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National Competition Authorities in France, Germany, and the United Kingdom: Resources, Independence, and Enforcement

Pierre-André Buigues & Roderick Meiklejohn[1]

I. INTRODUCTION

The optimal role of competition policy can depend on various factors: the economic development level of the countries and, as discussed by Jenny,[2] their orientation towards a market economy. The term "competition culture" is often used to describe the social and political climate for antitrust policy, which includes political will, regulatory expertise, efficient enforcement, and sufficient, targeted resources.[3]

Experts have paid particular attention to the effect of independence and resources of National Competition Authorities and of the enforcement of competition policy on the economic climate. Without an efficient enforcement scheme and penalties for anticompetitive behavior, competition law seems to be insufficient to support productivity growth.[4] For Nicholson, strong competition law does not necessarily imply effective competition policy and there is in many countries "a gap between de jure legislation and de facto implementation." For Gal,[5] laws will not change conduct unless legal sanctions and moral incentives exist.

The means of implementing laws differ substantially across jurisdictions, with regard to evidence-gathering, resources devoted to investigations, the nature of the decisions, and the sanctions. The evaluation of the performance of national competition authorities needs to take account of these differences.[6] To compare competition regimes and effective competition policy among countries, various methods have been used, including surveys of the presence or the absence of different antitrust laws and their effective implementation.

The *Global Competition Review* publishes an annual survey on the effectiveness of antitrust institutions in different jurisdictions.[7] The goal is to produce a "scoreboard based on the

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[1] Respectively, Professor Toulouse University, T.B.S. previously deputy chief economist, DG Competition, European Commission, Brussels; and Formerly DG Economic and Financial Affair, European Commission.

[2] F. Jenny, *Competition and Efficiency,* ANTITRUST IN A GLOBAL ECONOMY, (B.E. Hawk, ed. 1994)

[3] M. Nicholson, *An antitrust law index for empirical analysis of international competition policy*, 4*(4*) J. COMPETITION L. & ECON. 1009-1029 (2008).

[4] M. Tay-Chang, *Competition Authority independence, antitrust effectiveness, and institutions*, 30 INT'L REV. L. & ECON. 226-235 (2010) and M. Tay-Chang, *The effect of competition law enforcement on economic growth,*7(2) J. COMPETITION L. & ECON. 301-334 (2011).

[5] M. Gal, *When the going gets tight: Institutional solutions when antitrust enforcement resources are scarce, (41)* LOYOLA UNIV. CHI. L. 417-441(2010)

[6] W. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31(2) J. CORP. 505-547 (2006).

[7] See, specifically, GLOBAL COMPETITION REV.. 2000. Rating the Regulators. Vol 3, (2).

three Ps: policy, process and people." The users of the competition authorities (lawyers, consumer associations, economists, business people) have to answer questions on the procedure, expertise, handling of cases of the NCAs. Based on the answers, a ranking is provided of the different Authorities.

The World Economic Forum has also developed an evaluation of the effectiveness of antimonopoly policy based on the opinions of business executives. Respondents are asked to rate the "effectiveness of anti-monopoly" policy in their country on a scale ranging from 1 ("lax and not effective in promoting competition") to 7 ("effectively promotes competition"). On this indicator, the ranking of the EU countries was in 2011 among the best compared to all the countries analyzed: in the top 10 for Germany, the United Kingdom, and France. [8]

The majority of the studies on NCA independence, resources, and enforcement of competition law in a set of countries have used the set of indicators of the *Global Competition Review* or the one of the World Economic Forum. Certain academic studies examine the link between NCA institutions (resources, independence, enforcement of competition law) and their effectiveness for a large number of countries. Tay-Cheng[9] used a data set of antitrust effectiveness (proxy obtained from the survey of the World Economic Forum) and the institutional variables of the World Bank's Worldwide Governance Indicators (political stability, Government effectiveness, regulatory quality…). The weak side of this line of study is the quality of the statistical information collected for the empirical studies and its suitability for attempting to address a series of complex questions regarding the relationship among institutions and effectiveness of antitrust policy.

Rather than adopting an econometric approach based on a large number of countries, what this paper proposes is an in-depth analysis of the French, the U.K., and German NCAs. In theory, the practices of European NCAs are quite interconnected. The German, French, and the U.K. NCAs' competition practices are based on the same European competition law and all of them are strongly involved in the activities of the European Competition Network ("ECN"). They keep a watch on European case law and the decision-making practices of the other European NCAs and they are involved in the European meetings of the advisory committees on anticompetitive practices and mergers.

Further, each European NCA informs the other NCAs and the European Commission of the existence of cases that may affect trade between trade Member States. The posting online of the new cases by NCA is also used to identify cross-border cartels and a mechanism has been established to enable the NCAs concerned by such a case to entrust the entire investigation to the best placed NCA. Moreover, the ECN can ask a European NCA to carry out unannounced inspections on behalf of another European NCA or the European Commission.

This paper compares three National Competition Authorities of European countries, Germany, France, and the United Kingdom. These NCAs are perceived as being among the best and their practices are based on the same European law. We could expect many similarities on resources, independence, and enforcement of these 3 NCAs. But what are the differences in term

[8] *The Global Competitiveness Report 2011-2012*, World Economic Forum (2011).

[9] Tay-Cheng (2011), *supra* note 4.

of resources, independence, and enforcement? And if possible, how can we explain these differences?

II. COMPETENCES AND RESOURCES

A. The French Competition Authority ("Autorité de la Concurrence")

The new French Competition Authority began formally on March 2009. This new institution is the result of the growing influence and impact of EC law.

Before 2009, a bipartite system was in place for 20 years in France, competences on competition policy being shared between an independent agency—the "Competition Council"—and the Ministry of Economy, Industry and Employment. The new French competition authority, Autorité de la Concurrence, is vested with a full spectrum of enforcement powers. The Authority took over the past organization of the old Competition Council while incorporating the teams formerly in charge of carrying out dawn raids of the Ministry of Economy.

The Autorité de la Concurrence gained investigation power but relies mainly on its own resources to find cases, even if the Ministry may always bring cases. 35 percent of the resources of the Autorité were allocated in 2009 to its own initiatives (sector-specific enquiries, opinions on general competition issues, ex officio proceedings)

The Board counts 17 members—the President, four Vice-Presidents serving on a full-time basis, and 12 other non-permanent members. They are appointed by the President of the Republic upon the proposal of the Minister of Economy. A public opinion is issued by parliamentary committees competent in the field of competition after an interview of the chairman proposed by the government. The Board includes six members of the "Conseil d'Etat," of the Supreme Court, of the "Cour des Comptes," or of other administrative of judicial courts plus five individuals chosen for their expertise on competition and five individuals practicing within a company or a liberal profession.

Therefore, the Board is composed of experts coming from different backgrounds: civil judges, lawyers, economists, professionals, and consumer representatives. The members of the Board are appointed with a 5-year mandate and they adopt a position collegially. There is a clear separation between, on the one side, the Board and, on the other side, the services in charge of the instruction of the cases.

However, the Chairman of the Authority has significant decision-making powers. He may decide alone authorization of a merger transaction in stage 1, including authorization subject to conditions, or opening of a stage 2 where there is lack of evidence. He may also dismiss a claim relating to a cartel or abuse of dominant position.

There were 175 employees of the Autorité in 2010, of which 51 percent were lawyers, 27 percent economists, and 22 percent other experts. The main approach used by officials is a legal approach. The 2010 budget was EUR 20.4 Million of which EUR 15 Million was for personnel expenses.

The Paris Court of Appeal is empowered to check the legality of Autorité decisions, to make full assessments on the merits, and is increasingly being called to adjudicate on complex

economic issues. Drouas, Durand, and Hubert[10] have presented a report of the first year of activities of the Autorité based on its decisions and opinions.

The Autorité was censured by the Paris Court of Appeal (Court of Appeal, January 2010) which reduced fines imposed on a steel products cartel by more than EUR 500 Million, after the Autorité had imposed the heaviest sanctions ever imposed in France of EUR 575 Million. The total amount was reduced eight-fold by the Court! The Court considered that the seriousness and impact of the cartel had been moderate and so did not justify such heavy sanctions in proportion of the turnover of the firms directly involved.

B. Bundeskartellamt

The Bundeskartellamt (BKartA) is the oldest independent competition authority in Europe, having been created in 1958.[11] Its responsibilities and powers are laid down in the Law against Restrictions of Competition (Gesetz gegen Wettbewerbsbeschränkungen) as modified in 1998. In addition to its duties under competition law, the BKartA is charged with overseeing the regularity of public procurement procedures. It falls within the field of responsibility of the federal economics minister but the minister is only empowered to make directives of a general nature concerning its organization and functioning. The last time such a directive was issued was more than thirty years ago. In making its decisions, the BKartA is required to take only competition policy considerations into account. In merger cases, the minister may override a decision of the BKartA on broader policy grounds but this power has seldom been used.

In examining merger cases and investigating alleged anticompetitive practices, the BKartA has powers to demand the production of documents and to enter and search premises. Since 2005, it has also been able to carry out sectoral inquiries on its own initiative. Eight such inquiries had been completed by the end of 2012.

The competition law enforcement activities of the BKartA are entrusted to twelve divisions, which each have power to make decisions on individual cases without reference to the President of the authority. The latter is responsible for the overall policy and organization of the authority, as well as external representation. Nine of the twelve decision-making divisions are responsible for clusters of economic sectors, while the other three specialize in cartels.

The BKartA has a total staff of 320, of whom 223 are employed in competition enforcement. Its budget in 2012 was EUR 25 Million.

C. Office of Fair Trading and Competition Commission

The United Kingdom currently has a bipartite system of competition law enforcement with responsibilities divided between two independent bodies: the Office of Fair Trading ("OFT") and the Competition Commission ("CC"). The CC intervenes when in-depth market investigations are required or, in merger cases, when the OFT considers that there may be

[10] M. Drouas, E. Durand, & P. Hubert P. *L'Autorité de la Concurrence, un an après: Points de vue d'usagers*, CONCURRENCE*s*, 34-43 (2010).

[11] Although a Monopolies and Mergers Commission was established in the United Kingdom ten years earlier, its independence, resources and, powers were much more limited than those of the BKartA.

grounds for prohibiting a merger. In 2012, however, the government submitted draft legislation to Parliament aimed at combining the two bodies by 2014.

The OFT was, in effect, set up pursuant to the Fair Trading Act 1973.[12] In 1998 the Competition Act aligned U.K. competition law with that of the European Union, enhanced the powers of the OFT, and created the CC to replace the former Monopolies and Mergers Commission.

The OFT is headed by a board, including a chairperson and Chief Executive, appointed by the Secretary of State for Business, Innovation and Skills. The members of the CC are also appointed by the Secretary of State, following an open competition. The CC currently has 37 members, who constitute a panel from which a group of three or more is nominated by the Chairman to undertake each inquiry. The Council, which is responsible for the management and strategy of the organization, is composed of the Chairman and some of the other members together with the Chief Executive.

The OFT has wide powers of investigation, including the right to demand the production of documents and to enter and search premises with a magistrate's warrant. It may also impose fines on businesses up to 10 percent of turnover or initiate criminal prosecutions of individuals who participate in cartels. Criminal penalties may include fines, imprisonment for up to five years, and disqualification from serving as a company director.

As well as responding to complaints and specific allegations of anticompetitive behavior, the OFT examines mergers and, on its own initiative, carries out market studies and submits opinions on the competition impact of existing and proposed legislation.

The CC does not have power to initiate inquiries but conducts investigations at the request of the OFT (Phase 2 mergers and market investigations), the government in some merger cases, and the sector-specific regulators.

In 2010 the two bodies had a combined staff of over 800 and a combined budget of EUR 107 Million. However, a large part of the OFT`s workload is related to consumer protection while the regulation of network industries probably accounts for at least half of that of the CC. Neither body is structured in such a way as to clearly distinguish the resources devoted to competition law enforcement.

Appeals against decisions of the OFT normally lie to the Competition Appeal Tribunal, which also hears cases related to sector-specific regulation.

[12] However, it only exists as a corporate entity since the Enterprise Act 2002, which came into force in 2003, all the relevant powers and responsibilities having been hitherto vested personally in the Director General of Fair Trading.

Table 1: Human Resources and Budgets (2010)

		Autorité	BKartA	OFT*	CC**
No. of employees		175	320	683	122
Of which	Lawyers (%)	51%	23%	-	-
	Economists (%)	27%	23%	-	-
	Others (%)	22%	53%	-	-
Budget		20.4 Mio EUR	25 Mio EUR (2011)	81.6 Mio EUR	25.3 Mio EUR

Source: Annual reports of Bundeskartellamt, Autorité de la Concurrence, OFT, Competition Commission, and Global Competition Review.
*Includes consumer protection activities.
**Includes activities related to regulation of network industries.

D. Major Differences

1. Larger Resources for the BkartA and the U.K. Authorities

There are only 175 employees in the Autorité compared to 320 in the BKartA and over 800 in the U.K. authorities. However, unlike the Autorité, the German and U.K. bodies have responsibilities outside the field of competition policy. The BKartA is responsible for overseeing public procurement contracts, while the OFT plays a major role in consumer protection[13] and the CC investigates regulatory issues. Nevertheless, these additional responsibilities do not fully explain the differences in the numbers of employees. It is noteworthy that the Competition Commission alone has a larger budget than the Autorité.

2. Decentralized Structure Versus Centralized Structure

The BkartA has a highly decentralized structure and decisions are taken by the heads of the 12 divisions. The CC is also largely decentralized, since its reports and decisions are adopted on the authority of the individual *ad hoc* groups of members. The Autorité and the OFT, on the other hand, are highly centralized and only their Boards have decision-making powers. In certain specific cases, the Chairman of the board may take decisions alone.

3. Sectoral Approach Versus General Approach

Units are organized mainly by industry sector in the BkartA whereas in the Autorité antitrust units are not structured by sector and there is only one large Merger unit. The OFT organizes its work mainly around markets, although it has specialized units dealing with cartels and mergers. The former also works with other units on consumer protection issues, while the unit responsible for services, infrastructure, and public markets also undertakes tasks related to competition law enforcement. In the CC, specialist knowledge of sectors or markets is an important factor taken into account by the Chairman when selecting inquiry groups from among the members. However, the support staff are not organized along sectoral lines.

4. Quick Rotation Versus Long Mandate

[13] In combining competition law and consumer protection functions, the OFT resembles the Federal Trade Commission in the USA and the competition authorities in other English-speaking countries, such as Canada, Australia and New Zealand.

In the BkartA, there is a quick rotation of the presidency but no major institutional reform. By contrast, Bruno Lasserre, who had chaired the Competition Council since 2004, now chairs the Autorité, although at the same time there was a major institutional reform of the Autorité in 2009. The whole U.K. system underwent a major reform in 1998 and the management structure of the OFT was changed radically in 2003 by the creation of a Board to replace the former post of Director General.

As noted above, the U.K. system is likely to be further reorganized in the near future. In terms of rotation in the top posts, the two U.K. bodies differ. The current chairman of the OFT has held office since 2005. Although the OFT`s present Chief Executive was appointed only in 2012, his predecessor had occupied the post for seven years. In the CC, on the other hand, both the Chairman and the Chief Executive were appointed much more recently.

III. LEGAL SERVICES AND ECONOMIC SERVICES

A. Legal Service

In all the institutions, the legal service has the following missions:

- It is consulted on competition law questions and may produce memoranda or studies;
- It may provide assistance to the board during the course of the examination of a case;
- It participates in the preparation of the decisions and opinions (to ensure consistency with prior practice and national and European case law);
- It ensures the monitoring of the enforcement of decisions; and
- It coordinates the participation of the authority in meetings organized by the European Commission.

In the Autorité, the legal service is placed under the authority of the President and is composed of one Director, two Deputies, one principal legal advisor, and four legal advisors. The legal service assists the President and the Vice presidents in the "decisional" phase of litigation and advisory procedures.

In the BkartA**,** legal matters are the responsibility of two divisions—one dealing with procedural aspects and the other responsible for general questions of competition policy. Both divisions are placed under the authority of the Vice-President.

In the OFT**,** the chief legal adviser (General Counsel) is responsible to an Executive Director and has a staff including (in full-time equivalents) 22 lawyers, of whom four deal specifically with competition law. The team of legal advisers of the CC includes four senior lawyers and four others.

B. Chief Economist's Service

The Economic Service of the all the authorities has similar tasks:

- It contributes to investigation, strategy and inspection requests;
- It helps in consolidating the economic reasoning; and
- It responds to possible economic studies produced by the parties.

In the Autorité, the Economic Service is placed under the authority of the General Rapporteur and is composed of one chief economist, one deputy, and four economists.

In the BKartA, the Economics Unit was created in 2007 as part of the General Policy Division. Its main tasks are to make recommendations on general policy issues, contribute to sector inquiries, and support and advise the independent decision-making divisions. However, it has no power of veto over proposed decisions. There are currently five economists in the economics unit. An increasing number of testimonies of external economic experts needs to be evaluated, in particular in the fields of market definition and mergers (12 in 2009, 18 in 2010).

In the OFT, the Chief Economist is responsible to one of the two Executive Directors and is assisted by the full-time equivalents of ten economists, including two Directors. In the CC the Chief Economist is assisted by two Directors of Economic Analysis and nine other economists.

C. Major Differences

In all three countries the NCAs` specialized legal and economic services serve three main purposes: to advise on individual cases and market investigations, especially when these raise difficult or novel questions, to give independent opinions on draft decisions, and to develop policies and methodologies. The functions are combined in this way because they are closely interconnected.

In order to formulate timely, relevant and workable proposals, the policy units need to be familiar with the practical realities of casework and market investigations. However, the officials in these units also need time for research, reflection, and consultation on broader issues. It is therefore important that these units should have sufficient resources to avoid being swamped by the more urgent demands of ongoing investigations. As far as staffing levels are concerned, it appears that the U.K. competition authorities are better equipped than those of France and Germany to meet these demands.

To what extent do these differences of the NCAs have an impact on merger and antitrust decisions?

IV. MERGER DECISIONS

A. Autorité de la concurrence

The Autorité is responsible for merger control but the government may have the final say. The Ministry may reverse a decision of the Autorité on a merger notably on the grounds of industrial policy considerations; for example, the competitiveness of companies or the preservation of employment. The Ministry may also request the opening of an in-depth stage II investigation, even if in theory the Autorité may reject this request,

Merger transactions above a certain size must be notified to the Autorité. The reform of 2009 did not modify the general notification thresholds. The EUR 150 Million threshold of total turnover achieved by all the parties and the EUR 50 Million threshold of turnover achieved by at least two of the parties in France were maintained. However, new notification thresholds were introduced in retail distribution or in French overseas regions (respectively EUR 75 Million and EUR 15 Million).

In 2010, the Autorité issued 192 clearance decisions (85 in 2009), of which seven clearances were subject to commitments (three in 2009). Almost one-half of the merger cases concerned retail trade. Four merger cases that had been notified to the European Commission were also referred to the Autorité by the Commission.

The merger unit is in charge of examining all mergers notified and to ensure the monitoring of commitments made in this respect. It is a growing unit of the Autorité with a director, two deputies, 12 case officers, and three registrars.

The Autorité has published guidelines presenting its processes, methods, and practices (December 2009).[14] The guidelines underline the importance of economic analysis in merger control. An appendix guides companies on how to present economic studies in support of the notification.

B. Bundeskartellamt

Mergers must be notified to the BKartA if the global turnover of all the parties is above EUR 500 Million, the turnover of one firm in Germany is above EUR 25 Million and (since 2009) one other party has a turnover in Germany of at least EUR 5 Million The decision of the BKartA is binding, subject to review by the courts, but in very rare cases the government may override that decision on public interest grounds.

German law currently applies the dominance test to decide whether a merger should be approved or forbidden. However, the government has announced its intention to amend the law by substituting the criterion applied in the EU Merger Regulation, i.e. "a significant impediment to effective competition." The BKartA has published guidelines on the application of the dominance test, as well as information notes and model texts relating to other aspects of merger control.

Each merger case is allocated to the appropriate decision-making unit according to the sector concerned.

In 2011 the BKartA received 1,100 merger notifications, of which only 15 were subjected to an in-depth (Phase 2) review and two were forbidden. In one case a merger was authorized in Phase 2 after the parties had offered remedies to the competition problems.

C. OFT/CC

In the United Kingdom, prior notification of mergers to the OFT is optional. However, mergers that have not received prior approval may be reviewed by the OFT after completion. In such cases any reference to the CC (equivalent to opening of the Phase 2 procedure under the EU Merger Regulation) must occur within four months of completion or of the date when the merger was made public. Mergers are subject to control if the acquired firm has a turnover in the United Kingdom in excess of £70 million (currently about EUR 88 Million) or if the merging firms have a combined share of over 25 percent in any U.K. product market.

[14] B. Lasserre, *The New French Competition Authority: missions, priorities and strategies for the coming years*, Autorité de la Concurrence (2010)

The government has the right to intervene only in "public interest" cases, i.e. where the merger involves a defense contractor, where it may affect the plurality of the mass media, or where the stability of the financial system must be taken into consideration. The OFT and CC have published detailed guides to the procedural and analytical aspects of merger control, including best practice guides on the presentation of economic analysis and consumer surveys. If the OFT considers that a merger may lead to a "significant lessening of competition" it refers the case to the CC unless it considers that commitments offered by the parties will obviate the potential harm. In the financial year 2010/2011 the OFT examined 59 mergers, referring eight to the CC, which subsequently cleared them. In four cases, the OFT accepted commitments in lieu of a referral to the CC.

Table 2: Merger Control decisions in 2009 and 2010

	Bundeskartellamt		**Autorité de concurrence**	
	2009	***2010***	***2009***	***2010***
Clearances	899	888	85	192
Clearances subject to commitments	5 (all in phase 2)	3 (all in phase 2)	3 (all in phase 2)	7 (5 in phase 1 and 2 in phase 2)
Prohibitions	3	1	0	0
Total	**902**	**889**	**94**	**198**

	OFT/CC	
	2009/10	***2010/11***
Clearances	50	55
Clearances subject to commitments	5 (4 in Phase 1)	4 (all in Phase 1)
Prohibitions	1	0
Total	**55**	**59**

Source :Rapports annuels Autorité, BkartA (2011), Tätigkeitsbericht 2009/2010, p.158., Annual Reports of OFT and CC

D. Main Differences

1. Difference in the Number of Mergers Analyzed

The thresholds are different in the three countries, much lower in Germany and the United Kingdom than in France. The United Kingdom is unusual in that it also has a market share threshold and prior notification is not obligatory. The effect of the lower notification threshold in Germany is clear as the number of clearance decisions was more than 4 times higher in Germany than in France in 2010. As far as the United Kingdom is concerned, the number of cases examined by the competition authorities is very small in comparison with either of the other two countries, even though the intensity of merger activity is greater in the United Kingdom. The main reason for this anomaly is probably the fact that prior notification is optional while post-completion review is carried out only at the discretion of the OFT (or the government in very rare "public interest" cases).

2. Differences in the Number of Prohibition Decisions

Even if the numbers of mergers scrutinized by the two NCAs are quite different, the mergers cleared subject to commitments are similar: for 2009 and 2010, eight in Germany, ten in France, and nine in the United Kingdom. However, the BkartA has taken three prohibition decisions in two years whereas none were taken in France and only one in the United Kingdom.

V. PENALTIES

Financial penalties are the classical response for cartels and the abuse of a dominant position. Fighting cartels is one of the first priorities of all NCAs but the credibility and the effectiveness of competition policy relies on credible deterrence. The penalties have two objectives, punishing infringements and deterring firms involved in the cartels from recidivism.

Nearly all the European NCAs, including those discussed here, have adopted a three-step approach to calculating fines. First calculated is an amount for each company involved depending on its own sales related to the infringement and on coefficients reflecting both the duration and seriousness of the infringement (France has introduced also a legal criterion of the harm to the economy). Second, this amount is individually adjusted to take into account aggravating and mitigating circumstances (for example the firm being the leader of the cartel, the duration of the practices, the possible repeated nature of the infringement and, other factors). Finally, the amount of the fine is not to exceed the legal European threshold, 10 percent of the worldwide turnover of the group of firms involved.

In Germany and the United Kingdom, managers and directors who are found by the courts to have played a leading role in organizing a cartel may be subject to individual sanctions, including fines and imprisonment for up to five years. In Germany, however, fines imposed on individuals may not exceed EUR 1 Million and prison sentences may only be imposed in cases of bid-rigging. In the United Kingdom, individuals found guilty of organizing cartels may also be barred from holding company directorships for up to 15 years.

In the United Kingdom there has so far been only one prosecution of individuals since criminal law sanctions were introduced by the Enterprise Act 2002. The case concerned an international cartel in the market for marine hoses, i.e. specialized hoses used to transfer oil and petroleum products into and out of tankers. The cartel engaged in bid-rigging, price-fixing, and market allocation. Three company executives were found to have played leading roles in the cartel and sentenced (after review by the Court of Appeal) to terms of imprisonment ranging from 20 months to three years. They were also disqualified from serving as company directors for periods of 5 to 7 years.

Table 3: Trends in penalties over the period 2004/2010

Autorité Concurrence	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**Total**
No. of decisions imposing fines	26	31	13	24	16	15	12	137
No. of cos. or groups of cos.s or bodies sanctioned	137	137	178	94	82	58	50	

Total amount of penalties (M EUR)	50.2	754.4*	128.2	221	631.3**	206.6	439.5	2431.2

(*) of which 534 million Euros imposed in the mobile phone sector
(**) of which 575.4 million Euros imposed in the sector of trade in steel products

Bundeskartellamt[(1)]	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**Total**
*No. of decisions imposing fines**	3	4	3	5	7	9	8	53
*No. of cos. sanctioned (without individuals)***	13	19	11	20	40	27	36	
*Total amount of penalties (M EUR)(imposed)****	58	163.9	4.5	434.8	313.7	297.5	266.7	1539.1

[1]Since 2005 harmonization with EU fines rules (e.g. 10% of turnover threshold). Appeal pauses payment requirement (but 5% interest in case of later payment).
Source: (*)BkartA (2005), Tätigkeitsbericht 2003/2004, p. 230; BkartA (2007), Tätigkeitsbericht 2005/2006, p. 230 – 231; BkartA (2009), Tätigkeitsbericht 2007/2008, p. 184 – 185; BkartA (2011), Tätigkeitsbericht 2009/2010, p. 164 – 165. (**) based on press releases of BkartA. (***)BkartA (2011), Tätigkeitsbericht 2009/2010, p. 39
Source : Bundeskartellamt, annual report 2010.

OFT	**2004/5**	**2005/6**	**2006/7**	**2007/8**	**2008/9**	**2009/10**	**2010/11**	**Total**
No. of decisions imposing fines	5	3	1	1	2	2	3	17
No. of cos. or groups of cos. or bodies sanctioned	15	23	54	1	13	109	14	229
Total amount of penalties (M EUR)	3.4	6.9	2.1	177.5	316.8	189.1	307.7	1003.5

Source: OFT Annual Reports

A. Main Differences

The number of decisions imposing fines is much larger in France than in Germany and even more so in the United Kingdom. For the period 2004/2010, we have 137 decisions imposing fines in France against only 53 in Germany and 17 in the United Kingdom. Moreover, the total amount of penalties is EUR 2431.2 Million in France, compared to EUR 1539.1 Million in Germany and EUR 1003.5 Million in the United Kingdom. However, on average, the amount of

penalty per decision is largest in the United Kingdom: EUR 59 Million, compared to EUR 29 Million in Germany and EUR 17.8 Million in France.

Clearly, the policy followed by the three NCAs is not the same: 2.6 more decisions imposing fines in France than in Germany and 8 times more than in the United Kingdom for a period of seven years but the amount of fine per decision in the United Kingdom is twice as great as in Germany and more than three times larger than in France.[15]

B. Cartel Fines

The large majority of practices sanctioned by fines were cartels in all three countries. The competition practice developed has generally acknowledged the fact that agreements that lead to price-fixing, quotas, and market sharing are the most detrimental to competition. How many cartels were sanctioned by the three NCAs in 2009 and 2010?

1. Autorité

In 2010, ten cartels were sanctioned and there was one mixed decision (cartel and abuse of dominance) and in 2009, nine cartels and two mixed decisions.

2. Bundeskartellamt

In 2010, eight cartels or anticompetitive agreements were sanctioned by fines: seven hardcore cartels and one other case of horizontal cooperation. The total figure for 2009 was the same, including two hardcore cartels, five other cases of horizontal cooperation, and one vertical arrangement.

3. OFT

In the financial year 2009/2010 fines were imposed on 103 participants in a wide-ranging bid-rigging cartel in the construction industry and on six recruitment agencies taking part in a cartel to supply candidates for jobs in the building industry. In 2010/2011 fines were imposed in two cartel cases (tobacco products and airlines) and one case of abuse of a dominant position (pharmaceuticals).

VI. COMMITMENTS

During a procedure, merger, or antitrust procedure, an undertaking can propose commitments to the NCA (changes in its behavior) so as to respond to the competition concerns raised. If the NCA considers the commitment to be relevant, credible, and verifiable, it can decide to put an end to the procedure, after carrying out a market test so as to assess the relevance of the commitment. Commitments are solutions welcomed by NCAs, as they are in the interest of the NCA itself, freeing up resources that can be allocated to other cases, but they are also in the interest of the firms, as they can determine a solution before any infringement finding is made. The commitments are therefore made at the initiative of the undertakings. Once accepted by the NCA, the commitment becomes binding and if the firm fails to comply with this commitment it faces a penalty.

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[15] Nevertheless, a study carried out by London Economics for the OFT estimated that U.K. fines were about 65 percent lower than EU fines in comparable circumstances. London Economics, *An assessment of discretionary penalties regimes*, OFT1132, (2009).

Table 4: Commitments

2004*	2005**	2006**	2007***	2008***	2009****	2010****	Total 2004/2010
BKART							
Merger decisions with commitments							
2	4	6	8	4	5	3	32
Antitrust decisions with commitments (« Verpfllichtungszusagen")							
0	0	0	4	14	4	30	52
2	**4**	**6**	**12**	**18**	**9**	**33**	**84**
AUTORITE CONCURRENCE							
0	6	6	8	7	3	7	37
For the authority only the total is available							
OFT/CC							
Merger decisions with commitments							
6	8	11	12	7	5	4	53
Antitrust decisions with commitments							
1	1	5	3	3	5	3	21
7	**9**	**16**	**15**	**10**	**10**	**7**	**74**

Sources: Annual report, Autorité Concurrence, Annual Reports of OFT and CC
**BkartA (2005), Tätigkeitsbericht 2003/2004, p. 216;*
***BkartA (2007), Tätigkeitsbericht 2005/2006, p. 225 / 230 – 231*
****BkartA (2009), Tätigkeitsbericht 2007/2008, p. 178 / 184 – 185.*
*****BkartA (2011), Tätigkeitsbericht 2009/2010, p. 158 / 164 – 165*

In seven years (2004/2010), we have only 21 antitrust decisions accepting commitments by the OFT against 37 by the French NCA and 52 by the German NCA. As noted above, the number of U.K. antitrust cases leading to fines is also much lower in the United Kingdom than in the other two countries. This suggests that the OFT gives a much lower priority to pursuing individual cases, perhaps because of its heavy workload in the field of consumer protection and its apparent preference for industry-wide investigations.

Furthermore, the practice of commitments is much more frequently implemented in Germany than in France. One possible explanation for this could be that the higher average fines in Germany give companies a stronger incentive to propose commitments during a procedure before any infringement finding is made. The possibility that individual managers can also incur sanctions in Germany may also cause companies to adopt a more cooperative attitude towards the BKartA.

These factors could explain why the number of decisions imposing fines is much larger in France than in Germany and the United Kingdom; the firms involved in a procedure in the latter countries favoring a solution before a fine or other sanctions are imposed by the NCA.

VII. SETTLEMENTS

The settlement procedure allows firms that do not contest the objections made against them and cooperate with the investigation to benefit from a reduction in penalties. The benefit for the NCA is to save resources and time.

A. The Autorité

Under settlements, companies were required to make commitments to modify behavior in the future but since 2008 such commitments are only optional, although their implementation may result in a higher reduction in penalty.

The settlement procedure was used six times in 2009 and twice in 2010. In seven years, 2004-2010, this procedure was applied 27 times.

B. BKartA

In Germany settlements have been possible in cartel cases since 2007. In the four years up to 2010 settlements were agreed in 22 cases. However, some of these were so-called "hybrid settlements," which were accepted by only a sub-group of the parties involved in the infringement. The BKartA considers that even such partial settlements are helpful, in part because they facilitate the prosecution of the remaining cartel members.

C. OFT

The settlement procedure (known as early resolution) is less commonly used in the United Kingdom than in France. The main reason for this is that the OFT carries out fewer in-depth investigations of individual antitrust cases. In the past six years there have been only seven cases with early resolution. As in Germany, a settlement may be agreed with some but not all of the participants in an alleged cartel.

VIII. LENIENCY

The chances of detecting a cartel are relatively low and NCAs have encountered undeniable success since the introduction of leniency. A firm can get complete immunity if it blows the whistle on a cartel in which it takes part. The leniency has introduced a strong instability in cartels. Through the ECN, a "one-stop" system has allowed contacts between NCAs with undertakings involved in cross-border cartels.

The Autorité introduced a leniency procedure in 2001. The possibility of leniency was introduced in Germany in 2000 for hard-core cartel cases and extended to all cartels in 2006. The OFT introduced a leniency procedure in 2003. The leniency offered may include individual immunity from criminal prosecution under the anti-cartel provisions of the Enterprise Act 2002.

Table 5: Cases with Leniency Applications

2004	2005	2006	2007*	2008*	2009*	2010*	Total
Autorité							

5	6	8	1	18	5	7	50
* Not including summary leniency applications made in the framework of the European Competition Network, 4 in 2007, 8 in 2008, 5 in 2009 and 9 in 2010.							
Bundeskartellamt							
5	13	6	12	26	20	25	107
OFT							
2	9	8	12	22	15	20	88

Clearly, the number of leniency applications is much larger in Germany and the United Kingdom than in France. For the period 2004-2010, 107 in Germany, 88 in the United Kingdom, and only 50 in France, even if the number of decisions imposing fines is much larger in France (137) than in Germany (53) and the United Kingdom (17). That is surprising as we could expect that firms under threat of a fine would be more willing to engage in settlement. A partial explanation may be that the fines imposed in Germany and the United Kingdom tend to be higher and that managers may face individual penalties in these two countries.

IX. CONCLUSIONS

Our overview of the competition authorities in three major European countries reveals significant similarities but also remarkable differences.

The similarities between the national authorities result to a large extent from the pressure exerted by the EU for the harmonization of competition laws and enforcement practices but also from a global trend towards convergence, promoted by the exchange of ideas between academics and practitioners, notably in the framework of the International Competition Network.

In all three countries, the competition laws are essentially the same, being based on EU law. The competition authorities also have similar powers of investigation and can make use of similar tools, such as fines, commitments, early settlement procedures, and leniency.

Another major common feature is that the enforcement of competition law in all three countries is now entrusted to independent agencies. While the government appoints the members of the ruling body of the competition authority, the appointments are for fixed terms. In all three countries, the government retains some residual decision-making powers, mainly in relation to exceptional merger cases, but these powers are very rarely used. All the competition agencies are subject to judicial review.

At present, the United Kingdom shows a notable organizational difference from France and Germany in that powers and responsibilities are split between two bodies, the OFT and the CC, rather than vested in a single agency. However, the government intends to merge the two bodies in 2014.

In terms of resources of the NCAs, there seems to be a wide disparity between the three countries, even if comparisons are rendered difficult by the fact that both the BKartA and the OFT have responsibilities outside the field of competition law. However, this disparity is not obviously reflected in the outputs in terms of the numbers of decisions and settlements.

With regard to merger control, the three countries differ strongly. In France and Germany, prior notification of qualifying mergers is obligatory. Prior notification is only optional in the United Kingdom, although the OFT can challenge a merger within four months of its completion. The three countries also set different thresholds to define which mergers are subject to control. One result of these differences is that the BKartA takes many more merger decisions every year than the Autorité, while the U.K. authorities intervene in relatively few merger cases.

Although all the NCAs use the same instruments for dealing with antitrust cases, they vary in the extent to which they use each instrument. France imposes the largest number of fines and the United Kingdom by far the smallest, but the average fine is lower in France than in the other two countries. On the other hand, Germany accepts more commitments in antitrust cases. For reasons which are not clear, early settlements occur much less frequently in the United Kingdom than in France and Germany, even though U.K. penalties can be relatively high. Finally, companies seem much less likely to apply for leniency in France than in the other two countries, possibly because fines tend to be lower in France.

This article has adopted a descriptive/comparative approach to the study of systems of competition law enforcement. Such an approach cannot provide direct answers to questions concerning the effectiveness of different systems or different instruments. Nevertheless, unlike quantitative approaches, which have to rely on summary indicators, it permits a clearer understanding of the differences and the similarities between countries. On this basis, potentially fruitful and policy-relevant lines of further study can be formulated. Our brief survey suggests, to mention just a few examples, that the following questions might repay further consideration:

- How great is the risk that the government's powers of appointment could be used to "capture" the competition agency?
- What are the minimum resources needed to enable a competition authority to function effectively in a developed country?
- Does the ability to impose sanctions on individuals, as well as companies, significantly enhance the effectiveness of NCAs?
- What are the advantages and disadvantages of charging competition authorities with responsibilities in other, related policy areas as in Germany and the United Kingdom? Are there significant synergies? Is there a danger that priorities will be unclear?