



Where to draw that line?

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What is the question?

Where should decisions in competition law enforcement lie:

- ❖ at the higher [Federal, Union] level
- ❖ at the lower [State, Member State] level
- ❖ at an even lower lever through private enforcement [designated bodies, classes, firms, individuals]

Debates about decentralisation

In the US:

- ❖ Modernization commission
 - ❖ Role of States Attorneys General
 - ❖ Proposal on indirect purchasers

In the EU:

- ❖ Modernisation regulation
 - ❖ Delegating enforcement of Article 81(3) to NCAs
- ❖ Private enforcement
 - ❖ New infatuation - the love that can do no wrong

In Canada?

- ❖ Creation of expert panel on competition policy to report 2008

Why at the higher level?

Trade reasons

- ❖ Way to reduce adverse effects of strategic trade policy [rent shifting]
 - ❖ “Nowhere is the economic inefficiency and waste of actual policies more apparent than in the area of international trade” [A K Dixit]
- ❖ A way to avoid a race to the bottom
 - ❖ Creating a favourable business environment
- ❖ Way to ensure that decisions which satisfies Kaldor-Hicks but not Pareto are not blocked

Why at the higher level?

Trade reasons [Continued]

- ❖ Way to ensure distribution of gains and losses
 - ❖ Distributional justice is generally more efficiently advanced by public taxes and subsidies rather than by the legal system
 - ❖ Financing public enforcement by raising taxes imposes a deadweight cost on economic activity

Political reasons

- ❖ Regulator better able to face down powerful regulatee
- ❖ Consistency of policy - legal certainty
 - ❖ [single standard - lowers transaction costs]

Why at the lower level?

Taking the decision close to the information

- ❖ More information available
- ❖ Better use of information
 - ❖ Fewer errors [better assessment of information]
 - ❖ Lower ex ante monitoring costs
 - ❖ Quicker decisions
 - ❖ Lower transactions costs from ex post monitoring of remedies
- ❖ Moves the decision closer to the interested parties
- ❖ Competition among enforcers may lead to innovation

Lessons from the economic theory of the firm

Issue: centralised vs decentralised decision making within firms and other organisations

Observed waves of answer over time

- ❖ Centralisation to ensure control and coherence of plans
- ❖ Decentralisation to take decisions close to information

Principal - Agent model

- ❖ Obvious model of delegation
- ❖ Formally require “contracts” which are comprehensive if not complete

Hart’s model of residual control rights

- ❖ Recognises importance of incomplete “contracts”
- ❖ Focuses on residual rights to control [who can take the ball away?]

What about transactions costs models?

The principal retains some degree of control of the agent(s) through provision of incentives

- ❖ How much discretion does the agent have?
- ❖ How can discretion be controlled?
 - ❖ What would take the role of “the contract” in the P-A model?
 - ❖ What can be achieved through setting of rules?
 - ❖ Particular problems if same “contractual” solution has to fit all (member) states and these have different procedures

If there is a continual need to fill gaps in “the contracts”, then maybe it is worth to turn to Hart’s idea

Hart's model may offer an answer by focusing on who can take the ball away

US:

- ❖ Federal funding of roads?

EU:

- ❖ Powers to take back cases = embarrassment
- ❖ Go after the firm not the authority - lesson from the Deutsche Telekom case.

But these are quite inefficient and create their own transaction costs

While the concerns about loss of control from delegation from one authority to another may be real, what about private enforcement?

- ❖ Clearly scope for conflict
- ❖ Can the private agent be controlled sufficiently through procedural rules?
- ❖ Can the public enforcement level “take the case away”?
- ❖ Might the principal be “reduced” to writing amicus briefs?

Following successful public prosecution of a price fixing case:

- ❖ Individuals should have access to redress
 - ❖ But there are incentive problems related to bringing the case [no-one wants to be the agent]
- ❖ Aggregation can solve this
 - ❖ Class actions [US] or Designated bodies [UK]
- ❖ But after so many years, how many of those harmed can verify that
 - ❖ Solution: Cy Pres awards
- ❖ Why could the competition authority not have done this in the first place? [A looks like P]

If decentralising leads to a need to recentralise,
then why do it in the first place?

or

There is a reason for why we have public
enforcement. This should be explored more fully.

- ❖ What part should be decentralised/privatised?
 - ❖ Can we find an agent?
 - ❖ What features does the agent have?

From an economic perspective I see a lot of analogies and similarities with the various theories of the firm

- ❖ The way into this area for economists

The theories of the firm also tell us that there are many ways to cut the cake without necessarily sacrificing efficiencies

- ❖ Not always possible to rank organisational forms
- ❖ Even if very different there are lessons to be learned
- ❖ If we want to import a feature from one organisation to another, we better understand how both works - especially when they look very different

Different ways to get the same outcomes brings us to “Equilibrating Tendencies”