Integrate or separate: institutional design for the enforcement of competition law and consumer law

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Keywords: Antitrust law, Consumer Protection, Economics of Regulation, Enforcement of Law ; JEL: D18, L51, L40, K42

This paper compares three different institutional designs for the public enforcement of competition law and consumer law. The three models represent different ways for combining or separating enforcement responsibilities. In the *separate agency model* the enforcement of competition law and consumer law takes place in two distinct authorities like the example of the Dutch Consumer Authority and the Netherlands Competition Authority (NMa) will show. The *partially integrated model* combines the enforcement of competition law and some specific parts of consumer law related to information, such as rules against deception or misleading advertising. This is the case with the Hungarian Office of Economic Competition (GVH) and the Italian *Autorita Garante della concorrenza e del mercado* (AGCM). The *integrated model* represents an agency with a double mission: responsibilities for the enforcement of both competition law and consumer protection law. Examples can be found in the UK, the Office of Fair Trading (OFT), the US Federal Trade Commission (FTC) or the Australian Competition and Consumer Commission (ACCC). The allocation and division of competences across different enforcement agencies is analyzed through a comparative study between the different regulative approaches on a cross-country basis. The cross-country legal comparison offers an opportunity to compare concrete institutional solutions in historical context and applied in practical life.

The paper examines the legal and economic theories that govern the allocation of regulatory powers and it explores the various legal and economic arguments in favour of integrating or separating enforcement tasks. It, further, analyzes how the three institutional models impact on the public enforcement of competition law and consumer law. This analysis has three dimensions. It starts from current market developments on the intersection of competition law and consumer protection and their reflection in substantive law and policy. Second (and this is what the presentation will focus on), it discusses the law and economics literature on optimal law enforcement and applies its criteria to institutional design. In the law and economics literature an efficient law enforcement system depends on optimal allocation of enforcement powers, choice of enforcement tools, sanctions and timing of intervention. The law and economics literature of law enforcement provides a number of economic criteria for the allocation of enforcement powers between private and public enforcement. These criteria include access to information about law infringements, the need to achieve optimal level of enforcement excluding both over and under-enforcement (Shavell, 1993), (Polinsky, Shavell, 2000). The optimal level of enforcement depends on the likelihood to initiate proceedings and the expected sanctions. The match or deviation of social and private interests in enforcement is decisive. Whether private incentives to sue coincide with the social interest to enforce the law depends on a cost-benefit assessment of law enforcement.

This paper adds a further aspect: how institutional arrangements affect the effectiveness of law enforcement. Such an evaluation will make use of economic theories developed by Coase on transaction costs and the theory of the firm (Coase 1937, 1960), the insights of Williamson on institutional arrangements and governance structures (Williamson 1985, 1996), the theories of North on institutional environment (North, 1971, 1990), as well as Komesar's participation centred approach (Komesar, 1994). The economic relevance of legal institutional arrangements lies in the presence of non-negligible transaction costs. The reduction of these costs as well as the maximization of efficiency through alternative institutional arrangements has been a relevant contribution by Coase to public policy regarding institutional design. Transactions costs theory provides insights to both the costs and benefits of integrating or separating the enforcement of consumer law and competition law in one organization as well as the costs of internal organization such as information flows,

incentives, monitoring and performance evaluation. (Klein, 2000) Williamson has extended Coase's theories and focused on the process of governance. Transactions require mechanisms that call various governance structures into being. Organizations can react to individual preferences and institutional environment by accommodating these influences through revised forms of governance (Williamson, 1985). Estimating the costs of organizing transactions under alternative institutional arrangements can help to compare alternative institutions of governance.

Building on Coase comparative institutional analysis evaluates relative advantages and disadvantages of alternative ways of allocation of regulatory powers. Komesar focuses on participation as the key to comparative system evaluation and choice between alternative decision-making institutions (market, political process and courts) is essential to achieve social goals. Opportunities for participation and representation are to test alternative decision-making processes (Komesar, 1994). This comparative analysis can be complemented by the perspective of historical institutionalism, which is crucial to understand the influence of economic institutions on economic performance and why a certain policy proves to be successful or fails in different institutional contexts. North defines institutions as the rules that determine the behavior of individuals and organizations. He distinguishes between formal rules such as laws and regulations and informal rules such as constraints on behavior derived from culture, tradition, custom and attitudes. Formal rules and informal constraints are interdependent and in constant interaction. Similar measures will lead to different outcomes because of diverging informal rules and informal constraints in different economies. Institutional change is a process that is subject to path dependency. Institutional path dependency is the downstream institutional choices inherent in any institutional framework and which makes it difficult to alter the direction of economy once it is in a certain institutional path. Formal rules can be changed overnight, but informal constraints change slowly. This is what North calls "adaptive efficiency", namely the degree of success of institutions to encourage the creation of efficient factor and product markets and the development of political and economic organizations that mitigate transaction costs (North, 1997). Adaptive efficiency may also relate to established categories in constitutional theory such as representative democracy and access to justice. This link between economic, political and legal theory makes institutional analysis a promising study field of law (Bakardjieva, 2003).

Third, the paper explores the impact of the EU legal and policy framework on formal rules as well as enforcement possibilities and decision-making processes in the Member States. Europeanization is a process of influencing and challenging long-standing institutional constraints of national laws. It changes formal rules through harmonization, informal constraints by pursuing change in market actors' attitudes and enforcement models by imposing new mechanisms of enforcement.

In the first and second dimension, the paper discusses the following questions. What are the complementarities and tensions between the ways in which the competition law and consumer law are enforced? Which parts of consumer law can be effectively enforced by public bodies and how can competition law enforcement be combined with the enforcement of these consumer rules? Which would be the synergies and the conflicts of allocating enforcement powers in one or two agencies? What are the institutional and operational needs and constraints of the agencies? What are the consequences of a certain institutional arrangement for the choice of sanctions and the time of intervention and thus ultimately the goals of competition and consumer law enforcement? Finally, does such an institutional arrangement have beneficial "boomerang" effects on substantive legislation and policy-making?

The third dimension explores the external influence of the EU on national institutional design. It discusses the question on how Europeanization process opens for or constraints new variations and possibilities for the institutional framework by changing opportunities for participation and constraining effects of institutional path dependence.