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Review of Market and Competition Authorities

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ANNETJE OTTOW, MARKET AND COMPETITION AUTHORITIES: GOOD AGENCY PRINCIPLES

Oxford: Oxford University Press (www.oup.com), 2015. xv + 280 pages.

ISBN 9780198733041. £60.

Much writing in recent years has focused on the institutional framework within which competition law is enforced. In many ways the clarion call for this was the publication of Daniel A. Crane's influential book *The Institutional Structure of Antitrust Enforcement* in 2011. This new emphasis is surely welcome, since the open-ended antitrust statutes, although not unique in their terseness, tend to involve an enhanced role for interpretation when compared with many other areas of law. There is also much to recommend, from an economic perspective, consideration of the insights from new institutional economics in designing agency structures themselves, as a natural extension of the economic approaches already deployed in substantive antitrust analysis. At the risk of internecine disloyalty, it might be said that lawyers as a group seemed to take rather longer to consider the institutional question in the same comparative detail displayed considerably earlier by their economist counterparts (see e.g. Douglass C. North "Institutions" (1991) 5 *J. Economic Perspectives* 97).

Recent years have happily seen much greater lawyerly interest in the institutional question, and Annetje Ottow's recent book *Market and Competition Authorities: Good Agency Principles* makes a very welcome contribution to this burgeoning literature. The book provides a detailed and thoughtful analysis of the principles by which competition authorities are designed, and the contribution that this institutional framework makes to optimal decision making. The author has extensive experience gained in national competition and regulatory authorities and is therefore very well placed to assess the ingredients required to make for successful regulatory structures, and to communicate this in a way that is accessible and relevant to a range of audiences, including, importantly, those making decisions on institutional design.

The book builds an elegant argument drawing on a general analysis of abstract institutional principles, before moving on to considering specific application using case studies, and finally drawing succinct and practical recommendations. This structure works well and makes for arguments that are highly accessible: no small virtue, considering that a substantial section of the target audience might include regulators who initially have limited competition-specific experience.

The first section of the book introduces the reader to the important trade-offs and tensions inherent in much regulatory design, highlighting in particular the trade-off between gathering detailed evidence, and the risk of regulatory capture. As will be familiar to enforcers and practitioners, competition and market authorities have limited internal capacity for very detailed market analysis, and tend rely to varying degrees on representations from parties and their expert representatives such as consulting economists. Assembling a balanced view from these competing but erudite voices can often prove challenging, and introduces a risk of capture of the regulator by industry if any single voice is credited too much.

The book does an excellent job of drawing out the difficulties implied by this context, especially in relation to highly topical questions concerning trade-offs between transparency and confidence in decision-making. Those mulling prominent current questions such as the application of freedom of information law to competition authorities will find much food for thought in this discussion. The recommendation that "openness and transparency should, therefore, be the basic starting points, given the clear link between the principle of transparency and the principle of effectiveness" (p. 82) will doubtless be very welcome in a number of circles; not least, among those practitioners making Sisyphean arguments for greater transparency on the part of the sub-set of (publicly funded) enforcers who deny their public

access to some of the most important (publicly funded) documents in (publicly funded) competition law investigations, instead keeping them under (publicly funded) lock and key.

The book memorably summarises its approach to institutional design using a catchy acronym: regulation should be “LITER”, i.e. a context-sensitive approach to Legality, Independence, Transparency, Effectiveness and Responsibility. The book suggests that the principles might be used in the context of agency design and also in judicial review. Perhaps the greatest strength here is that a structured approach can help to identify areas where the various principles might reinforce each other.

An engaging discussion of the role of integration versus competition between agencies follows, drawing insights from the Netherlands, and also topically from the UK experience following the merger of the Competition Commission and the Competition and Markets Authority (pp. 140-141). Those who designed the new UK system will be heartened to read of perceived efficiencies in institutional integration (p. 144) while their counterparts in the Netherlands will be pleased to see the author note the internal structural steps taken to ensure that the Authority for Consumers and Markets does not succumb to bias, such as instituting systems of independent review within the agency.

The role of judicial review features prominently in the final section of the book, probing difficult questions such as the role of detailed economic evidence and its interaction with the margin of discretion associated with European competition law enforcement. It is not immediately obvious that the lesser discretions seen in the most mature competition law jurisdictions are misplaced, notably in merger review cases such as *U.S. v. Oracle Corporation*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) and the recent Canadian Supreme Court judgment in *Tervita Corporation et al v Commissioner of Competition*, [2015] SCC 3. Both cases resulted in a nuanced and detailed review of economic evidence, providing helpful guidance for regulator and regulatee alike. The author makes a commendable suggestion that a more economic approach to EU competition law implies a more detailed analysis of economic evidence in competition law cases (p. 227); much as this reader, at least, suspects that such an approach might grate with certain sections of the European judiciary.

The need for an analytical framework by which to assess agency design is increasingly urgent following the significant expansion in the number of market and competition authorities in recent years, not least with a view to the capacity building this implies. *Market and Competition Authorities* provides an excellent contribution to this important and practical question, drawing on a wide range of experience and analysis to arrive at balanced and practical suggestions that will play an important role in ensuring that market and competition authorities tread the fine line between being captured and upholding competition on a sure footing.

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