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MARKET & COMPETITION AUTHORITIES

GOOD AGENCY PRINCIPLES

Annetje Ottow

Market and Competition Authorities

Good Agency Principles

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Preface

This book builds on my work of the last seven years, which started with my PhD on the supervision of the Dutch telecommunications sector. The scope of my work has since broadened, thanks to the combination of my academic work as a law professor at Utrecht University and my membership of the board of OPTA, the Dutch Independent Post and Telecommunications Authority. In April 2013 OPTA merged with the Netherlands Competition Authority (NMa) and the Netherlands Consumer Authority to form the Netherlands Authority for Consumers & Markets (ACM). This example of institution building was a very valuable experience for me and inspired me to conduct further research, while, more recently, my membership of the board of the UK Competition & Markets Authority (CMA) has given me the opportunity to gain greater insight into how independent agencies work and the challenges they face.

Over the years it had become apparent to me that the same basic principles were coming back time and time again when we discussed and sought to understand the framework in which market and competition authorities operated, not only within the Dutch context, but also at a European and an international level. This book identifies five principles: legality (L), independence (I), transparency (T), effectiveness (E), and responsibility (R), which I refer to jointly as the LITER principles. These five principles prove to be fundamental to a framework for agency design and actions, both for the agencies themselves, and also for the actors reviewing the agencies' actions. The book explores theory and practice to provide insight into these fundamental principles and uses several cases, mainly from the Netherlands and the United Kingdom, to draw lessons for and illustrate issues that in my view need to be addressed worldwide. My purpose in identifying the five LITER principles is to enable independent agencies of all kinds, and especially agencies and practitioners responsible for market regulation and competition law enforcement, to apply them in their own specific environments. The book is intended for all those responsible, today and in the future, within the context of an independent agency overseeing markets.

There are a number of institutions and individuals I would like to thank for their help in enabling me to complete this book. I could not have done it without the financial contributions made by the Law Department of my Law, Economics & Governance Faculty, by RENFORCE (the Utrecht

Centre for Shared Regulation and Enforcement in Europe), as well as by 'Institutions', one of the multidisciplinary research programmes at Utrecht University. Writing a manuscript takes time, which was generously granted to me by Utrecht University in the form of a sabbatical leave. I am also very appreciative of the support I received from my Public Economic Law team, and especially the help provided by Anna Gerbrandy. The discussions with my fellow board members at OPTA and CMA, as well as the board of ACM, inspired me every day and indeed continue to do so. Their expert knowledge of and insight into the day-to-day work of independent agencies provided valuable information for the manuscript.

I am grateful to the many people who helped me during the writing process by providing critical comments, suggestions, and advice, specifically Lucky Belder, Sonya Branch, Anna Gerbrandy, Eva Lachnit, Philip Marsden, Benjamin Nunez, Monique van Oers, Mira Scholten, and Adam Scott. My two research assistants, Laurens Venderbos and Aydan Figaroa, found useful material and provided valuable technical assistance. I would also like to express my thanks to Laurian Kip and Alison Gibbs for their excellent language corrections and editing work that helped me to shape the book. A special word of appreciation is for Chris Fonteijn, the ACM chair, for his immense support and advice when commenting on the draft versions of the book. His ideas and insights inspired me tremendously. Above all, I am incredibly grateful to Ton and Anne, my family, who always believed in the project and helped me to keep on going.

Annetje Ottow

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Table of Cases

Accell Group v NMa 24 February 2004 (Netherlands)	237
Bendenoun v France (Case A/284) (1994) 18 EHRR 54 (ECtHR)	128
Bryan v United Kingdom (Case A/335-A) (1996) 21 EHRR 342 (ECtHR)	224
Comisión del Mercado de las Telecomunicaciones v Administracion del Estrado (Case C-82/07) [2008] ECR I-1265	79
Commission v Austria (Case C-614/10) [2013] 1 CMLR 23; [2013] All ER (EC) 237	79
Commission v Federal Republic of Germany (Case C-518/07) [2010] ECR I-1885	78
Commission v Greece (Greek Maize) (Case C-68/88) [1989] ECR 2965	153
Commission v Tetra Laval BV (Case C-12/03P) [2005] ECR I-987	220, 227–9, 231, 233
Compagnie Royale Asturienne des Mines SA v Commission (Joined cases 29/83 and 30/83) [1984] ECR 1679	226
CRV Holding BV 2 July 2007 (CBb)	229
Davis v Radcliffe [1990] 1 WLR 821	236
EFTA Surveillance Authority v Iceland (Case E-16/11)	58, 214–5
EnergieNed en VEMW v NMa en Gas Transport Services BV LJN BM9470; BJB 2010 1499 (Netherlands)	116
France v Commission (Case C-202/88) [1991] ECR I-01223 (ECtHR)	79
Funke v France (Case A/256-A) [1993] 1 CMLR 897 (ECtHR)	153
Gas Transport Services Case NJB 1499 ECLI (Netherlands)	77
Imperial Tobacco Group Plc v Office of Fair Trading [2010] CAT 28 (Competition Appeal Tribunal)	229
KPN Mobile NV v Nederlandse Mededingingsautoriteit 13 July 2006 (CBb)	230
KPN Telecom BV v Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA) (Case C-109/03) [2004] ECR I-11273	237–8
KPN-Reggefiber ‘Reggefiber I’ (Case 6397) (2008) (Netherlands)	136, 138
KPN-Reggefiber ‘Reggefiber II’ (Netherlands)	138
Menarini Diagnostics SRL v Italy (2011) (Case 43509/08) (ECtHR)	128, 223
Ministere Public v Decoster (Case C-69/91) [1993] ECR I-5335	79
Nuon/Reliant 28 November, 2006 (CBb)	228
Öztürk v Germany (Case A/73) (1984) 6 EHRR 409 (ECtHR)	128, 153
OPTA en Tiscali v KPN Telecom 2004 (7/8) Mediaforum (Netherlands)	72
Regie des Telegraphes et des Telephones v SA GB-INNO-BM (Case C-18/88) [1991] ECR I-5941	79
Saunders v United Kingdom (Case 19187/91) [1997] BCC 872 (ECtHR)	153
T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit (Case C-8/08) [2009] ECR I-4529	222, 229
T-Mobile (UK) Ltd v Office of Communications [2008] CAT 19 (Competition Appeal Tribunal)	231–2
Telet2 v Autoriteit Consument en Markt (ACM) 17 July 2014 (CBb)	231
Tesco v Office of Fair Trading [2012] CAT 31 (Competition Appeal Tribunal)	230
Three Rivers District Council v Governor and Company of the Bank of England [2000] 2 WLR 1220	236
Tsfayo v United Kingdom (Case 60860/00) (2009) 48 EHRR 18 (ECtHR)	224

Vie d'Or case	235
Vlaamse Federatie van Verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW v Raad voor de Mededinging (C-439/08) [2011] 4 CMLR 12	80–1

Table of Legislation

EUROPEAN UNION

Charter of Fundamental Rights of the European Union (EU Charter)	55, 57
Decision 2003/796 establishing the European Regulators Group for Electricity and Gas	39
Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data	78
Directive 2002/21 on a common regulatory framework for electronic communications networks and services (Framework Directive)	
Art.4	232
Art.7	34
Directive 2009/72 concerning common rules for the internal market in electricity	36
Art.35	107
Directive 2009/73 concerning common rules for the internal market in natural gas	36
Art.39	107
Directive 2009/140 amending Directives 2002/21 on a common regulatory framework for electronic communications networks and services, 2002/19 on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20 on the authorisation of electronic communications networks and services	232
Directive 2010/13 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)	79–80

Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty	34, 36, 80–1
Art.2	226
Art.7	181
Art.9	180
Art.9(2)	180
Art.11	37
Art.12	37
Art.13	37
Art.22	37
Art.23(2)(a)	172
Art.31	220
Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws	37
Treaty on European Union (TEU)	
Art.4(3)	153
Art.11	86
Regulation 713/2009 establishing an Agency for the Cooperation of Energy Regulators	
Art.1	39
Art.4	40
Art.7	40
Art.8	40
Art.9	40
Preamble	39
Regulation 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office	39
Art.3	39
Preamble	39
Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions	41

Treaty on the Functioning of the European Union (TFEU)	78
Art.101	36, 127
Art.101(1)	226
Art.102	36, 127
Art.127(1)	41
Art.130	78
Art.263	220
Treaty of Lisbon 2009	41, 57

FRANCE

Commercial Code 125

INTERNATIONAL

European Convention on Human Rights 1950 (ECHR)	56-7
Art.6	128-29, 153, 174, 223-4
Art.7	57
Universal Declaration of Human Rights 1948 (United Nations)	55-7
Art.10	57
Art.11	57
Art.12	57
Art.20	57

NETHERLANDS

Autonomous Administrative Authorities
Framework Act 2012 104

Competition Act 1998	102, 115
Art.5a	115
Art.47	114
Consumer Protection (Enforcement)	
Act 2007	102
Decree on Leased Lines and Telephony	
s.34	186
s.35	186
s.38	186
General Administrative Law Act	89
Telecommunications Act 1998	102
Art.15.4	186
Telecommunications Act 2004	89, 189

UNITED KINGDOM

Competition Act 1998	103, 121
Enforcement Act 2002	
s.58	119
s.131	103
Enterprise Act 2002	103, 140, 194, 206
Enterprise and Regulatory Reform Act 2013	
s.1(1)(b)	107, 114
s.1(2)	107, 114
s.3(1)	107
s.3(2)	114
s.3(3)	107
Fair Trading Act 1973	103, 140

List of Abbreviations

AER	Australian Energy Regulator
ACCC	Australian Competition & Consumer Commission
ACER	Agency for the Cooperation of Energy Regulators
ACM	Netherlands Authority for Consumers & Markets (<i>Autoriteit Consument & Markt</i>)
AFM	Netherlands Authority for the Financial Markets (<i>Autoriteit Financiële Markten</i>)
AID	General Inspectorate of the Dutch Ministry of Economic Affairs (<i>Algemene Inspectiedienst</i>)
AMF	French financial markets authority (<i>Autorité des marchés financiers</i>)
ARAF	French railway regulator (<i>Autorité de Régulation des Activités Ferroviaires</i>)
AVMS	Audiovisual Media Services Directive
BEREC	Body of European Regulators of Electronic Communications
BIS	UK Department for Business, Innovation & Skills
BNetzA	German federal electricity, gas, telecoms, postal and railway regulator (<i>Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen</i>)
CA	Netherlands Consumer Authority (<i>Consumentenautoriteit</i>)
CAA	UK Civil Aviation Authority
CAT	UK Competition Appeal Tribunal
CBb	Dutch Trade and Industry Appeals Tribunal (<i>College van Beroep voor het bedrijfsleven</i>)
CC	UK Competition Commission
CDGs	CMA Case decision groups
CERRE	Centre on Regulation in Europe
CMA	UK Competition & Markets Authority
CNMC	Spanish federal markets and competition authority (<i>Comisión Nacional de los Mercados y la Competencia</i>)
CPC	Nigerian Consumer Protection Council
CPD	continuing professional development
CPCS	EU Consumer Protection Cooperation System
DNB	Dutch central bank (<i>De Nederlandsche Bank</i>)
DGCCRF	French competition, consumer protection, and anti-fraud authority (<i>Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes</i>)
DTe	Netherlands Office of Energy Regulation (<i>Dienst uitvoering en Toezicht energie</i>)
EBA	European Banking Authority

EC	European Commission
ECB	European Central Bank
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
ECtHR	European Court of Human Rights (Council of Europe institution)
EGC	European General Court
EIOPA	European Insurance and Occupational Pensions Authority
ERG	European Regulators Group
ERGEG	European Regulators Group for Electricity and Gas
ESAs	European Supervisory Authorities
ESFS	European System of Financial Supervision
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
FCA	UK Financial Conduct Authority
FCC	US Federal Communications Commission
FERC	US Federal Energy Regulatory Commission
FSA	UK Financial Services Authority
FTC	US Federal Trade Commission
ICARE values	impartial (I), committed to service (C), accountable (A), respectful (R), ethical (E)
ICN	International Competition Network
ILR	Regulatory affairs institute of Luxemburg (<i>Institut Luxembourgeois de Régulation</i>)
INDIREG	indicators for independence and efficient functioning of audiovisual media services regulatory bodies
IMF	International Monetary Fund
KFST	Danish competition and consumer authority (<i>Konkurrence- og Forbrugerstyrelsen</i>)
KKV	Finnish competition and consumer protection authority (<i>Kilpailu- ja kuluttajavirasto/Konkurrens- och konsumentverket</i>)
LITER	legality (L), independence (I), transparency (T), effectiveness (E), responsibility (R)
NEDs	Non-executive directors
NCBs	National central banks
NMa	Netherlands Competition Authority (<i>Nederlandse Mededingings- autoriteit</i>)
NMD	Non-Ministerial Department (UK)
NRA	National Regulatory Authorities
NVWA	Netherlands Food and Consumer Product Safety Authority (<i>Nederlandse Voedsel- en Warenautoriteit</i>)
NZa	Dutch Healthcare Authority (<i>Nederlandse Zorgautoriteit</i>)
MMS	US Minerals Management Service

MTB	Dutch Consultation Forum of Regulatory Bodies (<i>Markttoezichthoudersberaad</i>)
MoU	Memorandum of Understanding
OECD	Organisation for Economic Co-operation and Development
Ofcom	UK Office of Communications
Ofgem	UK Office of Gas and Electricity Markets
Ofwat	UK Water Services Regulation Authority
OFT	UK Office of Fair Trading
OPTA	Dutch Independent Post and Telecommunications Authority (<i>Onafhankelijke Post en Telecommunicatie Autoriteit</i>)
ORR	UK Office of Rail Regulation
PD	Plant Pathology Inspectorate of the Dutch Ministry of Agriculture (<i>Plantenziektekundige Dienst</i>)
PRA	UK Prudential Regulation Authority
PRC	US Postal Regulatory Commission
Profeco	Mexican Federal Attorney's Office for Consumers (<i>Procuraduría Federal del Consumidor</i>)
SMP	significant market power
SSM	Single Supervisory Mechanism (for EU banking sector)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VWA	Dutch Food and Consumer Product Safety Authority (<i>Voedsel- en Warenautoriteit</i>)
WRR	Netherlands Scientific Council for Government Policy (<i>Wetenschappelijke Raad voor het Regeringsbeleid</i>)

Table of Contents

<i>Table of Cases</i>	ix
<i>Table of Legislation</i>	xi
<i>List of Abbreviations</i>	xiii

1. The Regulatory Space of Market and Competition Agencies	1
Introduction	1
Agency Dilemmas	5
Good Agency Principles	8
Institutional Design	13
Enforcement Styles and Tools	14
Evaluation and Judicial Review	16
Scope and Methodology of the Book	18
2. Types of Agencies	21
Introduction	21
Independent Agencies: Why Do We Have Them?	22
Types of Agencies	27
Different Combinations of Agencies	31
International Context: Europeanization and Global Networks	33
Conclusion	42
3. Good Agency Principles	45
Introduction	45
In Search of Key Fundamental Principles	47
Relevant Legal Framework	53
Governmental Reports Identifying Core Agency Principles	58
Core Values of Market and Competition Authorities	62
LITER Principles of Good Agency Behaviour	69
Conclusion	94
4. Institutional Design	95
Introduction	95
LITER Principles in the Context of Institutional Design	98
Introducing Two Cases of Institution Building	101
Governance Structure and Organizational Design	104
Interference with Ministers and Politics	114

Institutional Culture and Legitimacy	119
Investigation and Enforcement: Separation or Integration?	123
Coordination Between or Integration of Agencies?	130
Conclusion	144
5. Enforcement	147
Introduction	147
Principles of Enforcement	148
Prioritization	159
Styles of Enforcement	162
Tools and Instruments	174
Enforcement Choices in the United Kingdom and the Netherlands	185
Conclusion	194
6. Evaluation of Independent Agencies and Review by the Courts	197
Introduction	197
Evaluation of Independent Agencies	200
Review by the Courts	217
Liability of Independent Agencies	234
The LITER Principles in the Context of Liability	238
Conclusion	239
7. Conclusions and Recommendations	241
Introduction	241
Key Issues for Independent Agencies	242
Key Issues for Legislators, Governments, and Policymakers	249
Key Issues for the Courts	252
<i>Annexes</i>	255
<i>References</i>	259
<i>Index</i>	271

The Regulatory Space of Market and Competition Agencies

Introduction

Although market and competition agencies supervising and regulating competition and specific sectors in the economy are nowadays seen as an integral and indispensable part of the governmental and institutional scene, market oversight is actually a relatively new phenomenon. Prior to the 1980s it was generally accepted that only the state could oversee public services such as telephony and public utilities. In the late 1980s and early 1990s, however, partly as a result of technological advances, people started believing that these public services could be safeguarded more effectively and efficiently by introducing competition into these markets. Competition was seen as the instrument of choice for eliminating inefficiencies, for promoting technological advances, and for achieving greater prosperity. The state responded by divesting itself of various tasks and leaving these to the market, while at the same time establishing independent agencies to monitor this liberalization process and to promote and oversee fair competition. The state itself was unable to assume this role, given that it continued to hold a share in some of the privatized public services companies being supervised. Many countries created independent agencies of this nature.

Generically, all authorities supervising or regulating markets can be referred to as independent authorities or agencies. In general terms, they can be divided into two types: market authorities and competition authorities. Market authorities have a mandate pertaining to a specific economic sector, such as the energy, telecommunication, transport, or financial sectors. This first type of agency includes the UK communications regulator (Ofcom) and energy regulator (Ofgem), the Australian Energy Regulator (AER), the French rail regulator *Autorité de Régulation des Activités Ferroviaires* (ARAF), and the Federal Communications Commission (FCC), Postal Regulatory Commission (PRC), and Federal Energy Regulatory Commission (FERC) in

the United States. Germany in turn has BNetzA, the Federal Network Agency for Electricity, Gas, Telecommunications, Post, and Railway.¹ These types of agencies are also referred to as market or sectoral regulators. Competition authorities, on the other hand, seek to protect the process of competition, rather than the market participants, by enforcing competition laws. Often, these authorities include consumer protection agencies, which have been set up in order to monitor organizations' conduct. Examples of this second type of independent agency include the French competition authority *Autorité de la Concurrence*, the Federal Trade Commission (FTC) of the United States, the UK Competition & Markets Authority (CMA), and the Authority for Consumers & Markets (ACM) in the Netherlands. These market regulators and competition authorities are the parties forming the central theme of this book, and their typology is discussed in detail in the chapter on the types of agencies.

Forging independent agencies into good independent agencies

Attention has recently shifted from the question of 'What is good regulation?' to the question of 'What are good regulators?' For many years, specifically between 1990 and 2005, the focus in research and literature was primarily on substantive rules and means to make better regulation. Since the financial crisis, however, focusing on improving independent agencies and their work has been found to have a major impact on the effectiveness of these substantive rules, with the agencies' architecture and practices being seen as particularly important in this respect. Attention has consequently shifted to a new central issue: which principles should independent agencies adhere to in order to become good agencies?

Independent authorities operate in a complex landscape, with many stakeholders—enterprises, consumers, politicians, ministers, and legislators—playing an important role in and seeking to influence their decision-making processes. Agencies, governments, and the people and organizations they seek to regulate and supervise within these relationships are closely intertwined and interdependent.²

All these stakeholders' interests need to be balanced against the background of the statutory remit, the social context, and the applicable rights in each area of regulation.³ The agency has to find its way through this force

¹ In German: *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*.

² A Freiberg, *The Tools of Regulation* (Sydney: Federation Press 2010) 19.

³ T Prosser, *The Regulatory Enterprise. Government, Regulation and Legitimacy* (Oxford: Oxford University Press 2010) 19.

field, using the powers and instruments it has been given. As Prosser states, 'The regulatory enterprise is one of collaboration in determining the correct balance of different principles in each social and political context'.⁴ The regulatory ecosystem⁵ comprises many rules, procedures, and principles, and agencies have to take all these into account, while also receiving directions from politicians that may contradict the message from the general public. This dilemma puts agencies in a vulnerable position as they have to manage a whole range of expectations. On the one hand, agencies are subject to budgetary constraints as their oversight is not allowed to incur too many costs (i.e. no regulatory burden) for society and industries, while, on the other hand, the political scene and society expect agencies to reduce risks to a minimum, in the belief that they are able to oversee everything and everybody. If an accident or incident occurs, the relevant agency is blamed for lack of control and enforcement, and society is quick to ask 'Where was the regulator?' But how do we establish whether agencies have failed?

The general public's readiness to find fault has been augmented by the financial crisis, with financial market authorities being blamed for lack of enforcement and for showing too much leniency towards the financial sector. In addition, the internet and social media mean that not only have society in general, and consumers in particular, become more alert and assertive, but so, too, have agencies become more visible. This puts more pressure on agencies to perform instantly and promptly. Moreover, we are living in a world where technological developments are following each other in quick succession. Legislators are finding it difficult to keep pace with the speed of these developments and to anticipate every single potential problem in legislation. Agencies consequently need to be given wide-ranging discretionary powers and tools to ensure they are able to cope with these developments and, where necessary, intervene.

Given, however, limited capacity and resources, it is obviously impossible for any party to oversee every risk and potential problem in society. Agencies have to prioritize if their work is to be efficient and effective, and the way they analyse risks and select cases has become an art in itself. Although there is a clear desire, especially among politicians, to restrict the number of independent agencies, the latter are in practice being charged with more and more

⁴ *ibid* 235.

⁵ This term is taken from Professor Kovacic, who referred to the 'regulatory ecosystem'. See D A Hyman and W E Kovacic, 'Enforcing Competition Law: Benefits and Costs of a Multi-Purpose Agency', draft date unknown, <<https://www.law.upenn.edu/live/files/1140-dualpurposecompetitionagency.pdf>> accessed 25 April 2014.