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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

## **Global Forum on Competition**

### **INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES**

-- Session III --

#### **Call for country contributions**

*This document is a call for country contributions for Session III of the Global Forum on Competition to be held on 1-2 December 2016. GFC participants are invited to submit their contributions by 3 October 2016 at the latest.*

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**TO ALL GLOBAL FORUM PARTICIPANTS**

**RE: Independence of Competition Authorities – From Designs to Practices**

**15th Global Forum on Competition (1<sup>st</sup> and 2<sup>nd</sup> December 2016)**

Dear GFC participant,

The Global Forum on Competition will hold a discussion on "*Independence of Competition Authorities – From Designs to Practices*" at its forthcoming meeting of 1-2 December 2016. The session will include presentations by Prof. Michal Gal (Haifa University, Israel) and Prof. Allan Fels (University of Melbourne, Australia) and selected delegations. If you are interested in making a presentation please feel free to contact the Secretariat (Evrin Özgül Kazak, Email: [Evrin.Kazak@oecd.org](mailto:Evrin.Kazak@oecd.org)). This letter outlines some of the issues that will be covered in the roundtable and invites interested delegates to submit written contributions. These contributions will be used to stimulate a wider and interactive discussion among all the delegations present at the forum.

The issue of the independence of competition authorities has been increasingly important in the debate about the design of a competition authority and it can have several dimensions: structural independence from government, operational/decision-making independence, organizational independence and financial independence. The roundtable will cover all these aspects of the concept of independence. It will focus, however, on the notion of independence of competition enforcers from political interferences in their enforcement activity and will not address the equally important principle that competition authorities should be independent of business interests to avoid the risk of capture.

Agency independence from political power is a key element of effective enforcement of competition law. The ability of national competition authorities (NCAs) to take decisions based on legal and economic arguments rather than under political influence is a fundamental means to ensure that competition rules are applied in a sound, stable, coherent and foreseeable manner. Despite the overwhelming agreement on this basic principle of competition law, there are still differences on how jurisdictions achieve independence of their NCA. Jurisdictions differ from each other in their political, legal, administrative, economic and cultural contexts, and most importantly, the competition rules they enforce and the roles that NCAs play can be quite different. For example, in addition to competition, some NCAs have regulatory functions or are responsible for other policy areas such as consumer protection and public procurement. Given that NCAs face different sets of conditions, there is no single model for ensuring independence that is suitable to all NCAs and that can guarantee an independent decision making at arm's length from the political process.

Despite these differences, it is commonly accepted that there are some general principles that jurisdictions can rely on to provide NCAs with a certain level of protection against pressures from government. The purpose of this roundtable is to identify and discuss these general principles and safeguards mainly related to the legal framework under which an agency is set up. These include provisions concerning the status of the agency within the government, the appointment-dismissal procedures for its management, the relationship between the agency and the government and the resources that an agency need to perform.

With regard to the status of the NCA within the executive, the debate is whether it would be more appropriate for agencies to be placed inside or outside a government ministry. Structural separation from government provides agencies with greater insulation from political control, but close proximity to a ministry would ensure closer alignment of the agency with the wider policy agenda of the country and grant the NCA a stronger voice as advocate for sound competition across policy areas.

Another safeguard is concerned with the selection of agency leaders. Appointment conditions to the management can play a significant role in determining the level of agency independence. In principle in order to ensure management impartiality, appointments to the management and board should be made on objective, transparent and qualitative criteria. In addition, having terms of appointment that span beyond an electoral cycle is one way to promote stronger independence. The same degree of transparency and objectivity is needed for the termination of appointments too. Clear conditions for dismissals are important to avoid arbitrary and unjustified dismissals.

In order to function effectively and act independently, an agency requires adequate financial and human resources. Governments can significantly affect the operations of the agencies by implementing budgetary measures aiming at hampering the ability of the NCA to enforce the law effectively.. Ensuring sufficient and stable resources for competition authorities is a vital consideration and there is a growing interest and debate about how to ensure that. Competition authorities are less prone to be influenced or subject to capture if they can determine independently their own priorities and plans the use their resources accordingly. While political steer on the NCA's activities would ensure that the agency's actions are consistent with broader policy objectives, close supervision and a strategic steer by the government or related ministries may have adverse effect on the NCA's independence and diminish the perceived legitimacy of the authority.

Although the legal and structural measures sketched above are important elements of achieving independence, they do not themselves guarantee that agency has *de facto* independence. Actual independence also depends on unwritten political, social and cultural norms of the jurisdiction that go beyond the formal institutional design and structure of the agency.

*De facto* independence of an agency also derives from its own professionalism and expertise. A successful enforcement record by the agency can significantly strengthen its independence by enhancing its reputation and thereby its status in the society. Transparency in an agency's operations and decision-making is also instrumental in increasing its independence. As the decisions and procedures of the agencies become more easily monitored by the citizens as well as other public and non-public institutions and the business community, undue influence in the final decisions would be more visible and the agencies would then be more inclined to protect themselves against interventions.

In sum, an agency's *de facto* independence can be quite different from what is described in the legal texts for various reasons and there is a room in order for agencies to improve the actual level of their own independence. With the aim of identifying good practise, the session intends to underline the importance of the choices that can be made by the officials of the NCAs to enhance the level of its *de facto* independence regardless of its existing formal structure.

In order to achieve the optimal degree of independence, many NCAs have gone through some changes over time. This session intends to compare these experiences. The quality and utility of this roundtable will be greatly strengthened by written contributions. To this end, we invite you to submit a written contribution if your agency has experienced a reform about any of its structural or legal attributes. In this regard, introduction of the specific institutional challenges that your agency is facing will also be helpful for the session.

In order to assist you with your written contribution we prepared a list of possible questions in the Annex to this letter. This list is not exhaustive, and participants are encouraged to raise and address other issues in their submissions and during the discussion. We also include an suggested bibliography. The OECD's GFC webpage will be our vehicle for conveying documents and related links on this subject. Unless explicitly requested not to do so, the Secretariat will reproduce written contributions on the site.

In order to structure an inclusive and fruitful discussion, it is important to inform the Secretariat early if you intend to submit a written contribution. Please advise the Secretariat by **25 July 2016** if you will be making a written contribution. Written submissions are due by **3 October 2016** at the latest. Failure to meet this deadline could result in a contribution not being distributed in a timely fashion in advance of the meeting.

All substantive queries relating to this discussion should be sent to Antonio Capobianco ([Antonio.Capobianco@oecd.org](mailto:Antonio.Capobianco@oecd.org)) and Evrim Özgül Kazak ([Evrin.Kazak@oecd.org](mailto:Evrin.Kazak@oecd.org)). All communications regarding documentation for this session of the GFC should be sent to Angelique Servin ([Angelique.Servin@oecd.org](mailto:Angelique.Servin@oecd.org)).

We would like to remind you that the Secretariat will compile short summaries of the written contributions to be distributed before the meeting. We invite you to submit such a short summary (no more than one page) together with your contribution. Alternatively the Secretariat will produce one, but given the time constraints you will not be in a position to check it before distribution on OLIS.

**ANNEX****Suggested Questions for Consideration in Country Submissions  
Roundtable on “Independence of Competition Authorities – From Designs to Practices”**

This Annex provides a list of questions for consideration in preparing your submission. A submission does not need to cover every listed question. Based on your experience, you may wish to address other issues that are not listed here. You should also discuss relevant cases where appropriate to illustrate your answers. Please prepare a submission as an integrated essay rather than a list of answers to questions.

- What are the main existing challenges in your jurisdiction in terms of legal and de facto independence of your competition agency?
- What are the most important legal or structural characteristics that help insulate your agency from political pressures?
- Has your jurisdiction undergone any legal or structural reforms to enhance the independence of the competition agency? If yes, how did you manage to include it in the government agenda? What are the main characteristics of the reform? What are the main benefits that you expect from this reform?
- What is the structure of your competition authority: board or single commissioner? Do you think there is a link between the structure of the agency and its degree of independence?
- Who decides what the budget of the agency should be? How is your agency funded? What are the sources of the funding? Has there been a change in terms of its funding over time?
- Do you have decision-making autonomy? Should the government be allowed to supervise or give strategic guidance to your competition authority?
- Can the government decide which cases, market studies etc. the agency should and should not investigate? Can the government overrule a decision of your agency? Can this happen only under specific circumstances (e.g. on public interest grounds) or is it a general power?
- How are the resources of the agency managed? agency? Can the agency recruit its own staff independently? Who decides on the career progress of the agency’s staff and on the termination of the working relationship?
- Can the mandate of the individuals in the decision –making body of your agency (the head and/or the board members) be renewed? And by whom?

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