



Background note: Assessment of Institutional Capacity in Competition

The present background note was produced by the United Nations Economic and Social Commission for Western Asia (ESCWA) and the Organisation for Economic Cooperation and Development (OECD) for the session “Assessment of Institutional Capacity in Competition” of the Third Arab Competition Forum 2022.

Introduction

Public institutions are essential in the daily operations of a government and central to national development processes, establishing effective institutions in line with the progress towards the targets of Goal 16 of Agenda 2030. Thus, institutional reforms and public institution building in the region have been a focus of Governments to underpin more inclusive and sustainable economic growth.

Due to the important role played by competition law and policy in supporting economic growth, innovation, and productivity, the bodies that regulate competition must be equipped to fulfill their mandate. In 2021, the United ESCWA published The Arab Business Legislative Frameworks report, which assessed the competition legislation of 22 Arab countries according to international best practices. The assessment showed that most Arab countries possess some form of competition legislation, and the legal articles regarding competition enforcement mechanisms appear to be developed and clear. However, widespread exemptions and weak implementation hinder the potential gains of competition. Many competition authorities in the region lack the autonomy and resources needed to implement the legislation properly.

The mission of the Agency Effectiveness Working Group (AEWG) is to identify key elements of a well-functioning competition agency and good practices for strategy and planning, operations, and enforcement tools and procedures. The AEWG’s mandate is to share experience among International Competition Network (ICN) members and Non-Governmental Advisors (NGAs) and to develop and disseminate good practices for agency effectiveness.

While different domestic conditions may imply that the design of the competition regime should differ, some characteristics define efficient public regulatory bodies. These characteristics include independence, transparency, accountability, due process, ex-post evaluation process, adequate resources, qualified staff not susceptible to corruption, and a related well-structured, qualified, and noncorrupt judicial process. Furthermore, identifying and defining objectives and priorities are necessary for an effective competition agency. It is imperative to highlight how the effectiveness of a competition agency can also be affected by the environment in which it operates, including, as mentioned previously, the judicial system as well as other ministries, the business community and, non-governmental organizations (NGOs), the media, and the public.

Independence of competition authorities

The independence of the competition authority from State or political influence is essential for competition rules to be enforced to achieve their stated policy objectives and ensure predictability and transparency. Guaranteeing independence will allow the authority to make decisions based on the evidence and the legal and economic merits. However, competition authorities across the Arab region operate within differing environments with cultural, political, and legal variations. There is clearly no one-size-fits-all approach to independence, and several safeguards can help safeguard competition authorities' independence. The main aim of the competition authority independence is to ensure that decision-making is free of any form of external influence.

Due to the lack of competition culture in the Arab region, elected officials, policymakers, and judges often lack the skills and knowledge to make technical and complex decisions regarding competition matters. Ensuring independence leads to better and more consistent decisions, predictability and transparency, and guaranteed trust from the international and domestic business community. And in return, leading to a more robust competition framework and culture. Thus, this concept of independence for the institution enforcing the competition law will allow the enforcers to act and decide solely without being affected by the outside parties. The merits of its decisions will be only legal and economic.

The legal systems in the Arab region differ between one country and another, and the difference in the legal and social environments can be clearly seen between the Arab subregions. In the light of these differences, elements of legal independence also significantly differ among Arab countries. Legal independence has indicators, such as the term of the head of the agency and commissioners; conditions regarding the appointments and dismissals of the head of the agency and commissioners (assignment should not be by one person or group, clearance should be for minimal circumstances); source of budget (autonomy-different sources of funding); personnel policy; issues related to accountability; appointment process (based on merits); rules on conflict of interest. It is necessary that board members be appointed for a fixed term so they do not face arbitrary termination.

For example, Portugal has recently abolished an article in its Bylaw stating that the independence of the Portuguese Competition Authority (PCA) in the performance of its duties is “without prejudice to the guidelines on competition policy set out by the Government... or to the acts subject to ministerial oversight”. According to the PCA (OECD 2014), “The need to comply with government competition guidelines could be perceived as lessening the PCA's independence”. For this reason, this provision has been replaced with a new article stating that the PCA is not subject to governmental supervision and that the Government cannot make recommendations or issue directives to the board on the priorities to be adopted by the PCA in carrying out its mission.

The lack of independence can negatively affect enforcement and advocacy. Moreover, a solid judicial review will strengthen the independence of the authority. Qualified and specialized judges who are protected from political influence (in competition appeal) are an essential pillar of competition enforcement. However, interference can be exceptional for some cases, on public interest grounds and not on competition grounds. For example, national security, financial stability, and other aspects can significantly impact the citizens' welfare. Public interest clauses need to be defined carefully and explicitly.

It is essential to ensure accountability as a public institution in parallel to competition authority independence. The most important way of accountability is judicial review. Courts are entrusted to make a legal assessment regarding the work of the competition authority to ensure its legal mandate. Governments and political considerations must not participate in any accountability process unless requested by the judicial authority. However, other mechanisms to ensure accountability need to be in place, such as the publication of decisions online on easily accessible webpages and guidelines on key topics like merger control to ensure enforcement consistency.

Changes in institutional design of competition authorities

Against this backdrop, many jurisdictions have recently made, or have considered making, changes to their institutional design, which may provide helpful insights. In fact, regular review of the agency's processes and structure considering its maturity and the evolution of the domestic conditions and competition framework are important to maintaining effectiveness. For example, several jurisdictions have created new “multifunction” agencies by merging the competition agency with the authorities responsible for other economic policy functions, such as consumer protection, sector regulation, or public procurement control. Different jurisdictions have made changes designed to enhance the independence of the competition authority from the Government.

Competition authorities can take on additional roles as a multifunction agency instead of only enforcing the competition law, contributing to different economic policies and governance measures like consumer protection and public procurement processes. This diversification can lead to a higher generation of capacities within the public institutions. However, taking on new mandates needs to be reflected in the authority's design, such as ensuring sufficient resources, adequate specialized staff, and separation of responsibilities.

This may be viewed as both an opportunity and a challenge since while specialization may bring greater focus to the competition agency's work, a combination of functions may bring economies of scope and greater resource flexibility during peaks and troughs in workload. When combining different factors or elements of the market in one single entity, agencies may better understand how markets function and the root causes of market problems. The merging of authorities will ease information sharing unless there is an obligation of confidentiality. This operation should only be considered when policy areas are complementary, and it is helpful to have fully cross-functional or “horizontal” divisions, so the same staff work across different policy areas.

Competition and consumer protection are often seen as complementary as they share a general purpose: consumer welfare. However, in some aspects, they have separate functions. Therefore, a degree of specialization is still required for some cases, for example, product safety and labeling. On the other hand, some cases or advocacy initiatives may benefit from a joined-up approach to ensure that consumer welfare goals are effectively considered in an investigation, decision-making, or imposing fines. For instance, it has been noted that a combined authority may be more cognizant of potential collusion risks that could arise from a consumer protection remedy aimed at increasing market transparency.

The merger between competition and consumer protection will not create an imbalance between the cases related to each field. In fact, agencies involved staff in the integration process and included them in deliberations about priorities and vision for the combined agency in one. This practice can help demonstrate the benefits of the knowledge and expertise that each side can bring to the one agency.

References

ESCWA. (2021). Arab Business Legislative Frameworks. Retrieved from <https://publications.unescwa.org/projects/ablf/index.html>.

OECD. (2014). The Governance of Regulators. Retrieved from <https://www.oecd.org/gov/regulatory-policy/the-governance-of-regulators-9789264209015-en.htm>.

OECD. (2004). Competition Advocacy: Challenges for developing countries. Retrieved from <https://www.oecd.org/competition/latinamerica/20%2004-Latin20%American20%Competition20%Forum.pdf>.

OECD. (2003). Optimal Design of a Competition Agency. Retrieved from <https://www.oecd.org/daf/competition/2485827.pdf>.

OECD. (2014). Institutional Design (Changes) of Competition Authorities. Retrieved from <https://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm>.