

Unclassified

DAF/COMP/WD(2014)107

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

05-Dec-2014

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 03 December 2014

ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES

-- Note by the European Union --

17-18 December 2014

This document reproduces a written contribution from the European Union submitted for Item VIII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014.

More documents related to this discussion can be found at <http://www.oecd.org/daf/competition>.

JT03367998

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/WD(2014)107
Unclassified

English - Or. English

EUROPEAN UNION¹

1. Introduction

1. The legitimacy of antitrust agencies' actions is inherently linked to their ability to act independently, free from external influence either from the companies they supervise or from the State. While there is not one optimal model of institutional design, having minimum guarantees of independence in place gives agencies the necessary authority to act and underpins the impartiality and credibility of their actions vis-à-vis stakeholders.

2. The European Commission is currently examining how to enhance the ability of the national competition authorities ('NCAs') of the EU Member States to enforce the EU antitrust rules. In 2004, the NCAs were fully empowered to apply the EU antitrust rules in parallel with the European Commission. They now play a key role in the enforcement of these rules, adopting approximately 700 decisions to date. This means that the EU antitrust rules are being applied on a scale which the Commission could never have achieved on its own.

3. However, although all the NCAs apply the same antitrust rules, several aspects were not harmonised by EU law and, despite a varying degree of voluntary convergence, divergences persist. In particular, there are no rules providing for minimum guarantees of independence. This means that NCAs have varying degrees of independence when exercising their functions, which can impact on their ability to effectively enforce. Challenges continue to arise, for example, concerning the autonomy of NCAs vis-à-vis their respective governments, appointments and dismissals of NCA management or decision-makers, and ensuring that NCAs have sufficient financial and human resources to enforce the competition rules.

4. On 9 July 2014, the European Commission adopted a Communication² in which it identified a number of areas of action in which further action should be taken to ensure we have a genuine competition enforcement area. This includes having minimum guarantees to ensure the independence of the NCAs.

5. The European Commission is committed to further assess appropriate policy initiatives to best achieve the goals identified in the Communication. We are currently carrying out further fact-finding to this end. This Roundtable is therefore an ideal opportunity to share what we are doing and to benefit from an exchange of views and experiences, which we can feed into any follow up action.

1 . Note prepared by the services of the European Commission, Directorate-General for Competition

² Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives COM(2014) 453 and the accompanying Staff Working Documents: Ten Years of Antitrust Enforcement under Regulation 1/2003 SWD(2014) 230 and Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues SWD(2014) 231.

2. Institutional design and independence of the National Competition Authorities in the European Union

6. All NCAs enforce the same substantial rules, i.e. Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU') (hereafter 'EU antitrust rules') as the European Commission. They are obliged to do so whenever trade between Member States is affected in accordance with the procedures set in place by Regulation 1/2003. The European Competition Network ('ECN') was created in parallel as a vehicle for the European Commission and the NCAs to closely co-operate.

7. EU law leaves Member States a large degree of flexibility for the design of their competition enforcement regimes. Accordingly, the institutional set-up of the NCAs varies and they all have their own specificities.

8. The basic requirement as regards the institutional framework of competition enforcement in the Member States is contained in Article 35 of Regulation 1/2003. It only requires that the Member States designate the competition authority or authorities responsible for the application of the EU antitrust rules in such a way that the provisions of the Regulation are effectively complied with. While this provision clearly aims at ensuring the effective application of EU antitrust rules by putting in place an NCA (or more than one) in each Member State, Regulation 1/2003 refrains from imposing any specific requirements concerning the NCAs, except that they comply with the mechanisms of the Regulation. Nevertheless, the limited case law of the Court of Justice of the European Union on Article 35 suggests that this very general provision may require granting powers to NCAs which were ruled out, or were not foreseen, by the national legislator.³ In addition, Member States are bound to respect general principles of EU law, such as the principles of effectiveness and equivalence as well as requirements arising from fundamental rights. These principles can have a concrete impact on the national procedural or institutional framework.

9. At present, two basic institutional models can be distinguished among the NCAs.⁴ By far the most common institutional model within the EU is the administrative model where a single administrative authority investigates cases and takes enforcement decisions subject to judicial control. It currently exists for all, or part, of the types of decisions taken in the large majority of Member States, with variations in the internal structures of the authorities.⁵ Two main configurations can be distinguished within this model,

³ In Case C-439/08, *VEBIC*, [2010] ECR I-2471, the European Court of Justice ('ECJ') had to rule on whether Regulation 1/2003 requires that an NCA should be able to defend its own decisions before the national review courts. At the time, Belgian law did not allow the NCA to appear as defendant at the appeal stage. The ECJ held that national provisions that prevent a NCA from defending its own decision in judicial proceedings are contrary to the obligation in Article 35 of Regulation 1/2003 of ensuring the effective application of Articles 101 and 102 TFEU.

⁴ Commission Notice on [co-operation within the Network of Competition Authorities](#), C 101, 27.04.2004, p. 43-53, paragraph 2.

⁵ This is the case for Belgium, Bulgaria, Cyprus*, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom and the European Commission. See ECN Decision-Making Powers Report, see the Internet (<http://ec.europa.eu/competition/ecn/documents.html>). See also ECN Brief, Special Issue, A look inside the ECN: its members and its work, December 2010, see the Internet (http://ec.europa.eu/competition/ecn/brief/05_2010/brief_special.pdf). * *Footnote by Turkey*: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognizes the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of United Nations, Turkey shall preserve its position concerning the "Cyprus" issue. + *Footnote by all the European Union Member States of the OECD and the European Union*: The Republic of Cyprus is recognized by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus."

which are almost evenly divided among the different jurisdictions. The first involves a functional separation between the investigative and decision-making activities of the single administrative institution whereby the inquiry is carried out by investigation services and the final decision is adopted by a board/college/council of this administrative institution. Within this structure, there may be significant differences in terms of internal organisation and relationship between the different bodies. For example, in France and Spain a full functional separation between investigative and decision-making bodies has been set up, where their respective competences are carried out independently from one another. The second configuration follows a more unitary structure and does not have different bodies carrying out different steps in the procedure although there may be different divisions (e.g. a Competition department and a Legal department) inside these authorities that deal with separate aspects of the same case.

10. A small minority of other Member States operate a judicial model, where, in essence, an administrative authority carries out the investigation and then brings the cases before a court, either for a decision on substance and on sanctions (if any)⁶ or in relation to the imposition of sanctions only.⁷

11. The 'dual' administrative model, where one body is in charge of the investigation into cases and hands them over at the end of the investigation to another body in charge of decision-making, previously also existed in a number of Member States. However, they have all moved to the single administrative model.⁸

12. Irrespective of the institutional model, decisions of NCAs are subject to judicial review – most often including more than one tier of appeal.⁹

2.1 Independence

13. In order to ensure effective enforcement of the EU antitrust rules, it is generally accepted that NCAs should be independent when exercising their functions. Independence means that the authority's decisions are free from external influence and based on the application and interpretation of the competition rules relying on legal and economic arguments. In the vast majority of Member States, the NCAs benefit from a certain degree of independence but the extent of their independence and equally the degree of supervision exercised by other state bodies varies. Many NCAs are designated in national law as independent state bodies and formally established as either an administrative authority or an agency.

14. In terms of accountability, which is generally seen as an important counterpart for a state body's independence, almost all NCAs are obliged to report on their activities of the previous year, mostly in the form of submitting an annual report to the parliament or (part of) the executive branch. In addition, some NCAs may have to appear before a parliamentary committee or have to submit an annual plan for the upcoming year.

⁶ This is the case in Austria, Estonia (in criminal proceedings) Ireland and Sweden (cases involving the imposition of a fine). Where the Swedish NCA considers that the material circumstances regarding an infringement are clear, it may issue a fine order in cases that are not contested by the undertakings subject to the fine order.

⁷ Denmark (except for administrative fines) and Finland.

⁸ Over the past decade six authorities have departed from the dual administrative model and have instead opted for a single administrative model. This was the case for Belgium, Estonia, France, Luxemburg, Malta and Spain.

⁹ See further the ECN Decision-Making Powers Report, see the Internet (<http://ec.europa.eu/competition/ecn/documents.html>). However, in at least one Member State, the NCA is not the body defending its decisions imposing fines when they are appealed.

15. The majority of NCAs are not subject to supervision by another state body. However, a number of NCAs are formally assigned to, or come under the responsibility of, a minister or ministry. Moreover, some NCAs may in principle be subject to general supervision or to general instructions by the executive branch or parliament although, such supervision may not have been exercised in practice, or at least not recently. In addition, the degree of supervision differs and may range from guiding and co-ordinating the NCA's activities or outlining the NCA's activities without intervening or deciding on individual cases or on the actual application of the law, to giving instructions regarding the general application of the law or regarding budgetary issues or general policy matters which is also directed to other governmental institutions. In a number of Member States, the minister may instruct the NCA, for example, to carry out sector inquiries or competition studies or analyses, which the NCA cannot otherwise initiate itself, but without, however, directing the outcome. The minister may also instruct the NCA to investigate a particular case or examine the need for interim measures.¹⁰

16. The vast majority of NCAs also enjoy operational, organisational and financial independence. Operational independence is foreseen for most NCAs in carrying out their duties, for example, by explicitly excluding interference by, or instructions from, other state bodies or other persons when investigating and deciding on individual competition cases. The large majority of NCAs also decide on their internal organisation and they have a separate budget allocation in the overall state budget for which they have budgetary autonomy to spend. However, while most NCAs have a separate budget line, a few NCAs generate their own income. Only the Italian NCA is exclusively funded through its own income consisting of a mandatory contribution levied on companies with an annual turnover above 50 million EUR. The contribution is equal to 0.08 per thousand of the turnover of such companies and it cannot exceed 100 times the minimum contribution equal to 4,000 EUR. The Portuguese NCA generates its own income through merger fees imposed on undertakings and by being allocated a percentage of the fines it imposes; and a percentage of the fees charged by sector regulators. The Greek NCA receives a 1% contributory fee on the initial share capital of a corporation or the amount of any share capital increase thereof. This contribution comes on top of its allocation from the state budget. This is also the case for the few other NCAs which have additional own income from charging merger notification fees or administrative fees in the framework of access to file or from miscellaneous non-core activities.

17. Almost all NCAs employ their own staff, mostly under the general civil service rules. However, the NCAs' staff in two Member States is formally employed by another state body and put at the NCAs' disposal. Logically, the vast majority of NCAs are responsible for the selection and recruitment of their staff.

18. The body appointing the top management or board members of the NCA differs between the Member States. Formal appointment is most often the responsibility of the executive branch and is almost equally divided among the government, the competent minister, the President/Head of State or, exceptionally, the Prime Minister. In a few Member States, the top management or board members of the NCA are appointed by parliament or, exceptionally, by a general body in charge of public service appointments. Appointments of the top management or members of the board are for the large majority of NCAs based on specific criteria in the competition law or the general civil service framework but with differing level of detail. In a minority of Member States, there are no criteria laid down for the appointment of the top management or members of the board of the NCA.

¹⁰ In a number of Member States a specific form of government intervention exists in merger cases. It usually means that the government or competent minister may intervene on public interest grounds after the NCA has analysed the merger's impact on consumers and businesses. In one Member State, the Prime Minister may declare a merger to be of state interest and, as a consequence, exempt from competition scrutiny by the NCA.

19. The mandate of the top management or members of the board varies from a fixed term of three years up to, exceptionally, an indefinite term with in between fixed periods of four, five, six and seven years. Moreover, in case of a fixed term, in the majority of Member States their mandate is renewable either once or without limitations. In most jurisdictions, the NCAs' top management or board members are appointed for a renewable period of five years. In two Member States their mandate is limited to one term of six or seven years respectively.

20. Specific rules on conflicts of interests and/or incompatibilities exist for the NCAs' top management or board members of a large majority of NCAs. One NCA adopted its own code of conduct on conflicts of interests based on its general power to organise its own structure. In some Member States, the top management or members of the board are subject to conflicts of interests requirements contained in the general civil service rules or anti-corruption legislation. Such rules may involve different types of obligations. Examples include a general duty of information regarding their interests, abstaining from matters involving such interests and general or specific incompatibilities with other activities in the public sector, such as exercising an elected public mandate, and/or the private sector, mainly in terms of conducting business activities or participating in a management or supervisory board. Exceptions may apply, for example, for educational or scientific activities.

21. Finally, the legal framework of the large majority of NCAs contains specific rules on the early dismissal of the top management or members of the board either in the competition law or, in a few jurisdictions, in the applicable general civil service rules. Common grounds for early dismissal include the impossibility to perform their duties, conflicts of interests, disregarding professional secrecy, disciplinary sanctions, criminal conviction and personal reasons. Such specific rules on early dismissal do not exist in two Member States so that the prime minister or government, respectively, can dismiss the top management of the NCA without any limitation. Early dismissal is not foreseen in two Member States and in another Member State the top management of the NCA, which has the status of federal civil servants, cannot be dismissed but only be relocated to another comparable position in the federal administration.

22. The attribution of sufficient staff and budget to NCAs is a fundamental precondition for each authority to be independent not only in law but also in practice and to enable it to effectively enforce the EU antitrust rules. In terms of financial and human resources, significant differences exist among NCAs. Particularly the competition authorities in the smaller Member States suffer from limited financial resources or very low staff numbers. However, these NCAs also need to have the same basic equipment, both in terms of facilities and a minimum level of core personnel, as NCAs in larger Member States in order to be able to effectively enforce the competition rules.

23. Moreover, in the current budgetary and economic context, reforms of the competition enforcement framework in the Member States may impact on financial and human resources. Member States are responsible for ensuring that their competition authorities are adequately equipped for their duties and able to act under suitable conditions for the execution of their tasks. In 2010, an ECN Resolution called upon them to continue guaranteeing effective competition enforcement including in times of budgetary constraints.¹¹

2.2 *Portfolios of NCAs: Combining competition enforcement and other functions*

24. Developments can be observed in relation to the overall portfolio of NCAs. While certain NCAs have for a long time combined competition enforcement and other functions (e.g. the Italian and the Polish

¹¹ Resolution of the meeting of Heads of European competition authorities of 16 November 2010 on Competition authorities in the European Union – the continued need for effective institutions, see the Internet (<http://ec.europa.eu/competition/ecn/ncas.pdf>).

NCA with competition and consumer protection functions), there appears to be a recent dynamic in this area. Over the past years competition enforcement and consumer protection functions have become integrated in one single authority in Denmark, Finland, Ireland and Malta. In the UK, the Office of Fair Trading ("OFT") for many years combined competition supervision with consumer protection functions. However, it shared its competition supervision functions with the Competition Commission and the sectoral regulators. The Competition and Markets Authority ("CMA") has recently been set up, which joins the Competition Commission and the competition functions of the OFT.¹² The CMA also keeps certain consumer functions of the OFT¹³ and the sectoral regulators retain concurrent competition powers which include the power to apply the EU antitrust rules.

25. Moreover, in the Netherlands the energy and transport regulatory functions were already integrated in the competition authority which was recently further merged with the consumer authority as well as with the postal and telecoms regulator. This type of combination between sectoral regulatory functions and competition supervision already exists in Estonia, where the competition authority acts also as the sectoral regulator for the energy, postal, railway, telecoms and water sector. A similar merger has been decided in Spain which brings together the competition authority and six sectoral regulators in charge of airports, energy, postal, railways and telecom sectors into one organisation, the *Comisión Nacional de los Mercados y la Competencia* (CNMC).¹⁴

26. As a result, in terms of competences, a minority of NCAs remain exclusively responsible for competition enforcement, covering both antitrust and merger control, while the majority of NCAs now have additional competences in various areas including, inter alia, consumer protection, public procurement and the supervision of liberalised sectors such as energy, post, telecommunications and railways.

27. Such merging of authorities is part of a Member State's discretion and is often motivated by a search for synergies and efficiency gains. The Commission has closely followed instances where NCAs were merged with other regulators. Such amalgamation of competences should not lead to a weakening of competition enforcement or of the additional competences granted to the NCAs, or to a reduction in the means assigned to competition supervision.

2.3 Comparison with other policy areas

28. EU legislation in related policy areas, such as telecommunications,¹⁵ energy¹⁶ and railways,¹⁷ contains a number of requirements regarding the national supervisory authorities. This includes, in the first

¹² Enterprise and Regulatory Reform Bill, see the Internet (<http://news.bis.gov.uk/Press-Releases/Enterprise-and-Regulatory-Reform-Bill-published-67a68.aspx>).

¹³ A greater role has been granted to the local authority Trading Standards Services ("TSS") in the enforcement of consumer protection law at national level. That being said, the CMA, similar to the OFT, retains all of its previous consumer enforcement powers but will tend to use them only where breaches of consumer protection law point to systemic failures in a market.

¹⁴ Law 3/2013 of 4 June 2013.

¹⁵ See Article 3 of Directive 2002/21 of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ 2002, L 108, 33 as amended by Directive 2009/140 of the European and of the Council of 25 November 2009, OJ 2009, L 337, 37.

¹⁶ See Article 35 of Directive 2009/72 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54, OJ 2009, L 211, 55.

place, an explicit requirement for the Member States to guarantee the formal independence of the authority and to ensure that it exercises its powers impartially and transparently. In addition, the staff of these authorities are explicitly precluded from seeking or taking instructions from any other body when carrying out their tasks and the top management or board members may only be dismissed if they no longer fulfil the conditions required for the performance of their duties (or have been found guilty of misconduct).

29. Moreover, the respective EU legislation obliges the Member States to grant the regulatory authority a separate annual budget or separate annual budget allocations, with autonomy in the implementation thereof, and to allocate adequate financial and human resources to carry out its duties, which may include active co-operation at EU level.

30. A more general independence requirement applies in the area of data protection where the EU legal framework explicitly provides that the national supervisory authorities "shall act with complete independence in exercising the functions entrusted to them".¹⁸ Recent case-law of the Court of Justice indicates that such an independence guarantee is intended to ensure the effectiveness and reliability of the supervision of compliance with data protection rules. It precludes not only any influence exercised by the supervised bodies but also any directions or any other external influence, whether direct or indirect, including by the State.¹⁹ The authority should therefore fall outside the classic hierarchical administration and be independent of the government. However, this does not exclude all accountability by the authority to other bodies. For example, certain parliamentary control over such authorities remains possible.²⁰

31. In *Commission v. Austria*, the Court has added that operational independence,²¹ although an essential condition, is not sufficient to ensure complete independence in the area of data protection.²² It requires that the head of the authority maintains no service-related link with or is not supervised by the government to avoid any suspicion of partiality. An organisational overlap between the supervisory authority and the government is incompatible with the requirement of independence as it prevents the former from being above all suspicion of partiality. The same applies where the (head of) government has a right to be informed at all times by the top management or board of the supervisory authority of all aspects of its work. Such an unconditional and broad right to information is also liable to subject it to direct influence. The attribution of the necessary equipment and staff must also not prevent them from acting with complete independence. This is not the case if the staff consists of officials who are subject to supervision by the government.

¹⁷ See Article 55 of Directive 2012/34 of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, OJ 2012, L343, 32.

¹⁸ Article 28 of Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995, L 281, 31. See also Article 43 of Regulation No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001, L 8, 1 and Article 8(3) of the Charter of Fundamental Rights of the European Union which provides that compliance with the rules on personal data protection set out in Article 8(1) and (2) shall be subject to control by an independent authority.

¹⁹ Case C-518/07 *Commission v. Germany* [2010] ECR I-1885.

²⁰ Such parliamentary control may be exercised, for example, through the definition of their powers, the appointment of the management of these authorities and by obliging it to report its activities to the parliament.

²¹ Operational independence means that the members of the authority are independent and are not bound by instructions of any kind in the performance of their duties.

²² Judgment of 16 October 2012 in Case C-614/10, *Commission v. Austria*.

32. In a recent judgment regarding the independence of the Hungarian data protection authority the Court again emphasised that "the mere risk that the State scrutinising authorities could exercise a political influence over the decisions of the supervisory authorities is enough to hinder the latter in the independent performance of their tasks".²³ In particular, the Court noted that the threat of early dismissal of the head of the authority could have such a negative effect. Therefore, the independence requirement includes the need for the head of the authority to be able to serve its full term and premature termination should only be imposed in accordance with the rules and safeguards, in the sense of overriding and objectively verifiable reasons, foreseen in the applicable legal framework. As the underlying case involved a restructuring or changing of the institutional model of an existing authority, the Court emphasised that this does not qualify as an objective justification. While Member States are free to choose the appropriate institutional model and alter it, this should not affect its independence and, in particular, the guarantee that the head of the authority can serve his/her full term. Recent legislative proposals in the field of data protection consolidate the case law of the Court of Justice on independence and add more specific requirements.²⁴

33. Where competition enforcement and sectoral regulatory functions are integrated in a single authority, the question arises whether such integrated authority has to comply with the most stringent requirements for all its functions and, thus, whether its competition enforcement function could benefit from a spill over effect of the sectoral requirements. The recent liberalisation directive for the railway sector addresses this scenario and explicitly confirms such extended application in requiring that the integrated authority fulfils the sector specific independence requirements.

2.4 *Strengthening the position of NCAs in Programme Countries and in the framework of the European Semester*

34. In the absence of any explicit requirements concerning NCAs in Regulation 1/2003 or, in the case of an integrated authority, any extended application of sector specific requirements, there are no EU law provisions which explicitly oblige Member States to ensure the independence of the NCAs and to require the grant of sufficient resources. Nonetheless, the competition enforcement regimes in several Member States have been strengthened in the framework of the Memorandum of Understanding of Specific Economic Policy Conditionality ("MoU") with the Member States benefiting from a financial-assistance programme (the so-called "Programme countries") or following country specific recommendations in the framework of the European Semester.

35. For example, the MoU with Greece addressed the issue of enhancing the independence and continuity of the NCA.²⁵ In this context, the new competition law provides for the appointment of both its President and Vice-President by parliament and the decoupling of their mandates from the electoral cycle. Furthermore, the competition authority in Ireland was hindered in its task of effectively enforcing the competition rules due to a strong reduction in its resources. Therefore, the MoU with Ireland specified that the effective functioning of the Irish competition authority must be ensured which eventually led to the

²³ Judgment of 8 April 2014 in Case C-288/12, *Commission v. Hungary*.

²⁴ Articles 47 to 49 of the proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final of 25.1.2012, and Articles 40 to 42 of the proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM(2012) 10 final of 25.1.2012.

²⁵ See the Internet (http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm).

partial restoration of the pre-crisis staffing level.²⁶ Similarly, the MoU with Portugal provided that sufficient and stable resources should be allocated to the NCA.²⁷ The MoU with Portugal also led to the adoption of a framework law on national regulatory authorities which provides for general principles on the independence, structure, functioning and financing of administrative authorities in Portugal, including the NCA.²⁸

36. The institutional position of NCAs has also been addressed in the context of the European Semester with the aim of ensuring effective competition enforcement in all Member States as they contribute to fostering competition as a growth-enhancing policy.²⁹ Over the past couple of years, priority has been given to clear-cut shortcomings in the position of the NCA and the degree of independence. This has contributed to the reform process in those Member States where the NCA was still (partly) incorporated in a ministry as this could raise doubts regarding its independence from the State. Both Belgium and Slovenia have now established an independent administrative authority separate from the ministry.

37. In addition, the need for equipping competition authorities with adequate resources has been emphasised as this may affect the NCA's ability to expand its enforcement actions and to lend institutional weight to competition-increasing reform efforts. This was the case for Austria, Belgium, Latvia, Luxemburg, Malta and Slovenia, where the NCAs suffer from low staffing levels or limited financial resources compared to other NCAs. Notwithstanding these difficulties, the NCAs in these Member States have contributed to the increased enforcement of the EU antitrust rules.

38. The establishment of the new CNMC in Spain, merging the Spanish NCA with six sectoral regulators, has also been subject to close monitoring in the context of the European Semester, inter alia regarding its independence, financial and human resources and the division of functions between the regulator and the competent ministries. In relying on the EU legal framework for sectoral supervisory authorities, Spain was called upon to ensure the effectiveness, autonomy and independence of the newly created authority.

39. While these initiatives have been broadly successful and it is clear that the European Semester can make a useful contribution to enhancing the position of NCAs, they are Member State specific and recommendatory in nature.

3. Conclusion

40. There are no explicit requirements in EU law regarding the institutional design of the NCAs or to ensure that NCAs are able to execute their tasks in an impartial and independent manner. Member States have a large degree of flexibility for the design of their competition regimes. Two basic institutional models exist in the EU: the administrative model, which is followed by the majority of Member States, and the judicial model. Despite the lack of specific EU law requirements, the position of the NCAs has generally evolved in the direction of more autonomy and effectiveness. Many national laws already contain specific safeguards to ensure the independence and impartiality of NCAs. Such independence guarantees strengthen the NCAs' position vis-à-vis the Member States and very importantly strengthen the legitimacy of their action vis-à-vis stakeholders, including national parliaments and citizens.

²⁶ See the Internet (http://ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm).

²⁷ See the Internet (http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm).

²⁸ This has still to be implemented through the adoption of by-laws.

²⁹ See the Internet (http://ec.europa.eu/europe2020/index_en.htm).

41. Challenges in this regard still persist, in particular concerning the autonomy of NCAs vis-à-vis their respective governments, and appointments and dismissals of NCA management or decision-makers. Issues have also arisen with regard to ensuring NCAs have sufficient human and financial resources. Furthermore, the achievements made to date remain fragile and can be rolled back at any time. This can be contrasted with related policy areas, such as the telecoms, energy and railway sectors, where EU law already provides for a number of requirements regarding independence, financial and human resources of the national supervisory authorities.

42. Therefore, the Commission indicated in its Communication of 9 July 2014 on ten years of antitrust enforcement³⁰ that it is necessary to further guarantee the independence of NCAs in the exercise of their tasks and that they have sufficient resources. For this purpose, minimum guarantees are needed to ensure the independence of NCAs and their management or board members and to have NCAs endowed with sufficient human and financial resources.

43. Important aspects explicitly identified in this respect are the grant of a separate budget with budgetary autonomy for NCAs, clear and transparent appointment procedures for the NCA's management or board members on the basis of merit, guarantees ensuring that dismissals can only take place on objective grounds unrelated to the decision-making of the NCA and rules on conflicts of interest and incompatibilities for the NCA's management or board.

44. The Commission will further assess appropriate initiatives to best achieve these goals.

³⁰ See footnote 1.