

# THE APPOINTMENT AND DISMISSAL PROCEDURE OF THE POLISH NCA IN THE LIGHT OF EU AND INTERNATIONAL INDEPENDENCE STANDARDS

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## 1. INTRODUCTION

Since Regulation 1/2003<sup>1</sup> entered into force, national competition authorities ('NCAs') have been vested with the application of EU competition rules concurrently with the European Commission, and play a crucial role in their enforcement.<sup>2</sup> However, although all European national competition authorities apply homogeneous law, their design and level of independence are highly differentiated.<sup>3</sup> Unlike the agencies in regulated sectors such as telecommunications,<sup>4</sup> energy<sup>5</sup> or railways,<sup>6</sup> European law has so far not provided any specific requirements with regard to the independence of the national competition authorities.<sup>7</sup> In particular, there has been no guidance with regard to the appointment and dismissal procedure of the competition authority management, its term of office and the role of these factors in the authority's independence.<sup>8</sup> Nevertheless, it is widely acknowledged that the

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<sup>1</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

<sup>2</sup> Commission, '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 final ('Communication') 8.

<sup>3</sup> Mattia Guidi, 'Does Independence Affect Regulatory Performance? The Case of National Competition Authorities in the European Union' (2011) European University Institute Working Paper RSCAS 2011/64 1.

<sup>4</sup> 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 [2002] OJ L 108/33 as amended by Directive 2009/140 of the European Parliament and of the Council of 25 November 2009 [2009] OJ L 337/37.

<sup>5</sup> 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 [2009] OJ L 211/55.

<sup>6</sup> 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 [2012] OJ L343/32.

<sup>7</sup> OECD, 'Roundtable on changes in institutional design of competition authorities – Note by the European Union' (2014) DAF/COMP/WD(2014)107 7-8.

<sup>8</sup> Independence should be understood as encompassing values of objectivity, impartiality, integrity, expertise and professionalism of the agency, in accordance with explanation

way an agency's board is selected and dismissed is of major importance for the independence of the agency itself, and thus, also for effective enforcement of competition law.<sup>9</sup>

The European Commission ('the Commission') recognized deficiencies with regard to NCAs' independence<sup>10</sup> and therefore on 22<sup>nd</sup> March 2017 issued a proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market<sup>11</sup> ('the Proposal'). The Proposal seeks to ensure that NCAs have effective guarantees of independence and resources and enforcement and fining powers to be able to apply Articles 101 and 102 TFEU effectively, and contains important provisions for this article.<sup>12</sup>

Against this background, I decided to analyse the procedure for the appointment and dismissal of the President of the Polish Office for Competition and Consumer Protection ('OCCP', Polish: *Prezes Urzędu Ochrony Konkurencji i Konsumentów*) and its term of office, and answer the question of whether the way the Polish competition and consumer protection authority is appointed and dismissed influences its independence, and how it could be improved. Since the Polish provisions on appointment and dismissal are rather vague and general, and they do not foresee a specific term of office; in practice almost every change of political majority in the Polish Parliament may result in dismissal of the President of the OCCP, which raises doubts with regard to the independence of the authority itself, and presumably hinders the proper functioning of the agency.

Throughout this article focus will be put on analysis of *de jure* or formal independence, i.e. legal safeguards under which the authority is set up and operates.<sup>13</sup> Although *de facto* or actual independence<sup>14</sup> is of equal importance, it would be impossible to measure and assess it in a satisfactory way.<sup>15</sup> In addition, it is recognized that better *de jure* independence has a

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included in: Annetje Ottow, *Market and Competition Authorities: Good Agency Principles* (Oxford 2015) 74-76.

<sup>9</sup> ICN Advocacy Working Group, 'Advocacy and Competition Policy', Report presented at the first ICN's conference in Naples (2002) 53-55 <<http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>> accessed 4 May 2017.

<sup>10</sup> Communication 13.

<sup>11</sup> Commission, 'Proposal for a Directive the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market' COM(2017)142 final ('Proposal'). The Proposal was developed within ECN plus project of the European Commission, which intends to empower Member States' NCAs to be more effective enforcers.

<sup>12</sup> Recital 3 of the Proposal.

<sup>13</sup> Sofia Alves, Jeroen Capiau and Ailsa Sinclair, 'Principles for the Independent Competition Authorities' (2015) 11(1) *Competition Law International* 16.

<sup>14</sup> Although some scholars have attempted to measure *de facto* independence (see Martino Maggetti, 'De facto independence after delegation: A fuzzy-set analysis' (2007) 1 (4) *Regulation & Governance* 271-294), there is still no agreement with regard to which features constitute *de facto* independence. Such assessments are considered as too arbitrary and subjective to deliver reliable results. See Mattia Guidi (n 3) 68.

<sup>15</sup> Chris Hanretty, Pierre Larouche, and Andreas Reindl, 'Independence, accountability and perceived quality of regulators' (2012) CERRE study 23 <[https://pure.uvt.nl/ws/files/6846095/120306\\_IndependenceAccountabilityPerceivedQualityofNRAs\\_1.pdf](https://pure.uvt.nl/ws/files/6846095/120306_IndependenceAccountabilityPerceivedQualityofNRAs_1.pdf)> accessed 4 May 2017.

positive effect on greater *de facto* independence of the agency.<sup>16</sup> For these reasons, I will concentrate only on the formal independence from political influences.<sup>17</sup>

This article is organized as follows. Section 2 presents an overview of the European and international standards with regard to the appointment and dismissal of competition authority management and its term of office in light of the independence principle. Section 3 briefly outlines the impact thereof on other ‘good agency’ principles, i.e. legality (L), independence (I), transparency (T), effectiveness (E), and responsibility (R), together referred to as the LITER principles.<sup>18</sup> Section 4 demonstrates the Polish regime of appointment and dismissal of the President of the OCCP and its tenure, whereas section 5 provides analysis thereof. Section 6 presents solutions in relation to the term of office, as well as the appointment and dismissal procedures adopted by two other Member States – the Netherlands and the United Kingdom and examines whether they can be used as an exemplar for other NCAs. Section 7 provides set of recommendations that aim at enhancing the independence of the Polish competition authority, and section 8 concludes.

## 2. OVERVIEW OF THE EUROPEAN AND INTERNATIONAL STANDARDS IN LIGHT OF THE INDEPENDENCE PRINCIPLE

Adoption of Regulation 1/2003 triggered a major change in the way EU competition law is enforced, and shifted the main burden of applying it onto the national competition authorities. However, although NCAs, now being the backbone of the whole EU competition law system, apply the same harmonized competition rules, their institutional design and level of independence differ significantly among Member States,<sup>19</sup> which are given substantial flexibility in that respect. In contrast to other agencies (eg energy or telecommunications agencies),<sup>20</sup> they are not provided with any

<sup>16</sup> Chris Hanretty and Christel Koop, ‘De jure and de facto independence of regulatory agencies’ (2010) 41 <[http://chrishanretty.co.uk/blog/wp-content/uploads/2010/03/hanretty\\_koop\\_psa2010.pdf](http://chrishanretty.co.uk/blog/wp-content/uploads/2010/03/hanretty_koop_psa2010.pdf)> accessed 4 May 2017.

<sup>17</sup> I will not analyse independence from market parties, as it is irrelevant for purposes of this article.

<sup>18</sup> The concept of LITER-good agency principles was proposed by A. Ottow in: Annetje Ottow (n 8) 74-77.

<sup>19</sup> Mattia Guidi (n 3) 1. The institutional design of NCAs varies across countries. In particular, the powers of the NCA may be performed by a collegial body such as a board (eg as in the case of ACM in the Netherlands or CMA in the UK), or may be vested in a single person (eg as in the case of the President of the OCCP). In case of a collegial body, the way of decision-making process may take different forms (eg majority voting, second or casting vote may be granted to the chair of the board etc). See Frederic Jenny, ‘The institutional design of Competition Authorities: Debates and Trends’ in Frederic Jenny and Yannis Katsoulacos (eds), *Competition Law Enforcement in the BRICS and in Developing Countries* (Springer 2016) 30-31; Annetje Ottow (n 8) 107-109.

<sup>20</sup> Depending on the type of the agency in question, four different levels of protecting independence are distinguished at EU level. Whereas central banks and data protection authorities enjoy the highest level of protection, energy and telecommunications regulators - medium level protection, media regulators - low level of protection, the EU law does not

enforceable guarantees of independence at the EU level.<sup>21</sup> The Article 35 of the Regulation 1/2003 solely requires that the Member States designate the competition authority or authorities responsible for application of EU competition law (Article 101 and 102 TFEU) in such a way that the provisions of Regulation are effectively complied with.

However, although the EU legislation remains silent in that regard, it is generally acknowledged that in order to ensure effective application of the EU competition law NCAs should be independent when performing their duties.<sup>22</sup> Specifically, the Commission has acknowledged the importance of the independence of competition authorities on a number of occasions, in particular in relation to the term of office, and appointment and dismissal procedure of the NCAs' management.

In its Communication on Ten Years of Antitrust Enforcement under Regulation 1/2003, the Commission accentuated the need for independent NCAs and recognized challenges in this respect, concerning *inter alia* the term of office, appointments and dismissals of NCAs' management, as well as autonomy from their national governments.<sup>23</sup> In particular, it was explicitly stated that appointment procedures for NCAs' management should be clear, transparent and based on merit, and dismissals should occur solely on objective grounds guarded by clearly defined rules.<sup>24</sup> It was also pointed out that 'governments should not make appointments to NCAs without proper qualifications, and not 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 criticizing government proposals'.<sup>25</sup> Thus, bearing the above in mind, it can be contended that the way an agency's board is selected and dismissed, and its term of office is considered to be of major importance for independence of the agency itself.

The Commission's proposal for a Directive seeks to ensure adequate guarantees of the NCA's independence and thus fill in the gap in regulation of the NCA's independence.<sup>26</sup> Article 4 of the Proposal ('Independence') contains a general requirement for NCA's independence and several more detailed provisions. However, it does not provide a comprehensive set of rules that would address all the threats to the NCA's independence. In particular, it

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provide competition authorities with any formal guarantees of their independence. See Annetje Ottow (n 8) 79-81.

<sup>21</sup> Giorgio Monti, 'Independence, Interdependence and Legitimacy: the EU Commission, National Authorities and the European Competition Network' (2014) European University Institute Department of Law Research Paper No. 2014/01 10-11 <<http://ssrn.com/abstract=2379320>> accessed 4 May 2017. Also: Communication 9.

<sup>22</sup> OECD, 'Roundtable on changes in institutional design of competition authorities – Note by the European Union' (2014) DAF/COMP/WD(2014)107 4. Also: Sofia Alves, Jeroen Capiu and Ailsa Sinclair (n 13) 14; ICN Advocacy Working Group (n 9) 53-55; ICN, 'Seminar on Competition Agency Effectiveness', (2009) 25 <[http://ec.europa.eu/competition/information/icn\\_seminar\\_2009/report\\_final\\_version.pdf](http://ec.europa.eu/competition/information/icn_seminar_2009/report_final_version.pdf)> accessed 4 May 2017.

<sup>23</sup> Communication 9, 12.

<sup>24</sup> Communication 9.

<sup>25</sup> Alexander Italianer, 'The Independence of National Competition Authorities', Speech held on the Competition Conference – Best Practice in Investigations (Vienna, 12 December 2014) 4 <[http://ec.europa.eu/competition/speeches/text/sp2014\\_08\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2014_08_en.pdf)> accessed 4 May 2017.

<sup>26</sup> The proposal for a directive was forwarded to the European Parliament and the Council for adoption, and can be subject to changes, in accordance with the EU legislative process. .

does not regulate questions such as the appointment procedure, term of office or the possibility of re-election. From issues that are of interest for this article, it only mentions the dismissal procedure, stipulating that ‘the members of the decision-making body of national administrative competition authorities may be dismissed only if they no longer fulfil the conditions required for the performance of their duties or have been guilty of serious misconduct under national law. The grounds for dismissal should be laid down in advance in national law. They shall not be dismissed for reasons related to the proper performance of their duties and the exercise of their powers in the application of Articles 101 and 102 TFEU. Such a regulation of dismissal procedure is in line with the EU standards applied in the cases of certain national regulatory authorities (for example, in energy and electronic communications sector<sup>27</sup>).

Moreover, the EU protection of NCAs’ independence may be also indirectly derived from the case law of the Court of Justice of the European Union (‘CJEU’).<sup>28</sup> In the *VEBIC* case,<sup>29</sup> the CJEU emphasized, basing on the EU principle of effectiveness and the wording of the Regulation 1/2003, that the Member States should designate the competition authorities in such a way that the EU competition rules are *effectively* complied with, and therefore, should provide those authorities with sufficient competences and safeguards so as to allow them to duly perform their statutory duties.<sup>30</sup> Thus, since, as mentioned before, independence is one of the constituents of effective enforcement,<sup>31</sup> it can be argued - subsequent to the judgment - that Member States should ensure NCAs adequate degree of independence, also with regard to the term of office, appointment and dismissal procedures, so as they could enforce competition law effectively.<sup>32</sup>

Apart from the European Union, the need for independent competition authorities, with a transparent appointment and dismissal procedure, and clear rules governing the term of office was emphasized by other international organizations. For example, the OECD indicated that the criteria for appointing members of a regulator’s governing body, as well as the grounds and procedure for terminating their appointments, should be explicitly stated in legislation, which plays an important role in enhancing regulators’ independence and maintaining trust in their decision-making. It also recommended that the legislature or judiciary should be involved in the

<sup>27</sup> See Article 5(3) of the Commission proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final <<https://ec.europa.eu/digital-single-market/en/news/proposal-updated-audiovisual-media-services-directive>> accessed 4 May 2017.

<sup>28</sup> Sofia Alves, Jeroen Capiu and Ailsa Sinclair (n 13) 19.

<sup>29</sup> Case C-439/08 *VEBIC v Raad voor de Mededinging and Minister van Economie* [2010] EU:C:2010:739.

<sup>30</sup> Nicolas Petit, ‘The Judgment of the European Court of Justice in VEBIC: Filling a Gap in Regulation 1/2003’ (2011) 2 (4) *Journal of European Competition Law & Practice* 2-3.

<sup>31</sup> Annetje Ottow (n 8) 81. Also: Commission, ‘Enhancing competition enforcement by the Member States’ competition authorities: institutional and procedural issues’, SWD(2014) 231/2 6 <[http://ec.europa.eu/competition/antitrust/legislation/swd\\_2014\\_231\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf)> accessed 4 May 2017.

<sup>32</sup> Chris Fonteyn and Annetje Ottow, ‘Independence of Competition Authorities—Independence in Heart, Mind and Law’ in Dirk Arts and others (eds), *Mundi et Europae Civis: Liber Amicorum Jacques Steenbergen* (Larcier 2014) 405.

process, in order to ensure its transparency and accountability.<sup>33</sup> A specified term of appointment of a governing body was mentioned as an important aspect of institutional design that protects the independence of NCAs as well.<sup>34</sup>

Similarly, the International Competition Network recognized that mechanism of appointment of NCAs' heads and the ease with which they can be removed from the office constitutes an important indication of the agency's independence. This, in turn, is of great relevance for the effectiveness of competition advocacy undertaken by the NCAs.<sup>35</sup>

### 3. IMPACT ON OTHER GOOD AGENCY PRINCIPLES

As mentioned above, clear rules of the term of office, appointment and dismissal of the NCA's head constitute an important element of the independence of that authority,<sup>36</sup> and consequently also influence other good agency principles (in particular the principle of effectiveness and transparency), which may be seen as an indicator for the proper functioning of competition or regulatory agencies.<sup>37</sup>

Basically, the principle of independence is considered to be inherently linked to the principle of transparency (including the subvalue of accountability),<sup>38</sup> and it is acknowledged that the requirement for transparency also encompasses the procedure of appointment and dismissal of the NCA's head.<sup>39</sup> This leads to two remarks. Firstly, on a more general level, since the independence of the agency is not absolute, the need for the agency's independence should be counterbalanced by requirements of accountability (to the public, to the legislator, to market participants, etc.).<sup>40</sup> Secondly, more specifically, transparency with regard to appointment and dismissal procedures of the NCA's head reinforces the perceived independence of the authority and boosts its legitimacy.

Moreover, proper safeguards of independence and transparency mechanisms contribute to the better effectiveness of the agency.<sup>41</sup> The NCA governed by a head, who is elected in a transparent procedure and is considered as sufficiently independent, is assumed to perform its duties more efficiently and enforce competition law more effectively.

Thus, in turn, it should be emphasized that the lack of clear rules and transparency in relation to the appointment and dismissal process does not only infringe independence standards, but may also undermine the NCAs'

<sup>33</sup> OECD, 'Principles for the Governance of Regulators' (2013) Public consultation draft 31, 36.

<sup>34</sup> Ibid 38-39.

<sup>35</sup> ICN Advocacy Working Group (n 9) 40.

<sup>36</sup> Commission (n 31) 13.

<sup>37</sup> See Annetje Ottow (n 8) 74-77.

<sup>38</sup> Chris Hanretty, Pierre Larouche, and Andreas Reindl (n 15) 82.

<sup>39</sup> Annetje Ottow (n 8) 101.

<sup>40</sup> Annetje Ottow (n 8) 86. Thus, the more independent the agency is (also in terms of appointment of its governing body), the more accountable should it be. See also UNCTAD, 'Independence and accountability of competition authorities' (2008) 5 <[http://unctad.org/en/docs/c2clpd67\\_en.pdf](http://unctad.org/en/docs/c2clpd67_en.pdf)> accessed 4 May 2017.

<sup>41</sup> Mattia Guidi (n 3) 21. It was proven that formal independence has a positive impact on the agency's effectiveness, measured by the number of cases that NCAs investigate and sanction.

credibility, the legitimacy of their actions, and, more generally, the trust of society in public institutions.<sup>42</sup>

#### 4. CURRENT SYSTEM OF APPOINTMENT AND DISMISSAL OF THE PRESIDENT OF THE OCCP

The President of the Polish Office of Competition and Consumer Protection is responsible for the enforcement of both competition and consumer protection laws, and is a competent competition authority responsible for the application of Articles 101 and 102 TFEU within the meaning of Article 35 of the Regulation 1/2003.<sup>43</sup> Under Polish law, the President of the OCCP<sup>44</sup> is the only authority vested with the powers of competition law enforcement, and personally exercises all power of that authority<sup>45</sup> (i.e. it is a ‘one-man’ or monocratic authority). While performing its duties, the President is assisted by the Office of Competition and Consumer Protection and its local branches, but under the law, they have only an auxiliary function.<sup>46</sup>

Specific provisions concerning its functioning, competences, as well as its appointment and dismissal procedures are included in the Act of 16 February 2007 on competition and consumer protection (‘the Act’).<sup>47</sup> Under the Act, the President of the OCCP is appointed for an indefinite period by the Prime Minister from amongst the persons selected as a result of an open and competitive recruitment process (Article 29(3) of the Act). Information on recruitment is made public and all candidates who fulfil statutory requirements are allowed to participate in the public competition. Recruitment is conducted by a team appointed by the Prime Minister, composed of a minimum of 3 persons whose knowledge and experience is supposed to guarantee that the best candidates are selected; it results in selection of a maximum of 3 candidates, who are subsequently presented to the Prime Minister. The final decision is taken solely by the Prime Minister and is not reviewed by any other authority. It should be also indicated that whereas information on recruitment is made public, further proceedings and profiles of candidates are not. Solely the final result of the competition, i.e. the name of the selected President of the OCCP, is publicly communicated.

With regard to the dismissal procedure, the Act stipulates that the President of the OCCP is dismissed by the Prime Minister. It does not specify

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<sup>42</sup> Alexander Italianer (n 25) 3-4. Also ICN (n 22) 25.

<sup>43</sup> Krzysztof Jaroszyński, ‘Komentarz do Art. 29 ustawy o ochronie konkurencji i konsumentów’ in Tadeusz Skoczny (ed), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, (C.H. Beck 2014).

<sup>44</sup> It should be noted that in contrast to other European countries, competition authority in Poland does not have a management board and consists of only one person. It is the President of the OCCP itself, who constitutes a competition authority. Thus, in fact, it is a physical person, and not an office, who is empowered to enforce competition law. See Krzysztof Jaroszyński (n 43) para 12.

<sup>45</sup> Adam Jasser, ‘Independence and Accountability’ (2015) 6 (2) *Journal of European Competition Law & Practice* 72.

<sup>46</sup> Krzysztof Jaroszyński (n 43) para 12.

<sup>47</sup> Act of 16 February 2007 on competition and consumer protection (*Journal of Laws of 2007*, No. 50, item 331).

grounds for such a dismissal, nor imposes any limitations in this respect, leaving this decision to the sole discretion of the Prime Minister (Article 29(4) of the Act). Powers given in this respect to the Prime Minister have an arbitrary character and are not made dependent on the way the President of the OCCP exercises its duties. Consequently, it seems that such a design of the terms of appointment and dismissal may coerce the President of the OCCP into following governmental policy and refraining from decisions contrary thereto.<sup>48</sup> Thus, in fact, it can be claimed that the actual extent of the independence of the competition authority depends on the good will of political ruling powers. This, in turn, may give a justified cause for concern.

In practice, with almost every change of political powers in the Polish Parliament, the incumbent President of the OCCP has been removed by the Prime Minister and replaced by a new person, without providing the public with any explanation for such a decision. The last three nominations constitute a good illustration of this practice. Cezary Banasiński, who held the position of the President of the OCCP from 2001 till March 2007, was dismissed by the new Prime Minister, without providing any justification and replaced by Marek Niechciał. Marek Niechciał served as the President of the OCCP from April 2007 till June 2008, when he was dismissed by the new Prime Minister, also without stating any reasons, and replaced by Małgorzata Krasnodebska-Tomkiel. The Prime Minister removed her from the office in February 2014, also without any detailed explanation, but some commentators argued that he did not like her tough competition policy towards international corporations.<sup>49</sup> Adam Jasser, who held the position from March 2014,<sup>50</sup> was recalled in February 2016 by the new Prime Minister, also without providing any reason.<sup>51</sup> Currently, since 12<sup>th</sup> May 2016 the office of the President of the OCCP is held again by Marek Niechciał.

In short, the President of the OCCP, being the competent competition authority, is appointed for an indefinite term, there are no specific rules provided for its appointment and dismissal, so that the Prime Minister can remove him/her from the office at any time and without any limitation. In light of these considerations, in the next section I will analyse whether these solutions are in accord with the independence requirements mentioned above and how they influence the authority's independence.

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<sup>48</sup> Krzysztof Jaroszyński (n 43) para 6.

<sup>49</sup> Karina Piątek, 'Prezes UOKiK odwołana', *Rzeczpospolita* (Warsaw, 10 February 2014) <<http://www.rp.pl/artykul/1085733-Prezes-UOKiK-Malgorzata-Krasnodebska-Tomkiel-odwolana.html>> accessed 4 May 2017. Also: Wojciech Surmacz, 'Dymisja prezesa UOKiK, czyli czas „trzaskania statystyk', *Forbes* (Warsaw, 10 February 2014) <<http://www.forbes.pl/dlaczego-premier-odwolal-prezes-uokik-artykuly.171082.1.1.html>> accessed 4 May 2017.

<sup>50</sup> Karina Piątek, 'Nowy szef UOKiK powołany' *Rzeczpospolita* (Warsaw, 18 March 2014), <<http://www.rp.pl/artykul/1095051-Nowy-Prezes-Urzedu-Ochrony-Konkurencji-i-Konsumentow-powolany.html#ap-1>> accessed 4 May 2017.

<sup>51</sup> Patryk Słowik, 'Adam Jasser został odwołany ze stanowiska prezesa Urzędu Ochrony Konkurencji i Konsumentów' *Gazeta Prawna* (Warsaw, 21 January 2016), <<http://prawo.gazetaprawna.pl/artykuly/919021.adam-jasser-zostal-odwolany-ze-stanowiska-prezesa-urzedu-ochrony-konkurencji-i-konsumentow.html>> accessed 4 May 2017.



## 5. ANALYSIS OF THE CURRENT SYSTEM IN LIGHT OF THE INDEPENDENCE STANDARDS

Although there is no binding rule with regard to NCAs' independence at the European level, it is generally accepted, both in literature and official documents of international organizations, that clear terms of appointment and dismissal, as well as fixed term of the head of the NCA constitute indispensable elements of the authority's independence.<sup>52</sup> Consequently, also bearing in mind international practice and standards in this regard,<sup>53</sup> it may be concluded that solutions applied in relation to the appointment and dismissal of the President of the OCCP may significantly reduce its independence and have a negative impact on its credibility and legitimacy of its actions.

Concurrently, it must also be emphasized that since all powers of the Polish competition authority (both investigative and adjudicative) are concentrated in the hands of one person, he/she plays a much more important role than would be the case if the Polish NCA were a collegial body (e.g. with a management board and/or a supervisory board). Moreover, from a practical perspective, it seems much easier to influence one person than all members of the board. Thus, the vulnerability to political influence of a NCA shaped as the Polish President of the OCCP may be even more severe. Therefore, the potential threat to independence of the Polish NCA, and consequently also to its effectiveness, is even more discernible and the need for explicit safeguards of its independence, in particular transparent conditions governing appointment and term of office are even more compelling.

## 6. EXAMPLES FROM OTHER MEMBER STATES

While searching for optimal terms of appointment and dismissal of the NCAs' head or board, and their term of office, it may be useful to investigate how other Member States have shaped those procedures. Thus, below I will examine respective procedures adopted by two other Member States - the Netherlands and the United Kingdom with regard to their NCAs. These two Member States may prove to be an interesting base for comparison due to their novel approach to institutional design and recent changes in the organization of their NCAs.<sup>54</sup>

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<sup>52</sup> Communication 13. See also Gesner Oliveira and others, 'Aspects of the Independence of Regulatory Agencies and Competition Advocacy' (2005) <<http://www.internationalcompetitionnetwork.org/uploads/library/doc507.pdf>> accessed 4 May 2017, and their analysis of the literature on different methodologies used to measure degree of NCAs' independence.

<sup>53</sup> Hanretty and Koop concluded from their analysis of 175 regulatory agencies from 88 countries that *the modal regulatory agency* is managed by an agency head and has board members who serve for a fixed and renewable term of five years, who can be dismissed for reasons unrelated to policy, who are not allowed to hold other offices in the public administration, and who need to be formally independent. See Chris Hanretty and Christel Koop, 'Comparing Regulatory Agencies: Report on the Results of a Worldwide Survey' (2009) European University Institute Working Paper RSCAS 2009/63 17-18.

<sup>54</sup> Annetje Ottow (n 8) 102-110.

The Authority for Consumers and Markets ('ACM') is a relatively new agency created as a result of the merger between the Netherlands Competition Authority, the Netherlands Independent Post and Telecommunications Authority and the Netherlands Consumer Authority on 1<sup>st</sup> April 2013.<sup>55</sup> Thus, the scope of the ACM's competence is broad and encompasses competition oversight, consumer protection and sector specific regulation (telecommunications, transport, postal services, and energy).<sup>56</sup>

Under Dutch law, the ACM is an independent institution managed by a Board consisting of three executive members. The Board itself has a status of an autonomous administrative authority.<sup>57</sup> The Chair is appointed for a fixed term of seven years, whereas the other two Board members are appointed for five years, and can be reappointed once. Although this organizational solution is a result of the implementation of the EU requirements within the energy market<sup>58</sup> designed for energy sector regulators, it is also praiseworthy in light of international standards for competition agencies. The Board members are appointed through an open procedure by the Dutch Minister of Economic Affairs<sup>59</sup> and can be dismissed only on specific grounds stipulated by law.<sup>60</sup> Moreover, the Minister is obliged to announce a decision to dismiss a member by publishing a concise version of the decision in the Government Gazette, and the reasons for the dismissal should be made public at the request of the member concerned.<sup>61</sup> Although the prevailing terms of appointment and dismissal of the ACM's Board result from the EU obligations applicable to regulatory authorities of the energy market, these solutions may be considered as contributing to greater procedural transparency in that regard, and thus also to the whole agency's (including its competition division) independence and credibility towards consumers and other stakeholders.

In turn, the Competition and Markets Authority ('CMA')<sup>62</sup> was established as a result of the merger between the Office of Fair Trading and

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<sup>55</sup> OECD, 'Roundtable on changes in institutional design of competition authorities – Note by the Netherlands' (2014) DAF/COMP/WD(2014)100 2.

<sup>56</sup> Information available at: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-tasks/>.

<sup>57</sup> OECD (n 55) 4.

<sup>58</sup> See Article 35(5b) of Directive 2009/72/EC 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/EC, OJ L 211, 14.8.2009 55-93. Also: Article 39(5b) of Directive 2009/73/EC of the European Parliament and of the Council of the European Union of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/54/EC [2009] OJ L 211/94.

<sup>59</sup> OECD (n 55) 4.

<sup>60</sup> I.e. in case of unsuitability or incompetence for the position, or other serious reasons concerning the person involved. Thus, the member of the Board cannot be dismissed on the basis of a specific case or decision issued. However, these grounds for dismissal should be considered as rather ambiguous. See Annetje Ottow (n 8) 109.

<sup>61</sup> Section 3.6 of the Act of 28 February 2013 containing rules concerning the establishment of the Authority for Consumers and Markets. Translation of the Act is available at: <https://www.acm.nl/en/publications/publication/15445/Establishment-Act-of-the-Netherlands-Authority-for-Consumers-and-Markets/> accessed 4 May 2017.

<sup>62</sup> The CMA is a Non-Ministerial Department, i.e. a government department, usually headed by a statutory board (and not by a minister), with its own budget, annual report, separate staff, and accountable to the parliament. The CMA is supported by and works with the Department for Business, Innovation and Skills. See Jill Rutter, 'The Strange Case of Non-Ministerial Departments' (2013)

the Competition Commission on 1<sup>st</sup> April 2014,<sup>63</sup> and, similarly to the Polish President of the OCCP, is vested with both competition and consumer protection competences.<sup>64</sup> The CMA is led by a Board, which consists of a chair, chief executive, and at least five other members,<sup>65</sup> both executive and non-executive, appointed for a term of not more than five years by the Secretary of State.<sup>66</sup> While appointing the Board members, the Secretary of State is obliged to comply with the rules included in the Commissioner for Public Appointments' Code of Practice for Ministerial Appointments to Public Bodies,<sup>67</sup> in particular to ensure that the whole appointment process fulfils the requirements of transparency and openness. The possibility of reappointment is not foreseen. With regard to the dismissal procedure, the Secretary of State may at any time remove a person from office as a member of the CMA on specified, but rather vague, grounds of incapacity, misbehaviour or failure to perform its duties.<sup>68</sup>

It may seem that these authorities are provided with sufficient legal safeguards of their independence. In particular, it is acknowledged that specified term lengths for board members, constraints on re-appointment, and limits on dismissal constitute important fundamentals of the agency's legal independence.<sup>69</sup> However, there is still some room for improvement, especially concerning more detailed grounds for dismissal.<sup>70</sup> Therefore, at least on the theoretical level, appointment and dismissal procedures of both authorities' boards may be used as a source of inspiration for other NCAs, but with certain reservations. Finally, since both authorities were established only recently, it is difficult to assess how their design impinges upon the authorities' effectiveness.

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<<http://www.instituteforgovernment.org.uk/sites/default/files/publications/NMDs%20-%20final.pdf>> accessed 4 May 2017.

<sup>63</sup> OECD, 'Roundtable on changes in institutional design of competition authorities – Note by the United Kingdom' (2014) DAF/COMP/WD(2014)105 2.

<sup>64</sup> CMA, 'Towards the CMA – CMA Guidance' (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/212285/CMA1 - Towards the CMA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212285/CMA1_-_Towards_the_CMA.pdf)> accessed 4 May 2017.

<sup>65</sup> Currently, apart from the Chair and Chief Executive, there are three executive and five non-executive directors in the Board. See Information available at: <<https://www.gov.uk/government/organisations/competition-and-markets-authority/about/our-governance#cma-board>> accessed 4 May 2017.

<sup>66</sup> Enterprise and Regulatory Reform Act 2013, sch 4(1) and (3) <[http://www.legislation.gov.uk/ukpga/2013/24/pdfs/ukpga\\_20130024\\_en.pdf](http://www.legislation.gov.uk/ukpga/2013/24/pdfs/ukpga_20130024_en.pdf)> accessed 4 May 2017.

<sup>67</sup> It stipulates that all public appointment procedures should be conducted in accordance with seven principles (ie ministerial responsibility, merit, independent scrutiny, equal opportunities, probity, openness and transparency, and proportionality). The Commissioner for Public Appointments' Code of Practice for Ministerial Appointments to Public Bodies is available at: <<http://publicappointmentscommissioner.independent.gov.uk/wp-content/uploads/2012/02/New-Code-of-Practice-for-Ministerial-Appointments-to-Public-Bodies-August-2009.pdf>> accessed 4 May 2017.

<sup>68</sup> Enterprise and Regulatory Reform Act 2013, sch 4(7).

<sup>69</sup> Chris Hanretty, Pierre Larouche, and Andreas Reindl (n 15) 9.

<sup>70</sup> Annetje Ottow (n 8) 109.

## 7. RECOMMENDATIONS – HOW TO ENHANCE INDEPENDENCE OF THE PRESIDENT OF THE OCCP?

Since it is not possible to formulate a ‘one-size-fits-all’ solution in terms of institutional design and organization of competition authority,<sup>71</sup> in the following section I will try to formulate a set of recommendations with regard to conditions of appointment and dismissal that could be applied by a Polish legislator aiming at enhancing the independence of the President of the OCCP. I will divide subsequent recommendations into those that could be applied at the national level, and those that could be adopted by the EU lawmaker.

At the national level, the main mechanism that may provide the President of the OCCP with a desirable degree of independence from the government could be introduction of the term of office of the authority and specification of grounds for dismissal.<sup>72</sup> A specified term of office would ensure the stability of functioning of the authority and provide the President of the OCCP with sufficient time and stability to achieve specific goals, e.g. in terms of conducting antitrust investigations or undertaking reforms. Preferably, the term should not be linked to the parliamentary elections, and should not be too short, e.g. at least 5 years.<sup>73</sup> Moreover, although reappointments could ensure continuity of the regulator’s policy and under certain circumstances reinforce its independence, I would rather avoid such a solution, since it may lead to greater regulatory capture, which, due to the monocratic nature of the office, may be even more probable.<sup>74</sup>

Furthermore, with regard to the grounds for dismissal, they should not be formulated too broadly, so as to avoid the potential misuse of powers by the Prime Minister. Exemplary grounds for dismissal could include: failure to disclose a conflict of interest, breach of the Act he or she is responsible for enforcing, conviction of an indictable offence,<sup>75</sup> but definitely not the incompatibility of NCA’s decisions with political preferences.<sup>76</sup> In addition, the Prime Minister should provide the public and/or the Parliament with adequate justification for such a dismissal decision.<sup>77</sup> These changes could enhance public trust in the whole system of competition enforcement, which may be regarded as having been undermined by recent practice.

Moreover, it is also advisable to redesign the appointment process. Since it is the authority itself, which is appointed and not particular members of its management board, it can be argued that it is too important a decision

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<sup>71</sup> Sofia Alves, Jeroen Capiou and Ailsa Sinclair (n 13) 13.

<sup>72</sup> Sofia Alves, Jeroen Capiou and Ailsa Sinclair (n 13) 16.

<sup>73</sup> Parliamentary elections in Poland are held every 4 years.

<sup>74</sup> OECD (n 33) 38-39. Also: UNCTAD (n 40) 8.

<sup>75</sup> OECD (n 33) 39.

<sup>76</sup> Giorgio Monti (n 21) 4. Also: Chris Hanretty and Christel Koop (n 53) 7.

<sup>77</sup> A proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities may be used as an inspiration in that regard. Article 5(3) stipulates that ‘The Head of a national regulatory authority or the members of the collegiate body fulfilling that function within a national regulatory authority, may be dismissed only if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance in national law. A dismissal decision shall be made public and a statement of reasons shall be made available’.

to be left to the sole discretion of the Prime Minister.<sup>78</sup> Therefore, in order to provide adequate checks and balances within this process, it seems reasonable to engage the Parliament in it (e.g. by means of proposing candidates or confirming the nomination of a candidate by a qualified majority<sup>79</sup>). Furthermore, the appointment procedure should be made more transparent, e.g. by introducing Parliamentary hearings of the candidates.<sup>80</sup>

On the top of that, it should be also indicated that whereas sector regulators are only empowered to influence undertakings and other stakeholders within one specific sector, the competition authority by its decision-making may affect functioning of a wide range of undertakings, irrespective of the sector in which they operate.<sup>81</sup> Therefore, since the possible intervention of competition authorities may have much more far-reaching effects than that of sector regulators,<sup>82</sup> it is all the harder to comprehend why the EU has been so restrained with introducing rules for independence of competition authorities.

Although Article 4 of the Commission Proposal seeks to ensure adequate guarantees of the NCA's independence, it may appear insufficient and too vague. In particular, it does not give any provision with regard to the term of office and the appointment procedure, which were identified as crucial aspects impinging upon the NCA's independence. Since the Commission has already issued a proposal for a directive in that regard, it should go a step further and introduce specific solutions also regarding the appointment and tenure of the NCA's board or other internal bodies.<sup>83</sup> Although it may be argued that such a solution could clash with the principle of institutional and procedural autonomy of the Member States,<sup>84</sup> it should be observed that this argument did not hinder the reform of the agencies in some of the regulated sectors mentioned above.

Issuing non-binding recommendations or best practices, and by these means incentivizing Member States, including Poland, to conform to the standards included therein, may not be successful. Since the EU has no powers to force the Member States to comply with such soft law documents, the convergence with standards set therein might be low, and their aim may be unrealized.

<sup>78</sup> UNCTAD (n 40) 8. However, the appointment by the Prime Minister should not be considered as unusual and inadequate. Actually, the government is empowered to appoint agencies' heads in the majority of countries. See Chris Hanretty and Christel Koop (n 53) 6. Also: ICN Advocacy Working Group (n 9) 45-46.

<sup>79</sup> OECD, 'Designing independent and accountable regulatory authorities for high quality regulation' (2005), 152 <<https://www.oecd.org/gov/regulatory-policy/35028836.pdf>> accessed 4 May 2017.

<sup>80</sup> Abel M. Mateus, 'Why Should National Competition Authorities be Independent and How Should they Be Accountable?' (2007) 3 (1) European Competition Journal 19.

<sup>81</sup> Mattia Guidi, 'Explaining and Assessing Independence: National Competition Authorities in the EU Member States' (2012) 162 <[http://cadmus.eui.eu/bitstream/handle/1814/22688/2012\\_guidi\\_authorversion.pdf?sequence=1&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/22688/2012_guidi_authorversion.pdf?sequence=1&isAllowed=y)> accessed 4 May 2017.

<sup>82</sup> Abel M. Mateus (n 80) 22.

<sup>83</sup> Mattia Guidi (n 3) 21. Also Mattia Guidi (n 81) 158.

<sup>84</sup> Annetje Ottow, 'The Different Levels of Protection of National Supervisors' Independence in the European Landscape' in Suzanne Comtois and Kars de Graaf (eds), *On Judicial and Quasi-Judicial Independence* (Eleven International Publishing 2013) 139.

At the other end of the scale, a more far-reaching solution would be amending the current Regulation 1/2003 or adopting a new one, which would incorporate all the necessary safeguards of the NCA's independence.<sup>85</sup>

## 8. CONCLUSION

Although there are no binding rules at the European level with regard to the independence of national competition authorities, it is acknowledged by the European Union and international organizations that a sufficient degree of NCAs' independence is indispensable for effective enforcement of EU competition law. In particular, it was proven that the way the NCA's head is elected and dismissed, as well as its term of office is an important constituent of the NCAs' independence. Against this background, the conditions of the appointment and dismissal of the President of the OCCP were analysed and it was inferred that in the current form they may significantly infringe upon the authority's independence, as well as undermine its credibility and legitimacy. In order to find an optimal design of appointment and dismissal procedures, the NCAs from two other Member States (the Netherlands and the United Kingdom) were investigated and it was concluded that their models may be used as an inspiration for other NCAs, however, with certain reservations. Finally, a set of recommendations for both national and European legislator was presented, which aim at improving the independence and effectiveness of the Polish NCA.

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