

NCA's Institutional Design and Enforcement Strategies

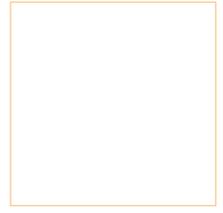
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POLICY BRIEF

Abstract

On 22nd - 23rd April 2016, 'ENTraNCE' for Executives held its third workshop. The event focused on institutional design of National Competition Authorities (NCAs) and their enforcement strategies. The workshop was divided into four panels, which dealt, respectively, with (i) the pros and cons of single- and multi-function competition authorities; (ii) advocacy, in particular in the context of the NCA's right to challenge anti-competitive regulations in national courts, and comment on draft legislations, (iii) settlements and remedies, and (iv) quantification of NCAs' enforcement and the imposition of sanctions.

The workshop gathered different stakeholders together, which included representatives from NCAs, international organisations, academia, and industry, as well as law and consulting firms. The diversity of views ensured a lively debate. While participants agreed on various issues, the discussion revealed the need for further research on those issues that have not yet been sufficiently explored. This policy brief summarises the main points raised during the discussion and seeks to stimulate further debate.



1. Recent trends: the shift towards multifunctional competition authorities

The institutional design of competition authorities is a critical element in competition law and policy. Even the finest competition laws become insufficient to ensure the attainment of competition goals if they are not enforced by appropriately designed institutions. The design of competition authorities does matter, and it is not surprising that the authorities often seem to be protective of their institutional arrangements.

During recent years, however, competition authorities have been under pressure about how their design affects the outcome of their work. Partially due to such pressure, there has been a wave of institutional reforms that have considerably reshaped the design of competition authorities in various countries. Recently, different authorities have been merged in Finland (January, 2013), the Netherlands (April, 2013), Spain (October, 2013), and in the UK (April, 2014). The overview of institutional designs in various jurisdictions clearly shows that they vary from country to country. The workshop's attendees agreed that when it comes to the optimal design for a competition authority, there is no one-size that fits all.

Institutional changes have usually led to the establishment of multifunctional competition authorities, ones which merged a competition authority with the authorities entrusted with other policy functions, such as consumer protection and sector regulation. There are also other, although less frequently encountered variations, such as the combination of powers in the area of competition and procurement law. In general, however, the integration of competition and consumer authorities appears to be the main trend, and, at the same time, it seems to be the most efficient one.

Institutional modifications raise a number of questions: what is the optimal institutional design? How far one can go with integrating different functions within the competition authority? How to ensure integration and cross-fertilisation across the

authority? How to prevent silos and unproductive rivalry between departments?

While answers to these questions may depend on many variables, the general framework for evaluating competition authorities should be based on five broad principles. These five principles, referred to as 'LITER' are: legality, independence, transparency, effectiveness and responsibility.¹ Legality implies that the administrative actions of competition authorities should be undertaken in accordance with the legislative mandate. Independence, which is an essential attribute of effective authorities, refers to independence, both from politics and market parties. Furthermore, competition authorities have to carry out their activities in a transparent and fair manner, ensuring sufficient room for consultation and stakeholders' participation. The NCAs interventions also have to be effective and efficient, and last but not least, the authorities have to be responsible for their actions. The conclusion that emerged from the discussion is that, irrespectively of the chosen institutional setting, the authority must have political support in order to carry out its functions effectively and efficiently.

Advantages and disadvantages of multifunctional competition authorities

While the attendees agreed that the integration of various functions can produce a number of beneficial outcomes, they also pointed to the various risks and costs that such integration may entail. While some of the costs and benefits are likely to arise in respect of any type of integration, others will depend on the specific functions that are combined.

Participants agreed that the horizontal integration of any two authorities certainly leads to administrative cost savings. However, these savings have to be weighed against the costs of integration in order to determine whether, on balance, the integration will produce not just short term savings but, more importantly longer term ones also.

1. Annetje Ottow (2015), *Market and Competition Authorities: Good Agency Principles*, Oxford University Press.



Another important advantage of multifunctional authorities is that they can be better placed to address the problem of staff turnover and a lack of career progress. In particular, multifunctional authorities offer their employees a possibility to move between different departments, which, in turn, may facilitate recruitment and the retention of experienced and specialised staff.

Participants also reflected on the ability of a multifunctional authority to prioritise, which is of particular relevance when resources are limited. On the one hand, the authority may prioritise by simply choosing easier cases. Some participants have claimed that consumer cases tend to be easier than competition cases, due to increasingly more extensive use of economics in the latter. On the other hand, the integration of two functions may actually impair the authority's ability to strike the right balance between its priorities. This may, for example, be the case where the authority has to decide how to divide its attention and resources between obligatory and more discretionary tasks.

The integration of various authorities can also give the impulse for change in terms of institutional culture. While the combination of two or more authorities can lead to a 'culture clash', it can also be beneficial as long as the new authority has a clear mission and overarching objectives to which different units of the authority can ascribe. For example, in the Netherlands the Independent Post and Telecommunications Authority (OPTA - i.e., the telecoms regulator) was initially against a merger with the competition authority. To ensure that the process of integration went smoothly, the competition authority encouraged dialogue, which involved employees, and chose the protection of consumer welfare as the overarching objective of the new Authority for Consumers and Markets (ACM).

Participants agreed that while institutional transformations always create some disruption, such disruption can be used in a positive way. However, as some participants warned, if the process of institutional transformation is not swift

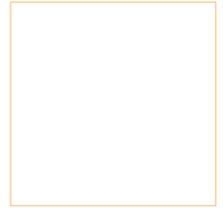
enough, there is a risk that valued staff may leave the authority. Finally, the integration of various authorities may be seen as being beneficial from the business perspective also, since the cost of dealing with multiple authorities can be substantially reduced.

While there has been a common understanding that the integration of various authorities can produce numerous benefits, the participants also stressed the importance of identifying the disadvantages and of evaluating the costs that integration may raise. In particular, an integrated authority may lose focus, while its identity may be diluted; regulatory competition may be lost; and there can also be unproductive rivalry between departments. Moreover, within the merged authority, an excessive focus may be placed on uniformity, which is not a goal in itself.

Merging competition and consumer protection

Participants considered that the integration of the competition and consumer protection functions within one authority is overall beneficial, given that these two areas tend to reinforce one another. Accordingly, the participants agreed that this kind of combination is, in general, the least problematic. However, some also stressed that this is not completely free from challenges as sometimes both policies can clash. It is therefore important to evaluate and counterweigh the challenges and benefits that may arise, particularly when competition and consumer protection functions are integrated under one authority.

Participants acknowledged that an integrated authority is likely to benefit from a stronger, more unified voice and greater external visibility among the public. This, in turn, should facilitate advocacy and raise awareness among the public about the authority's mission and activities. Attendees also highlighted the importance of the appropriate allocation of resources. It was noted also that the combination of competition and consumer protection functions within one authority has



often raised fears that one area would dominate the other. Some participants claimed that competition enforcement would dominate, since it resonates better with the public, while others argued that consumer protection would come to the fore, as its enforcement is less complex.

Of course, the fact that the integration of different functions raises a specific set of challenges does not mean that they necessarily have to materialise. For example, when competition and consumer protection were integrated in Poland in 1996, some of the challenges apparently did not materialise.

Merging a competition authority with a sectoral regulator

The integration of a competition authority and a sectoral regulator within one authority allows for the exploitation of various synergies that arise between the regulation of network industries characterised by the presence of natural monopolies and the work of competition authorities. For example, an integrated authority may ensure more uniform application of some rudimentary concepts, such as dominance and significant market power (SMP). When the authority is entrusted with powers to overview various sectors, integrated enforcement can also ensure inter-sectoral consistency. Another benefit is the ability of the integrated authority to create better teams by combining experts who have relevant knowledge but diverse backgrounds, such as lawyers, economists, engineers and technicians. Moreover, multifunctional authorities can provide greater legal certainty to market players.

However, the participants pointed out that if combining competition and consumer protection is already problematic, then integrating further functions is certainly going to raise even more difficulties, since these authorities may sometimes have extremely different points of view. This is because the objectives of competition and the sectoral regulators are not always compatible, which can compromise the effectiveness of both regimes when implemented by an integrated authority. Some participants referred to the financial sector

as an example: they pointed out that, in terms of objectives, financial stability will most likely be given priority over competition in cases of conflict, even if consumers will have to pay the price. Another argument against the integration of sectoral regulation within the competition authority is linked to the danger of nationalising competition policy, as the infiltration of political issues could jeopardise the achievement of competition.

With respect to sectoral regulators, a particularly acute problem is that of regulatory capture. However, it was pointed out that the risk of regulatory capture may actually be diluted when competition and regulatory functions are integrated within one authority. This can, for example, be achieved if the staff is encouraged to move across different departments of the authority. However, the extent to which this type of risk can be effectively minimised may also depend on the number of sectors that fall under the supervision of the integrated authority.

Participants also stressed the importance of independence. It is commonly assumed that competition and regulatory authorities should be independent when they perform their functions. However, since the degree of independence enjoyed by competition and regulatory authorities may differ, the inclusion of regulators in the merged entity can have a negative impact on the independence of the competition authority.

Having reflected on the advantages and disadvantages of various institutional settings, participants recalled that integration is not the only solution and that coordination should also be evaluated. To determine whether a coordination or integration model better suits the needs of a particular jurisdiction, a comprehensive evaluation should be carried out. Another conclusion that emerged during the discussion was that, irrespective of the institutional design chosen in a given jurisdiction, there are some key ingredients that lead to success. It was pointed out that, according to Hyman and Kovacic,² for an institutional design to be successful

2. David Hyman and William Kovacic (2013), 'Institutional Design, Agency Life Cycle, and the Goals of Competition Law', vol. 81(5) Fordham Law Review, pp. 2163-2174.



it has to ensure policy coherence, credibility, adequate capacity, resilience (understood, among other things, as the ability to adapt the organisation to what is happening around it) and cohesion. The attendees agreed that bringing different authorities under one roof does not in itself mean integration: for integration to be meaningful and effective, it is necessary to prevent internal silos.

Finally, the participants also reflected that these institutional permutations are taking place in the middle of the 'digital revolution'. As disruptive innovations change markets and consumers' behaviours, various authorities are increasingly confronted with a plethora of questions that are related to the regulation of the Internet world. These developments call for more expertise and possibly for further integration and coordination among different authorities.

2. Competition authorities and advocacy

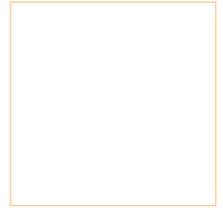
In most cases, the enforcement of competition law by competition authorities concerns the overview of private conduct, such as the abuse of dominant position, anti-competitive mergers, vertical restraints, or various horizontal forms of cooperation. In some circumstances, however, competition can be hindered also by public regulatory intervention and rule making. While such intervention may often be warranted and justified, in some cases it may actually impede competition by going beyond what is strictly necessary in order to prevent anticompetitive effects. Accordingly, the next issue that raised lively debate was whether NCAs are the right actors to carry out advocacy work, and if not the NCAs, then who should be entrusted with such a task. Since most advocacy is done in the context of regulated sectors, it was suggested that perhaps advocacy should be carried out by regulatory authorities instead. Some participants remarked that governments with well developed competition impact assessments do not necessarily need competition authorities to do advocacy work.

The main reason that competition authorities undertake advocacy work is that such activities

pursue the interests of consumers. However, as some participants pointed out, enforcement, and not advocacy, is a top priority for a competition authority. Advocacy, seen as enforcement, however, is very appealing to the competition authorities as it offers a high rate of success, as well as clear and visible results. An irresistible temptation to turn competition advocacy into enforcement is further compounded by the fact that conducting market investigation is easier than investigating a case. Moreover, policy advocacy may provide quantifiable and broad *ex-ante* impact, while the impact of enforcement is hard to quantify. On the other hand, through *ex-post* enforcement the authority can at least compare prices, whereas, in the case of impact assessment, the authority can only obtain an approximation or a forecast of a possible outcome.

Participants also briefly discussed the catalogue of advocacy tools, which typically include market investigations, competition impact assessment and opinions on legislation. Market investigations, for example, may lead to the adoption of decisions that are addressed to undertakings or recommendations for law reform, as happened in the UK in respect of the British Airports Authority (BAA) or with the OECD competition assessment in Greece.

The discussion on advocacy revealed that an important question is that of getting the balance right. While there is always a temptation to seek more power, competition authorities should carefully consider how much power they actually want to have. Enhanced advocacy powers certainly imply more political power, which, however, raises the question of a potential deficit in accountability. Advocacy powers also risk distracting the competition authority from its core objectives and raise the question of how non-competition considerations should be factored in. For example, impact assessments do not focus only on competition, but take into consideration many other public interest values, such as social, fiscal, environmental considerations. Furthermore, advocacy and policy-making by competition authorities imply the use of resources that are withdrawn from enforcement,



unless the budget of the competition authority is increased accordingly.

Some participants expressed scepticism about legislative advocacy, as the risk of getting things wrong is high. In cases where there is doubt about the effects of a given legislation, it is important to inform the public at the outset that there will be a review and that some modifications may be necessary.

3. Settlements and remedies imposed by NCAs

The role of NCAs in the enforcement of EU competition rules has been significantly strengthened with the introduction of the power to negotiate settlements and to impose remedies. These tools have enriched the toolbox that is available to national competition authorities with a view to improving the enforcement of EU competition rules and also to increasing their uniform application.

The common goal of settlements and remedies is to allow for a better allocation of resources, so that the authorities can concentrate on the most important cases. In particular, the aims are to increase the efficiency of the proceedings, to release human resources to pursue other violations, to increase the level of detection and effectiveness, all of which are relevant to ensuring that these instruments have a deterrent effect. While settlements apply only in the cases involving cartels, commitments should not apply to cases involving the most serious forms of violation of competition law, such as cartels. Accordingly, commitments and settlements have different scopes of application.

Participants noted that practically all NCAs have the power to adopt commitment decisions. However, they also pointed out that this is a discretionary power and therefore, competition authorities are under no obligation to accept commitments. When assessing proposed commitments, the authority should verify whether they are addressing the main concern in the conduct or the transaction being investigated. Some participants pointed to the lack of a uniform approach at the national level in respect

of how commitments should be used. For example, according to an Italian court, commitments should not apply to conducts whose effects have already materialised.

Some participants remarked that while commitments offer a number of benefits, they also have a detrimental effect, to the extent that they make case law less clear. As the recourse to commitments increases, there is less jurisprudence and as jurisprudence becomes truncated, it does not give much guidance to private firms.

Participants then reflected on the role and the use of settlements. It was noted that settlements had become a successful tool at the EU level. Since 2010, the Commission has accepted commitments in 19 cases. The rationale behind this instrument is that its use should increase procedural economies, thereby allowing competition authorities to direct their limited resources to other cases that require more in-depth investigation. Various attendees stressed that while procedural economy is a valid objective, it is important to strike the correct balance between this and other equally valid objectives, such as the right to due process.

Participants also discussed fragmentation at the national level in terms of the possibility to settle in cartel cases, as well as the extent to which a fine could be reduced. Some pointed to the risk of treating the same conduct differently, such as transnational cartels, which, in turn, could jeopardise legal certainty.

A lack of full convergence has also been observed in respect of remedies. Remedies must bring an infringement to an end, but, more importantly, they should eliminate the effects of the conduct being investigated. For behavioural remedies, the list is open, and can include the granting of licenses for IP rights upon non-discriminatory conditions, enabling access to specific infrastructures upon non-discriminatory conditions, amending a contract, or guaranteeing a supply to other firms or customers. Structural remedies can be imposed only if behavioural remedies are ineffective, and only



after the authority has obtained an opinion from the undertaking. In this sense, remedies bear some resemblance to the commitments procedure where NCAs always have to discuss how to eliminate the effects of a given conduct or transaction. While most of the NCAs have the powers to impose both structural and behavioural remedies, some authorities can only impose behavioural remedies. Many participants agreed that increased or full convergence at the national level would limit the risk of divergent treatments in cases where there are parallel investigations before different NCAs, thereby strengthening legal certainty for undertakings.

The participants also reflected on advocacy in the context of disruptive innovations, which affect many completely different markets. While such innovations have the potential to bring significant benefits, they are not welcome equally by everyone, and in particular by the incumbent market players, whose position is challenged, and, in some cases, completely eroded. Most typically, disruptive innovations raise concerns in areas such as employment, public safety, health, and consumer protection. Given these concerns, many participants agreed that competition authorities can play an important role by using the available advocacy tools to ensure that regulations that are necessary to address legitimate public concerns do not restrict competition more than is strictly necessary.

The attendees then looked at some of the recent examples of the use of advocacy tools in the context of disruptive innovation. Many competition authorities around the world have, in fact, already done some advocacy work in areas that are affected by disruptive innovation. Most advocacy work concerned the transport sector, and, in particular, taxis affected by Uber and the accommodation sector, which has been affected by players such as Airbnb.

4. Quantifying NCAs enforcement results and setting fines

Participants remarked that even if today competition laws tend to be very comparable, institutional traditions and designs often differ to a lesser or greater extent, thereby leading to different treatments of otherwise identical infringements and to different approaches in relation to how to quantify the enforcement activities of NCAs. The key questions that emerged during the discussion are whether all NCAs should be required to perform impact assessment of their interventions; what are the areas in which the approaches are different, and whether there is a need to harmonise the way in which impact assessments are carried out.

Participants recalled that, in 2014, the OECD published a 'Guide for helping competition authorities assess the expected impact of their activities'.³ The Guide suggested that NCAs should regularly carry out impact assessments so as to calculate the benefits of their enforcement activities in terms of the improvement of consumers' welfare. In particular, NCAs could elaborate reliable statistics in this regard by looking at the turnover of the firms that are affected by the decision, as well as at the price over-charge which is caused by the infringement and its duration. If detailed data for each case investigated are not available, the NCAs could estimate the price over-charge as between 3% for merger decisions and 10% for cartel cases. On the other hand, the average duration of the infringement would be between 2 and 3 years. According to the Survey published by the OECD, together with the Guide, NCAs only occasionally performed such impact assessment, especially in cartel cases.

Participants also debated on the existence of the divergent approaches adopted by NCAs in the process of setting fines. For instance, while the principle that the fine is calculated on the basis of the firm's turnover throughout the period of the infringement is common to every NCA, the

3. OECD (2014), *Guide for helping competition authorities assess the expected impact of their activities*.

‘maximum’ percentage of the relevant turnover taken into consideration varies from country to country, even within the EU. For instance, while the EU Commission and other NCAs (e.g., Germany and Portugal) consider 30% to be the maximum turnover, the UK Competition and Market Authority opted for only 10% as the maximum turnover. Furthermore, participants noticed that a major difference among NCAs concerns the role of competition law compliance programmes in calculating the fine.⁴ For example, the German NCA and the EU Commission do not grant any fine reduction to firms that have implemented antitrust compliance programmes. In contrast, the French and Italian NCAs have recently mentioned in their guidelines on fines calculation that the existence of a compliance programme should be considered a mitigating factor, which, in turn, may justify a reduction in a fine.

To conclude, participants agreed that further convergence is welcome, both in relation to how NCAs carry out impact assessments of their enforcement activities and the manner in which they set fines.

4. In this regard, see the previous ENTraNCE Policy Brief ‘Antitrust Compliance Programs in Europe: Status Quo and Challenges Ahead’. The text of the document is available at: <http://www.eui.eu/Projects/ENTRANCE/Workshop/AntitrustCompliance.aspx> (accessed on 24.6.2016).

The ENTraNCE Project

ENTraNCE for Executives aims to provide training to a variety of enforcers of competition rules, to carry out research and to promote informed discussion on key policy issues in competition law and economics. ENTraNCE for Executives is part of ENTraNCE at the European University Institute and builds upon and complements the experience gained during the past five years in organising ENTraNCE for Judges, a training programme co-financed by the European Commission and addressed to EU national judges dealing with competition cases. ENTraNCE for Executives and ENTraNCE for Judges constitute the two pillars of ENTraNCE.

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