

Institutional design of competition authorities

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Institutional design of competition authorities

- 1) Institutional designs of competition authorities vary across countries
- 2) Institutional designs of competition authorities vary across time within the same country
- 3) Multi-function competition authorities have a wide variety of functions
- 4) Recent tendency in Europe to move from single to multi-function agencies (even if there are some contrary movements)
- 5) Increasing concern with the effectiveness of competition agencies
- 6) Main lesson: there is no unique model but for multi-function competition authorities to be successful a strategic plan and an integrated approach to their various functions, to the use of their various instruments and to the mixing the different cultures of their staff are necessary even if they keep separate the enforcement of the various statutes which fall within their scope of responsibility.

Competition law enforcement and consumer protection

Merged	Separated	Considered merging but opted against
Denmark (2010)	Iceland (2005)	Brazil (2012)
Finland (2013)	Japan (2009)	Bulgaria
Ireland (2014)	(United Kingdom (2013-14) ?)	Estonia (2008)
Italy (2007, 2014)		Chinese Taipei (2005)
Korea (2006, 2008)		
Lithuania (2000)		
Netherlands (2013)		

Merger of competition law and consumer protection

Country	Date of change	Motivations	Concerns	Functions
Finland	01/01/13	1)Contrib. market mech. 2)Cross sector expertise 3) Develop research 4) Cost saving		Separated (by law)
Denmark	2010	Prof. synergies	1) Domination of competition 2) Merger of diff cultures	Merged support functions (ex communication) (market analysis) (policy and legislation) Comp. cases Separate from cons. cases
Ireland	31/03/14	1)Cost savings 2)Increased effectiveness	1) Structure of the new body	mixed
Italy	21/02/14		1) Risk of creeping acquisition of functions	

Merger of competition law and consumer protection

Country	Date of change	Motivations	Concerns	Functions
Finland	21/02/14		Creeping acquisition of functions	
Korea	09/06 02/08	Unifying the operational process of consumer policy	Neg react of cons. rep.	
Netherlands	01/04/13	<ol style="list-style-type: none"> 1) Cost saving 2) Effectiveness gains 	<ol style="list-style-type: none"> 1) Appropriate ICT for merged authority 2) Use of information gathered 3) Publicity of decisions 4) Identification of common strategy 	<p>Cross agency teams detection strategy communication legislation International</p> <p>Case team not integrated</p>

Separation of competition and consumer protection

Country	Date of change	Motivations	Issues	Functions
Iceland	2005	<ol style="list-style-type: none">1) Strengthen the competition enforcement2) Enhance the effectiveness of the competition authority (ICA).		
Japan	2009	Effectiveness of consumer protection		Establishment of the Consumer Affairs Agency of Japan

Merger of competition law and consumer protection

Pros/Opportunities	Cons/Challenges
<p data-bbox="131 439 479 482"><u>Policy/Outcomes</u></p> <ul data-bbox="131 554 927 1253" style="list-style-type: none"><li data-bbox="131 554 927 642">• Complementary policy objectives that can re-enforce one another<li data-bbox="131 706 927 849">• More holistic view of market problems (demand side and supply side)<li data-bbox="131 906 927 999">• More flexible range / portfolio of tools to resolve market problems<li data-bbox="131 1063 927 1253">• Better able to detect/manage policy or enforcement conflicts (e.g., imposing remedy that has unintended consequences)	<p data-bbox="973 439 1321 482"><u>Policy/Outcomes</u></p> <ul data-bbox="973 554 1777 1206" style="list-style-type: none"><li data-bbox="973 554 1777 799">• Loss of “focus” because some consumer protection activities have less obvious connection to competition (spam, privacy, product safety, etc.)<li data-bbox="973 856 1777 899">• Prioritisation may be more complex<li data-bbox="973 956 1777 1206">• Risk of under-allocating resource to consumer policy because often less litigious, high-profile matters (i.e., often a large number of smaller, varied cases/campaigns)

Merger of competition law and consumer protection

Pros/Opportunities	Cons/Challenges
<p><u>Internally</u></p> <ul style="list-style-type: none">• Cost savings from admin / overhead efficiencies• Better able to share know-how / market intelligence / complaints internally• Better able to pool investigative and litigation expertise• Easier to recruit / develop / retain scarce talent b/c similar competencies required (may be helpful in smaller jurisdictions)	<p><u>Internally</u></p> <ul style="list-style-type: none">• Risk of culture clash• Integration costs (e.g., consultations, amendments, staff uncertainty, distraction of senior officials, relocation, training, etc.)• Substantive and procedural differences may limit synergies/integration because a degree of specialisation still required to inv. Cases• Info sharing concerns may require firewalls• Some efficiencies not merger-specific

Merger of competition law and consumer protection

Pros/Opportunities	Cons/Challenges
<p data-bbox="117 405 324 444"><u>Externally</u></p> <ul data-bbox="117 519 896 968" style="list-style-type: none"><li data-bbox="117 519 896 615">• Stronger more unified voice / greater visibility externally<li data-bbox="117 672 896 815">• Greater community or political support for consumer policy spills over into competition<li data-bbox="117 872 896 968">• One-stop-shop for consumer complaints	<p data-bbox="962 405 1168 444"><u>Externally</u></p> <ul data-bbox="962 519 1760 1068" style="list-style-type: none"><li data-bbox="962 519 1760 615">• Two voices are sometimes better than one<li data-bbox="962 672 1760 815">• Risk of spurious consumer protection defences being raised in competition cases or vice versa<li data-bbox="962 872 1760 1068">• Perception of overreaching (using competition proceedings to extract consumer protection remedies or vice versa)

Merger of competition law enforcement and sectoral regulation

Merged	Separated
Denmark (2009) - Water	Denmark (2010) – Energy
Estonia (2008) – Energy, Rail, and Telecom	Estonia (2014) – Telecom
Netherlands (2013) – Telecom and Post	
Spain (2013) – Airports, Audio Visual Products, Energy, Rail, Post, and Telecom	
Lithuania (2009, 2011) – Rail	

Merger of competition law enforcement and sectoral regulation

Pros/Opportunities

Policy/Outcomes

- **Reduced** risk of regulatory **capture**
- More **flexible range** / portfolio of **tools** to resolve market problems
- Better able to **detect/manage** policy or **enforcement conflicts** (e.g., imposing a remedy that conflicts with regulatory requirements or vice versa)
- **Pooling** of sectoral responsibilities may **make agency more adaptable to changing markets** (e.g., where convergence occurring)

Cons/Challenges

Policy/Outcomes

- Different sometimes **conflicting objectives**
- **Different** philosophy / **approach to market intervention** (ex ante vs ex post)
- **Prioritisation** may be **more complex**
- **Loss of “focus”** because some sector regulation activities less connected to competition (e.g., technical regulation)
- May operate under **different governance and decision-making structures** due to different role (rule making vs. investigative)

Merger of competition law enforcement and sectoral regulation

Pros/Opportunities

Internally

- **Cost savings** from admin/overhead efficiencies
- Technical sector **expertise complements** competition expertise (and vice versa)
- Easier to **recruit / develop / retain scarce talent** b/c similar competencies required (may be helpful in smaller jurisdictions)

Cons/Challenges

Internally

- Risk of **culture clash**
- **Integration costs** (e.g., consultations, amendments, staff uncertainty, distraction of senior officials, relocation, training, etc.)
- **Substantive and procedural differences** may limit synergies/integration because a degree of specialisation still required
- **Info sharing concerns** may require firewalls
- Some **efficiencies not merger-specific**

Other models: restriction in the scope of the competition authority's functions

Country	Date of change	Motivations	Action	Structure
Mexico	2005	Increase the effectiveness of oversight of broadcasting and telecomm	Separation of Competition function for broadcasting and telecom	Creation of the Federal Telecommunications Institute (Instituto Federal de Telecomunicaciones – IFT),

Other models: Separation of functions

Country	Motivations	Issues	Proposals
<p>Australia 2014</p> <p>Monash Business Policy Forum proposal</p>	<p>Focusing the ACCC on its competition and consumer functions</p>	<p>The culture and analytical approach required to regulate an industry differs from those typically characteristic of a competition law enforcement agency</p> <p>While international experience favours embedding a market studies function within the competition regulator, this approach may lead to conflicts between policy and regulation/enforcement functions.</p>	<p>the creation of an 'Australian Essential Services Commission' to bring all pricing and access regulation into one agency.</p> <p>Separation of policy design and implementation is key to effective regulatory agencies ... regulators should be explicitly excluded from policy development'</p>

Reservations about merging competition and sectoral regulation

The Italian Competition Authority believes that a strong and consistent institutional design can be preserved and strengthened by **recognizing the intrinsically different nature and role of competition authorities compared to regulators**. Competition, which is enshrined in the European Treaty and Italian Constitution, is a value of constitutional rank and general application. The **ICA** assesses specific conducts as an “adjudicator”: it **exercises powers similar to the judicial powers and therefore is requested to be neutral and highly independent**, like an ordinary judge, both with respect to Government and the parties to the proceedings. Sector specific regulation is typically an ex-ante activity that strives to achieve a balance between different objectives. **Since regulators are rule-making entities and are responsible for the implementation of policies and strategies set by the Government**, they may need to act in close cooperation with Government departments, although in an impartial and non-discriminatory manner.

In light of the above, in Italy **the separation between the ICA and sector regulators currently in place is proving very effective**. By contrast, possible forms of merger between these two different types of institution would raise several complex issues and risk to undermine the effectiveness of the system.

Functions of competition authorities

Australia	Belgium	Denmark	Estonia	Finland
Competition	Competition	Competition	Competition	Competition
Consum. Pro		Cons. Prot.		Consumer Protection,
Nat. Access regimes			Energy Market Inspectorate,	Network inds
Nat. Broadband regime			Communications Board,	
			Railway Inspectorate	
Water markets		Regulatory Authority for Water and Wastewater supply		
Price Increases Reg Air serv Serv to airports Post Office	Price increases (Ministry of Econ)			

Functions of competition authorities

Greece	Hungary	Iceland	Ireland	Italy
Competition	Competition	Competition	Competition	Competition
	Cons. Prot.		Cons. Prot.	Cons. Protect.
				Conflict of interest
				Legality ratings
			Inform on Personal Finance	
	Unfair Pract.			
	Surveil. of large-scale retail chains		Regulation Grocery Sector	Economic Dependence
			Product Safety	Imbalance of contractual power in the agricultural chain

Functions of competition authorities

Korea	Mexico	Netherlands	New Zealand	Portugal
Competition	Competition	Competition	Competition	Competition
consumer		Consumer protection	Consumer protection	
		Energy	Electricity	
		Transport	Gas pipelines	
		Post	Telecoms	
		Telecom	Airports	
			Fair trading	
			Consumer credit	
			Dairy	

Functions of competition authorities

United Kingdom	United States FTC	US DoJ
Competition	Competition	Competition
Consumer (partial)	Cons protect.	
Regulatory references in relation to certain price controls, access charges and other licence modifications Regulatory appeals aviation, communications, energy, railways, health and water sectors.		
Concurrency powers with energy (gas and electricity); water and sewerage services; rail; air traffic control; airport operations; telecoms, broadcasting, spectrum and postal services; healthcare services; financial services and payment systems.		

Independence

A (...) **definition of independence focuses on the agency's exercise of its power to prosecute cases or to enact secondary legislation, such as rules that set binding standards of conduct. Independence safeguards should discourage political branches of government from intervening to guide or force the initiation or disposal of cases or rules.** Such safeguards should not prevent political institutions from offering guidance or recommendations about larger issues of policy. By this standard, it would be inappropriate for political authorities to have the capacity to prevent, by direct mandate or by persuasion, an agency from blocking a specific merger. It would be appropriate for political authorities to offer their views more generally – for example, in a legislative hearing – about whether an agency's approach to merger review is too tolerant or too strict.

Bill Kovacic, COMPETITION AGENCIES, INDEPENDENCE, AND THE POLITICAL PROCESS, OECD December 2014

Independence means that the authority's decisions are free from external influence and based on the application and interpretation of the competition rules relying on legal and economic arguments.

EU contribution to the roundtable on Institutional Changes, OECD Competition Committee, December 2014

Independence

“NCAs have varying degrees of independence when exercising their functions, which can impact on their ability to effectively enforce. Challenges continue to arise, for example, concerning the autonomy of NCAs vis-à-vis their respective governments, appointments and dismissals of NCA management or decision-makers, and ensuring that NCAs have sufficient financial and human resources to enforce the competition rules”

EU contribution, Roundtable on institutional changes, OECD Competition Committee, December 2014

Meaning of independence

Safeguards that would tend to ensure insulation from political control would include:

- **Legal commands or customs that impede the head of state, government ministries, or the legislature** from taking direct or indirect steps **to shape broad policy or to determine how the agency exercises its power to prosecute cases or adopt secondary legislation.**
- An **absence of judicial review of agency decisions**, or requirements that courts abide by a highly deferential standard of oversight.
- The absence of, or **severe limits upon, the ability of citizens, nongovernment bodies, or commercial entities to influence the agency's agenda or to monitor its operations** by having access to the agency's records or by participating in its activities.
- **Sources of funding that do not depend upon the exercise of discretion by the head of state, executive ministries, or the legislature.**

Issues related to the independence of the authority

- 1) Oversight by a public body
- 2) Operational, organizational and financial independence
- 3) Control of the Authority on its own staff
- 4) Rules on the appointment/ dismissal of Board members; terms of appointments
- 5) Conflict of interest ,incompatibilities
- 6) Budget and resources

Tension between independence and accountability

The concept of accountability is closely linked to independence. **It is generally accepted that institutional independence cannot be defended without a requisite level of accountability.** Ideally, agencies will be both autonomous from political pressures with respect to their investigations and simultaneously accountable “for the exercise of its powers and expenditure of public resources”.

The means to ensure accountability are broad and at times can conflict with the criteria for independence. Such mechanisms can include subjecting budgetary appropriations to government approval, the involvement of the executive branch or Parliament in the appointment of agency members and agency-published enforcement guidelines.

Statutory independence and de facto independence

The US contribution states that **“The President designates the Chair from among the Commissioners; if the President changes the Chair, the previous Chair can continue to serve his or her term as a Commissioner.** These arrangements provide accountability by enabling the President to choose the Chair, and by extension the senior leadership of the agency to implement the Chair’s policies. At the same time, it provides for significant continuity in the Commission’s composition and thus its jurisprudence”.

US contribution , Roundtable on institutional changes, OECD Competition Committee, December 2014

In contrast to the FTC, the Antitrust Division of **the DOJ is not formally independent from government:** it is part of the executive branch and is responsible for representing the U.S. in court proceedings.

(...) Further, both the head of the DOJ and its specific Antitrust Division are appointed by the President.

(...) **Nevertheless, the Antitrust Division of the DOJ is considered to “exercise its powers largely independently of the executive branch to which it belongs”**

BIAC contribution , Roundtable on institutional changes, OECD Competition Committee, December 2014

Supervision, strategic steer

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

Strategic steer from Ministers and independence of the competition authority

United Kingdom

A new feature in the recent landscape changes has been the **requirement for the Government to provide the CMA with a strategic steer**. Whilst at the time of the reforms certain **concerns were raised that such a statement risked weakening the CMA's perceived independence**, the Steer is a public document setting out the Government's high-level aims and expectations for the CMA in an open and transparent way. The Government has published its strategic steer for the CMA, applicable for the period 2014 – 2017 (the Steer14). And 24.

Whilst the CMA has regard to the Steer and remains accountable to the Government for its performance assessed by reference to the Performance Framework, its decision-making remains fully independent from Government.

Strategic steer from Ministers and independence of the competition authority

Portugal

The previous PCA's Bylaws of **2003** stated that the independence of the PCA in the performance of its duties was **“without prejudice to the guidelines on competition policy set out by the Government (...) or to the acts subject to ministerial oversight” (article 4)**.

The need to comply with Government competition guidelines could be perceived as lessening the PCA's independence.

This provision has now been removed from the Bylaws, which state instead 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 (Article 40(1) of the PCA's Bylaws). The law explicitly excludes, therefore, the possibility of external interferences with the PCA's activity.

Specific challenges facing multi-function agencies

1) Defining the goal(s) of the institution

Possible difficulties due to the fact that competition authorities tend to have a narrow focus on consumer welfare whereas regulation is often more concerned with a broader efficiency goal. Can « output maximization » bridge the gap ?

2) Achieving a balance between different functions

Defining prioritization criteria, defining a strategic plan for the agency, planning to combine different enforcement approaches (ex ante/ex post and consumer/competition)

3) Managing the resources of the institution

Multi-function competition authorities will, in general, have a larger and more diversified set of resources than single function authorities. Hence the problems of management, coordination and efficient allocation of the resources of the institution are more complex and require closer attention in multi-function agencies than in single function agencies

Specific challenges facing multi-function agencies

4) avoiding cultural clashes within the Authority

Facilitate exchanges and mutual understanding between the specialized skills available in-house through internal inclusive discussions on cross-cutting issues; develop projects on issues which require complementary approaches or skills such as on markets which do not work well in spite of competition or on sectors where sectoral regulation rather than private practices is the main obstacle to competition

5) Structuring the multi-function institution

Integration of support functions, integration of research and policy functions, market study functions, advocacy functions; keep law enforcement and sectoral regulation enforcement teams separate; establish firewalls to ensure that information gathered for specific purpose and with specific powers is not used for different purpose.

Specific challenges facing multi-function agencies

6) Minimizing integration costs

Think ahead and act fast; involve staff of institutions to be merged in the planning for the organization of the multi-function authority and the definition of its goals; establish clear cooperation framework and clear lines of division of responsibilities, establish dispute resolution mechanisms.

7) Promoting substantial synergies

Focus on how markets work; use of market investigations or sectoral studies; developing early thinking about the various way(s) to approach a market dysfunction helps choose the appropriate procedure or combination of procedures to fix the problem. Substantive synergies are likely to come from policy coordination rather than from law or sectoral regulation enforcement

Specific challenges facing multi-function agencies

8) Avoiding criticism for overreaching, avoiding the public perception that the authority has a very diffuse mandate which makes its goal or performance hard to judge

Multi-function agencies are more complex and less well understood by the public. Specific need to communicate a sense of focus, to explain the goals of the institution and how its various activities fit together.

9) Avoiding the risk that the government will heap heterogeneous regulatory functions on the Competition Authority ?

Explaining to government the risks and costs in lost credibility of too many different functions; insisting on proper financing for any additional function; discriminating between additional functions and accepting only those which are consistent with the overall goal(s) of the institution, resisting the temptation to build an empire or to ask for excessive budgetary increases .

Specific challenges facing multi-function agencies

10) Ensuring the independence, accountability and relevance of the multi-function agency

Independence is key to the enforcement function; relevance is key to the advocacy function, accountability is key to ensure the respect of the institution .

Besides the legal framework, perceptions count. Communication is important. Furthermore the credibility of the institution should be built over time.

Thank you very much

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