

Transparency and Networks: Accounting for Governance in the Competition Sphere

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Networks

- Feature of competition law governance.
- Why?
 - From 'rowing' to steering'
 - Delegation to regulatory bodies
 - Liberalisation
 - Globalisation
 - Information

A. National

1. Regulators + NCAs

- Concurrent jurisdiction

e.g. UK Concurrency Working Party

Consistency, case allocation, consultation

ERRA2013:

More hierarchy

Better info exchange

National

2. **Federal Systems**

- e.g. US Antitrust Taskforce
- State laws + state AGs:
 - damages actions under Sherman + injunctive relief
- States + federal levels
- Soft cooperation.
- Limited info exchange.

(Cengiz: 2012)

B. Supranational

e.g. European Competition Network

- Enforcement
- Case allocation
- Common substance, different procedures
- Exchange of confidential info
- Working groups, sub groups.

3. International

Transgovernmental -> Transnational



(Maher & Papadopoulos 2012)



1. OECD Competition Committee:

regime reviews, reports, recommendations

Regional centres (Budapest, Seoul)

2. UNCTAD Intergovernmental Group:

Code, model law, reviews,

technical assistance programmes:

Latin America and Africa, other networks



3. ASEAN expert group on competition

Capacity building

Best practice

Discussion

4. APEC Competition Policy and Law Group



5. African Competition Forum

Capacity building

6. European Competition Association

Discussion

7. European Competition Network

Enforcement



Common Languages

8. Nordic Competition Network

Discussion

Enhanced cooperation

9. Lusophone Competition Network

10. Ibero-American Competition Forum



11. International Competition Network

Virtual
Voluntary

Transparency – How Important?

Very – see OECD, ICN, ICC, ASEAN

Competition Enforcement

What about networks?

On Different Plains(Hood, 2006)

A. International

- No secret treaties
- Accounts (trade arrangements)
 - For competition:
 - No secret competition networks
 - Accounts:
 - Regime reviews
 - Survey responses (but anonymised)



B. National (sub national and supranational)

- Governance by predictable rules, openness of governance information to citizens and governance accounting
 - Applied to NCAs as agents of government
 - ICN (2013) all NCAs replying had laws and enforcement guidelines in public domain

Why transparency?

- Legitimizing strategy
- Transparency essential for credibility (ASEAN guidelines, 2007)
- Transparency universal value for NCAs (ICN, 2013)
- Issue is only when, how, and to whom.

What is Transparency?

- Clearly defined and published procedures and rules
- Methods of accounting and public reporting (who gains, who pays)
- Governance that is intelligible and accessible to the general public (Hood, 2006)



Openness

- Open but opaque
- Info can overwhelm
- Disclosure without receptors

Surveillance v. Transparency

- ‘The more closely we are watched, the better we behave.’ Bentham
- Surveillance punishes
- Risk: diversion of resources
- Removal of negotiation zone
- Undermining of effectiveness with shift from outcomes to process
- Removal of paper trails

Transparency

Transparency disciplines institutions, deters corruption, poor performance and provides a base for better and more trustworthy performance (O'Neill, 2006)

Virtuous cycle:

Transparency -> trustworthiness -> trust

BUT needs effective, ethical communication to different audiences

(O'Neill, 2006)

Networks

- Part of a communication strategy
- National reviews
 - Audiences: peers, experts, national governments, media, OECD, UNCTAD
- ICN Reports
 - Surveys, case studies on best practice
 - Audiences: peers, experts
- General public???

Audience

- Upward transparency (principal)
- Downward (to the ruled)
 - ICN Report: subjects, third parties and general public = audiences
 - Limited consistency re provision of info to general public in investigation with confidentiality the boundary

Audience II – ask the EUCJ

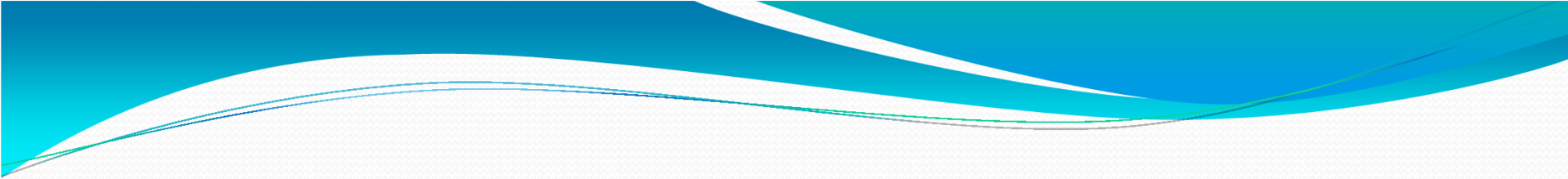
- C-360/09 *Pfleiderer*:
- National courts must balance interests of third party seeking damages against whistle blower with the interests in non-disclosure for the leniency programme
- AG Jääskinen: absolute ban on release of info not legal under EU rules see C-356/11 *Donau Chemie*

National Grid [2012] – Roth J.

Test: specific relevance to be established by the judge first reviewing documents.

Relevant Factors:

- only extracts,
- No increase in comparative liability,
- Re future leniency applicants: risk of disclosure v. risk of other member making leniency application
- Info not available from other sources
- Proportionality suggested disclosure based on relevance.

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- The scope of confidentiality and the relationship between that, effectiveness and transparency is one that the Court weighs up differently from NGAs

Who benefits? (O'Neill, 2006)

- Expert outsiders (academics, NGOs, lobby groups)
- Private v. public interest
- Powerful insiders

Directions of transparency: (Heald, 2006)

- Outward
 - monitor peers or competitors.
- Inward
 - those outside can observe into an organization

Dichotomies of Transparency

(Heald, 2006)

Event

- inputs, outputs and outcome
- Measurable
- Fairly common
- General Transparency (ICN)

Process

- procedures (rule book) and operations (how it is applied).
- Hard to measure.
- Can damage effectiveness and efficiency.
- Resource costs.
- Defensive behavior.
- Investigative transparency (ICN)

Dichotomies

- Retrospective (reporting) v. Real time transparency (surveillance)
- Nominal v. Effective transparency i.e. the transparency illusion.
- Timing: need to manage introduction of transparency.
- Note context.
- Transparency: instrumental or inherent value?
- Is it just a tool for legitimacy and fairness?
Effectiveness?

Conclusion

- Enforcement v. Discursive networks
- Varieties of transparency (Heald) shapes requirements
- Networks as tools for transparency, where communication and audience are important.