggested questions for discussion

- *Is there a need for new or revised rules in order to enhance the powers of the competition authority? Please consider the need for such rules in relation to , (i) investigating possible infringements, (ii) sanctioning and remedying anti-competitive behaviour, (iii) advocating for pro-competitive reform.*
- *Are there ways to increase the total resources of the competition authority or, if not, what could be done to use existing resources more effectively?*
- *What other incentives than salary could be used to make qualified staff stay longer with the authority?*
- *How could the competition authority help enhancing competition culture in order to raise public and political support for competition and ultimately acquire necessary resources and powers?*

VI. Conclusions – institutional challenges in promoting competition

33. It is important that competition agencies are able to perform their tasks effectively, and to address the most important competition problems that hamper growth, economic performance and consumer welfare in their country. The work they perform should have high quality and stand free from undue influence from those who benefit from competitive restraints. The number of staff and the quality of staff are key issues, which in turn relate to the resources allocated to the competition authority. But also the regulatory framework and the interaction with the judiciary and with other branches of government are important. Finally, all those factors are fundamentally linked to the competition culture in the country and whether the competition institutions, the competition rules and competition as such have backing from the political level and from the society as a whole.

34. Some of these things are outside the influence of the competition authority, but much can be done to strengthen the role of the authority and raise enhanced support. The contributions to the first session of the meeting provide many examples of concrete initiatives taken by competition authorities, and the objective of the general discussion is to exchange experiences and share ideas of how institutional challenges in promoting competition may be addressed.