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The Design of Competition Law Institutions

Global Norms, Local Choices

Edited by Eleanor M. Fox and Michael J. Trebilcock

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List of Abbreviations

AB	Appellate Body
ACCC	Australian Competition and Consumer Commission
ACT	Australian Competition Tribunal
AER	Australian Energy Regulator
ALJ (US)	administrative law judge
AMA (Japan)	Anti-Monopoly Act
AMC (China)	Anti-Monopoly Commission
AMEA (China)	Anti-Monopoly Enforcement Agencies
AML (China)	Anti-Monopoly Law
AMP (Can)	Administrative Monetary Penalties
AMSA (SA)	Arcelor Mittal South Africa
ANZ	Australia and New Zealand
ANZCERTA	Australia New Zealand Closer Economic Relations Trade Agreement
ASBP	abuse of a superior bargaining position
AUCL (China)	Anti-Unfair Competition Law
AUPMR (Japan)	Act against Unjustifiable Premiums and Misleading Representations
BIAC	Business and Industry Advisory Committee to the OECD
BRIC	Brazil, Russia, India, China
CAC (SA)	Competition Appeal Court
CADE (Brazil)	Administrative Council for Economic Defense
CCE (EU)	Chief Competition Economist
CCPB	Competition and Consumer Policies Branch of UNCTAD
CDPP (Aus)	Commonwealth Department of Public Prosecutions
CER (NZ)	Closer Economic Relations framework
COPAL	program of capacity building in Latin America
CRTC	Canadian Radio-television and Telecommunications Commission
CSRC (China)	China Securities Regulatory Commission
DG Comp (EU)	Directorate General for Competition
DOJ (US)	Department of Justice
DSU (US)	Dispute Settlement Understanding
DSB	Dispute Settlement Body
ECC	Economic Council of Canada
ECMR	EC Merger Regulation
ECSC	European Coal and Steel Community
FNE (Chile)	Fiscalía Nacional Económica
FTC (US)	Federal Trade Commission
GAL	Global Administrative Law
GATS	General Agreement on Trade in Services
GATT (EU)	General Agreement on Tariffs and Trade
HSR (US)	Hart-Scott-Rodino Act
ICN	International Competition Network
JFTC	Japan Fair Trade Commission

MITI (Japan)	Ministry of International Trade and Industry
MOFCOM (China)	Ministry of Commerce
MOU (SA)	memorandum of understanding
NAAG	National Association of Attorneys General
NAFTA	North American Free Trade Agreement
NCA (EU)	National Competition Authorities
NCC (Aus)	National Competition Council
NDRC (China)	National Development and Reform Commission
NEP (Chile)	National Economic Prosecutor
NEPO (Chile)	National Economic Prosecutor's Office
NGA	Non-governmental advisor
NGO	Non-governmental organization
NPC (China)	National People's Congress
NZCC	New Zealand Commerce Commission
OECD	Organisation for Economic Co-operation and Development
OEEC	Organization for European Cooperation
PAIA (SA)	Promotion of Access to Information Act
PPO (Japan)	Public Prosecutors' Office
RCD	Regulated Conduct Defence
SA	South Africa
SADC (SA)	Southern African Development Community
SAFE (China)	State Administration of Foreign Exchange
SAIC (China)	State Administration for Industry and Commerce
SASAC (China)	State-Owned Assets Supervision and Administration Commission
SCA (SA)	Supreme Court of Appeal
SDE (Brazil)	Secretariat of Economic Law of the Ministry of Justice
SEAE (Brazil)	Secretariat of Economic Monitoring of the Ministry of Finance
SEM (ANZ)	Single Economic Market
SERNAC (Chile)	National Consumer Service
SII (Japan)	Structural Impediments Initiative
SIR (Can)	Supplementary Information Request
SME	Small- and medium-sized enterprises
SOE (China)	state-owned enterprises
STE	State Trading Enterprises
TAC (SA)	Treatment Action Campaign
TBT	Technical Barriers to Trade
TFEU	Treaty on the Functioning of the European Union
TRIMs	Agreement on Trade-Related Investment Measures
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSO (NZ)	Telecommunications Services Obligation
UNCTAD	United Nations Conference on Trade and Development
VER	voluntary export restraints
VOIP	Voice Over Internet Protocol
WTO	World Trade Organization

Contents

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Introduction

The GAL Competition Project: The Global Convergence of Process Norms

Eleanor M. Fox and Michael J. Trebilcock

I. The birth and evolution of the project

In 2004 New York University School of Law launched a project that has become a new area of law: Global Administrative Law, known in the literature as GAL. Professors Richard Stewart and Benedict Kingsbury developed this concept against the backdrop of globalization, the shrinking borders between nations, and the rise of international systems of governance.

Were these international systems of governance accountable and legitimate? Were the procedures and outputs fair? Transparent? Predictable? Were the decision-makers sufficiently expert? Were the systems efficient? How should they be assessed? Are there benchmarks by which the new institutions of governance can be evaluated?

Some scholars have engaged with the problem by invoking "global constitutionalism": rules from above. GAL attacks the problem from below.[1] GAL begins by reference to administrative law: requirements of accountability and legitimacy as informed by more specific norms such as transparency, reason-giving by decision-makers, and rights of review. Many of the GAL projects work from the ground up to uncover the process norms embedded in a system, to observe how the norms are formulated and applied, and how systems and their norms interact, with due respect to culture and context. This modus operandi does not presume a single best design or order. It reflects the aspiration, by knowledge, assessment, and increasing convergence of process norms and the institutional designs that reflect them, to improve global governance.

[1] *See* Benedict Kingsbury, Nico Krisch, Richard B. Stewart, and Jonathan B. Wiener, "Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law," 68 LAW AND CONTEMPORARY PROBLEMS 1 (2005).

A description of the GAL project and links to numerous papers written under its aegis may be found at <http://www.iilj.org/GAL/GALNetwork.asp>.

During its first five years, participants in the GAL projects studied areas of law in which the global space was occupied by global institutions with powers of rule-making and adjudication, such as trade law and environmental law. In 2010, the project list expanded to include national law with intertwined international implications, and GAL launched this project on competition law. Although competition law is essentially national, the intense global nature of markets means that one nation's system affects its sister systems, and virtually every national system affects people and firms beyond its borders. Consider, for example, the proposed and aborted iron ore joint venture of Rio Tinto (UK) and BHP Billiton (Australia); or the practices of Microsoft, Intel, and Google; or the cartels in vitamins and lysene, all of which rippled around the world and were vetted in scores of nations.

In recognition of the deep interconnections, international institutions with a competition function have expanded their number and scope. The newest player is the International Competition Network, now comprising 120 competition authorities from 106 jurisdictions. An international law of competition was once on the World Trade Organization's notional agenda, and although it slipped from the agenda, it may resurface. In any event, WTO rules and initiatives deeply affect world competition, some more explicitly than others. The procedure/process/performance norms of the global institutions that bear on competition law affect all citizens of the world.

Fortuitously, quite separately from the GAL project, the subject of procedure and process norms in competition law has become a prominent issue in the world competition community in the last several years. Christine Varney gave a speech early in her tenure as US Assistant Attorney General in charge of Antitrust devoted to process norms, particularly transparency,[2] and she initiated a project on the subject at the Organisation for Economic Co-Operation and Development.[3] Meanwhile, in Europe, issues of fairness of process in the context of the EU administrative and inquisitorial model began to take a high profile, particularly with the advent of very high fines in cartel and abuse cases that were likened to criminal punishment. The Lisbon Treaty, with the promise of accession of the European Union to the European Convention on Human Rights, has influenced the debate on what protections a guarantee of fundamental rights demands. This

[2] Christine A. Varney, Assistant Attorney General, US Dep't of Justice, Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency (February 15, 2010), <http://www.justice.gov/atr/public/speeches/255189.htm>. *See* Rachel Brandenburger, Special Advisor, International Antitrust Division, US Dep't of Justice, International Competition Policy and Practice: New Perspectives?, King's College, London (October 29, 2010), <http://www.justice.gov/atr/public/speeches/70980.htm>.

For some years Bill Kovacic, drawing on work of Douglass North and Hernando de Soto, has identified institutional and performance norms as crucial to the effectiveness of competition authorities. *See*, e.g., William E. Kovacic, "Rating the Competition Agencies: What Constitutes Good Performance?," 16 GEO. MASON L. REV. 903 (2009); William E. Kovacic, "Getting Started: Creating New Competition Policy Institutions in Transition Economies," 23 BROOK. J. INT'l L. 403 (1997).

The OECD, ICN, and UNCTAD have undertaken projects on agency effectiveness. Their projects express and reflect notional best practices for increasing agency effectiveness.

[3] *See* Procedural Fairness and Transparency—2012 (OECD), <http://www.oecd.org/document/20/0,3746,en_2649_37463_50235668_1_1_1_37463,00.html>, summarizing the OECD's three roundtable discussions on transparency and procedural fairness held during 2010 and 2011.

debate, and the policy-making and litigation surrounding it, are now a central focus of attention in Europe and elsewhere. As more jurisdictions, especially developing countries, adopt competition laws, and yet others modernize their laws, the subject has special and immediate practical importance. The GAL Competition Project is thus especially timely.

In 2010, the authors of this chapter became co-directors of the GAL Competition Project. We chose a representative selection of jurisdictions by continent or region and stages of economic development, assembled teams from these jurisdictions, and prepared a common research template.[4]

The jurisdictions/institutions represented in the study and the team members are:

Australia/New Zealand:	Simon Peart, Freshfields Bruckhaus Deringer, London
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International institutions:	Eleanor Fox, NYU, and Amedeo Arena, University of Naples

Brazil and India, two notable fast-growing economies, are not included in the in-depth studies. The Brazilian competition system was reorganized after the country studies were complete, and India's law had seen virtually no enforcement at that time. Given the importance of these two jurisdictions, we include them in our country summaries, later in this chapter.

The members of the GAL Competition team drafted papers describing the institutional design of their country or jurisdiction, identifying the mandate of the competition authority therein, the norms embedded in the system for both rights of defense and institutional performance, and the trade-offs made (for example, more administrative efficiency versus more transparency or more rights of defense), and evaluating conformity with the list of notional norms in the template. For example, the due process norms in case-by-case decision-making include the opportunity to be heard and the open-mindedness of decision-makers;

[4] The relevant part of the template is set out in an appendix to this chapter.

institutional performance norms include timeliness, expertise, transparency, and accountability. The full list is set out in the research template appended to this chapter. The group met for a workshop at New York University School of Law in February 2011 to discuss draft papers. The workshop was joined by Stephen Harris, now of Baker & McKenzie, as China expert to stand in for Xiaoye Wang and Jessica Su, whose obligations required them to remain in China.

The papers were revised in the light of vigorous discussions at the workshop and thereafter. This volume presents the papers, each of which is deeply factual and contextual as well as evaluative. This introductory essay provides an overview of the major cross-cutting themes in the papers, including major points of convergence and divergence, as well as the major normative issues relating to institutional design and decision-making processes across the developed and developing world.

We can report that our country studies, and our study of the EU and the international bodies, demonstrate a remarkable degree of consensus on the basic procedural requirements and institutional performance norms of competition law institutions. Although the systems entail a range of approaches, we, as competition law scholars and lawyers, basically speak the same "language" and care about the same procedural/process values. There are some differences, which we are able to articulate within a common frame of reference. If the point of GAL is to take a ground-up approach towards revealing and nudging convergence of process norms, competition law globally seems well on its way to substantiating the project's hypothesis.

We note the limits as well as the breadth of the project. As explained, we selected eight national competition law systems, the European Union, and four international institutions as the database for study. Perhaps this study will inspire an enlargement of the sample. Scholars will have no dearth of attractive and diverse candidates from which to choose, including Brazil and India (for which we provide summaries but no separate studies), Egypt, Indonesia, Kenya, South Korea, Mexico, Russia, and Singapore, among many others.

As suggested, we conclude, albeit within our sample, that the procedure/process norms can be fulfilled within a number of institutional designs. At the end of this chapter we ask: if this is so, what relevance has this work to the project of convergence of competition laws? Our answer is, it has high relevance. In a world of more than 100 national competition law systems and thus potential for high costs of system clashes, the sympathy of national systems to one another is a compelling objective. Convergence of procedure/process norms, which we observe herein, no less than convergence of substantive law, enhances respect, regard, and legitimacy, and thus, the sympathy of nations.

II. Themes—A synthesis

We embarked upon this project without strong preconceptions of a best model for effective and procedurally fair systems. Fundamental design choices are, to an important extent, a function of a country's history and legal, political, and

economic culture. We sought to identify specific shortfalls, on the one hand, and to identify choices likely to contribute to better performance and sense of legitimacy, on the other. In this spirit, we turn seriatim to institutional design, mandate of the agency, due process, and institutional performance.

A. Institutional design

At the start of the project we identified the three basic models: the bifurcated judicial model (the competition authority goes to court for enforcement), the bifurcated agency/tribunal model (the agency goes to a specialized tribunal for enforcement), and the integrated agency model (a commission within the agency makes the first-level adjudication). Among the nine national/regional jurisdictions studied there are examples or variants of each. Canada, South Africa, and Chile are examples of the bifurcated agency model; the EU, Japan, China, and US Federal Trade Commission are examples of the integrated agency model; and the US Antitrust Division of the Department of Justice (DOJ) exemplifies the bifurcated judicial model. India combines elements of the bifurcated agency model and integrated agency model. Australia and New Zealand combine elements of all three.

The studies reveal that, where courts are weak (as they are in many developing countries), the bifurcated or integrated agency/tribunal models have some significant advantages. On the other hand, where courts are strong, independent, honest, and efficient (as in the US), the bifurcated judicial model has some significant advantages. In jurisdictions adopting bifurcated agency/tribunal models, the South African, Chilean, and Canadian experiences reveal the importance of ensuring that the members of the adjudicative tribunal have substantial legal and economic expertise of a consistent and continuous nature. The Canadian experience demonstrates pitfalls of lack of such expertise.

Whichever model is chosen, cases go to court, whether immediately or ultimately. The studies reveal numerous problems with court systems including unacceptable delays and unknowledgeable jurists. In some jurisdictions, review of agency or tribunal determinations is de novo (South Africa) and in others review is deferential to fact-finding, at least normally and to some extent (European Union; US—appeals from the FTC). Concerns have arisen in both directions—too much intrusion by appellate courts (South Africa)[5] and too little examination by appellate courts (the European Union)[6]—thus underlining the observation that there are costs, benefits, and trade-offs of both approaches, and feasible solutions are particular to the context.

Design includes many other factors. Is competition law located in a common law or civil law system? Is enforcement civil only or also criminal? Is there one federal

[5] The South African law provides for de novo review of Tribunal decisions. This means that the Court of Appeal may substitute its judgment on facts for that of the Tribunal, and it often does. *See* South Africa country study, Chapter 7 *infra*.

[6] In the European Union, the General Court may set aside fact-finding by the European Commission only if the Commission has made manifest errors of assessment. Concerns of insufficient due process have led to proposals for more thorough appellate review.

enforcement body or more (as in China and the United States)? Is there a right of private enforcement, and how does private enforcement interact with public enforcement? The elements vary from jurisdiction to jurisdiction, with virtually all jurisdictions aspiring to efficient and effective enforcement subject to effective protection of rights, and subject to the context of the jurisdiction.

The status quo can include less-than-optimal institutions that may be politically difficult to dislodge. For example, observers of the US system note the jurisdictional overlaps of the Department of Justice Antitrust Division and the Federal Trade Commission, and some have emphasized attendant tensions.[7] Some reformers propose abolishing the competition arm of the FTC or consolidating merger review in either the FTC or DOJ. In Europe, concern focuses on the combination of the functions of investigator, prosecutor, and judge. Some reformers have proposed spinning-off the EU Competition Directorate to create an agency obliged to bring cases before an independent court, although current proposals with traction are more modest.

Dramatic changes may be difficult to execute especially at a mature stage of the institutions. Less dramatic adjustments may be the practical course, and might work better than a large reform whose own weaknesses may unfold only in time.[8] Yet sometimes major reform seems wise and achievable, as appears to be so in the case of consolidation in Brazil.

Some of the problems traceable to institutional design manifest themselves in due process and institutional performance, which we discuss below.

B. Mandate

The mandate of the competition authorities within our sample varies. All, of course, are charged with enforcing the competition law. Some authorities have consumer protection responsibilities (the US FTC, the Canadian Competition Bureau); others do not. Some function also as sector regulators (Australia). The Indian law prescribes a non-binding consultative mechanism between the Competition Commission and the sector regulators. Some systems authorize simultaneous competition and regulatory enforcement; some favor preemption by the regulatory

[7] *See*, e.g., Thomas Catan, "This Takeover Battle Pits Bureaucrat v. Bureaucrat," WALL STREET J., April 12, 2011, quoting William Kovacic, then a Commissioner of the FTC. But compare US country study, Chapter 8 *infra*.

[8] *See* John Fingleton, when Chief Executive of the Office of Fair Trading of the UK, regarding the UK Government's proposed consolidation of the UK competition authorities: "The OFT has long recognised the potential benefits of a merger between the OFT and the Competition Commission (CC), particularly the opportunity for improved consistency, more efficient use of resources and greater flexibility. That said, the current regime is widely accepted as already being impactful and effective, and reforms should therefore build on these strengths."

"Big systemic changes should only be introduced where they will clearly contribute to the promotion of growth in the economy, given the potential risks and costs involved and the time needed to bed such changes in. Generally, incremental reform is preferable. . . ." J. Fingleton, "The future of the competition regime: increasing consumer welfare and economic growth," 25 May 2011, <http://www.oft.gov.uk/news-and-updates/speeches/2011/1011>.

The UK is, however, in the process of a major consolidation of agencies.

regime. Where preemption does not occur, jurisdictions differ as to the scope of competition law in regulated sectors.

With respect to the competition law mandate itself, degrees of consistency and predictability are influenced by the objectives of the law and how clearly they are articulated. A specific objective, such as consumer welfare or total welfare, constrains the discretion of the agency and tightens its focus, both in choosing priorities and evaluating particular practices and transactions. Regimes with a broader set of objectives, such as South Africa, China, and Japan in our project, face more daunting challenges in articulating clear and consistent rules of law.

C. Due process and rights of defense

In case-by-case decision-making, integrated agencies, such as the EU, Japan, China, and the US FTC in our project, raise systemic concerns that the integration of investigation, enforcement, and adjudicative functions create bias or lack of objectivity ("confirmation bias"),[9] or the appearance of it, in the discharge of the adjudicatory functions vested in the agencies. At least in perception, integration of these functions may render the agencies "judges in their own cause." There are avenues by which these concerns can be and have been addressed even within the integrated agency format. For example, the agency can sharply separate investigative and enforcement functions from the adjudicative functions through use of different personnel and through firewalls. The European system integrates prosecutor and adjudicator and applies a non-adversarial administrative tradition common in civil law jurisdictions. This approach trades off more rights of defense (for example, to cross-examine witnesses and to argue to decision-makers with no prior involvement in the case) for more efficiency and effectiveness in enforcement. The conformity of the system to notions of basic rights, especially as applied to high-stakes litigation, is being challenged in the European Union courts and may ultimately be taken to the European Court on Human Rights. The Human Rights Court thus far has upheld the consistency with human rights of systems featuring integrated agencies at least where the system offers robust appellate court review in cases that are not hard-core criminal cases.[10] Meanwhile, the European Commission has responded to concerns about systemic bias by strengthening the functions of the hearing officer, mandating transparency of intended fines and how they are calculated, and extending state-of-play meetings to cartel cases.[11] A pending

[9] Confirmation bias entails a person's readiness to accept the version of a story that confirms his or her pre-existing beliefs. *See* Wouter Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function," 27 WORLD COMPETITION L. & ECON. REV. 202, 215 (2004).

[10] *See* A. Menarini Diagnostics, European Court of Human Rights, 27 September 2011; KME, Case C-272/09 P, European Court of Justice, 8 December 2011. *See* Wouter Wils, "EU Anti-trust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights," 27 WORLD COMPETITION L. & ECON. REV. 189, 203–6 (2011). *See* also the European Union study in this project, Chapter V *infra*.

[11] *See* Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, Fair process in EU competition enforcement, remarks at European Competition Day,