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# Enforcing Fintech Competition: Some Reflections on Institutional Design

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# Enforcing Fintech Competition: Some Reflections on Institutional Design[*]

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***Abstract***

This paper focuses on institutional design aspects of the enforcement of competition law and other procompetitive regulation in fintech markets. Those interventions may prove necessary because the market entry of technology-enabled innovation may depend on accessing other (competing) market operators' data and facilities or the enabling of data portability and interoperability of complementing financial services. Basic choices of allocating enforcement powers are identified. Five institutional design topics are discussed: bureaucratic enforcement styles and strategies; efficient use of administrative resources; motivation of staff; treatment of conflicting regulatory objectives; and legitimising elements in competition procedures.

***Keywords:*** fintech, competition enforcement, enforcing regulation, institutional design, enforcement style, regulatory capture

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[*] Forthcoming in Konstantinos Stylianou, Marios Iacovides, and Björn Lundqvist (eds), *Fintech Competition: Law, Policy, and Market Organisation* (Bloomsbury Hart, 2023).

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## I. INTRODUCTION

With the advent of fintech comes the expectation of fruitful disruption: the integration of financial services into the internet and mobile devices, and their combination with technologies such as artificial intelligence, cloud computing and distributed ledger technology, promise better products at lower prices. This development affects all facets of the financial industry: payment, lending and capital raising, investment and trade, as well as clearing and settlement.[1] Whether consumers – business users as well as end consumers – and investors ultimately benefit from those developments depends on various preconditions, one of which is open markets and functioning competition. This is essentially no different in fintech markets than in other markets.

Several aspects may make safeguarding competition for fintech services particularly challenging. The level of financial market regulation may be inappropriately high and thus create unjustified entry barriers for fintech firms. At the EU level, we can see that bespoke regulation, for example via the Crowdfunding Regulation[2] or the proposed Regulation on Markets in Crypto-assets,[3] aims at promoting competition through fintech.[4] The focus of this chapter is more specific than these legislative instruments:[5] the market entry of technology-enabled innovation in the financial sector may depend on access to other (competing) market operators' data and facilities or the enabling of data portability and interoperability of complementing financial services.[6] While all types of competitors – incumbent firms, start-ups, and the large digital gatekeepers ('big tech') – make use and benefit of new technologies, their stakes in these developments differ. Start-ups bring innovative business models to the market and seek to scale them as quickly as possible, attacking established business models of incumbent players such as the traditional commercial banks. The latter, therefore, may fear for their cash cows and the preferential access to their customer base, but may also want to benefit from the rise of fintech services. Furthermore, the large digital gatekeepers, operating commercial platforms or controlling the integration of new financial services in mobile devices, may strive for monetising their quasi-exclusive access to their user base. Therefore, various players in fintech markets may have specific interests in foreclosing competitors and exploiting consumers.

Competition law enforcement in these scenarios can involve complex factual issues as well as the considering and balancing of conflicting interests beyond concerns of competition and, ultimately, the drafting and monitoring of remedies that entail detailed technical instructions. Therefore, while swift intervention may seem vital to keep markets open for fintech, the enforcement of competition law may prove to be demanding, burdensome, and lengthy. For these reasons, among others, it may appear appropriate to take recourse to legislation for facilitating fintech services' market access. Examples at the

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[1] Elena Carletti and Agnieszka Smolenska, '10 Years On from the Financial Crisis: Co-operation between Competition Agencies and Regulators in the Financial Sector', OECD Note DAF/COMP/WP2(2017)8 (13 October 2017) 19.

[2] Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 OJ [2020] L 347/1.

[3] Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM/2020/593 final ('MiCA proposal').

[4] See MiCA proposal (n 3), recital 2.

[5] But see Section VI on dealing with conflicting regulatory objectives.

[6] Certainly, this does not apply exclusively to fintech innovation. See eg Commission Decisions in Cases COMP/39.592, *Standard & Poor's*, C (2011) 8209 final (15.11.2011); COMP/39.654 *Reuters Instrument Codes (RICs)*, C (2012) 9635 final (20.12.2012), Case AT.39745 *Credit Default Swaps – Information Market* C(2016) 4583 final (ISDA) and C(2016) 4585 final (Markit) (20.7.2016), where the Commission accepted binding commitments that aimed at facilitating market entry by granting third parties access to financial data via FRAND licensing agreements, allowing for the portability of information and interoperability.

EU law level include the obligation imposed on account-holding institutions to provide payment initiation services and account information services with dedicated interfaces under the revised Payment Services Directive (PSD2)[7] and the access and interoperability requirements imposed on large digital gatekeepers under the Digital Markets Act (DMA), which apply not least for the benefit of payment service providers.[8]

This raises the question of the avenue most appropriate for the formation of fintech competition rules: competition enforcement, legislative rulemaking, or possibly a hybrid form of rulemaking such as UK-style market investigation? While we have addressed this question of adequate institutional design of fintech competition rulemaking elsewhere,[9] this contribution focuses on the bureaucratic side of the enforcement of procompetitive rules and standards. The two topics are of course interrelated: when considering passing new law, a legislature needs to take into account how effective available competition law enforcement is, which essentially depends on institutional factors. Furthermore, the legislature will have to consider how a new statutory procompetitive rule could be implemented institutionally. This chapter is thus motivated by the question of how fintech competition enforcement should be designed so that the related objectives – keeping fintech markets open and competitive – can best be achieved.

A word of caution is appropriate at the outset. Addressing normative questions of institutional design is rather intricate. One can hardly hope for universally valid answers. The significance of the constitutional framework and the political, social, and economic environment in which procompetitive policy is pursued, as well as the status quo of the enforcement architecture in a particular jurisdiction, cannot be overstated. What is more, the various features, factors, and criteria that will be considered in the following are interrelated. Taken together, it should be clear that normative statements of a general nature can only be made to a limited extent.

The ambitions of this chapter are therefore modest. Starting from the typical real-world choice a legislature faces in allocating powers of fintech competition enforcement, relevant trade-offs and interrelations will be identified, and factors that need to be considered and weighed in this context will be outlined and illustrated. Ideally, this will contribute to the understanding of how certain choices of institutional design may have an impact on the effectiveness of fintech competition enforcement and may be considered when legislating. For, as Hawkins and Thomas noted,

> [K]knowledge of the way the agency bureaucracy develops and implements enforcement policy can be of considerable value at the lawmaking stage of regulation.[10]

This contribution proceeds by identifying the basic options a legislature may have at its disposal when allocating competences for enforcing fintech competition (section II). Five topics of institutional design or related to it will be touched upon thereafter. Section III discusses models of enforcement style and strategies. Section IV considers the efficient use of administrative resources, whereas section V addresses the motivation of staff. Section VI is dedicated to the dealing with conflicting regulatory

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[7] See rec 93 and arts 66, 67, 68, and 98 of Dir (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC OJ [2015] L 337/35.

[8] See rec 43 and art 6(7) of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 OJ [2022] L 265/1 ('Digital Markets Act' or 'DMA').

[9] Jens-Uwe Franck, 'Open Markets in the Era of Fintech and Big Tech: Lessons for the Institutional Design of Competition Policy', *Discussion Paper Series – CRC TR 224* (No. 367, September 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218097>.

[10] Keith Hawkins and John M Thomas, 'The Enforcement Process in Regulatory Bureaucracies' in Keith Hawkins and John M Thomas (eds), *Enforcing Regulation* (Springer Science & Business Media, 1984) 3–22, 20.

objectives and section VII focuses on legitimising elements in competition procedures. Section VIII concludes.

## II. ALLOCATION OF BUREAUCRATIC ENFORCEMENT COMPETENCES: BASIC CHOICES AND MODELS

The various aspects of institutional design discussed in the following may contribute to a better understanding of bureaucratic enforcement. In doing so, they also offer starting points for considering how enforcement should be designed so that procompetitive interventions are most effective. Yet enforcement mechanisms are not designed on a clean slate. On the contrary, individual interventions in fintech markets are unlikely to prompt a legislature to invest resources to change authority structures or to make small-scale changes to the organisational structure of a particular authority. Institutional design decisions therefore often (merely) boil down to the question of which of the existing authorities should be responsible for enforcing a certain procompetitive provision.

Against this background, this section will briefly outline the main choices that are available to a legislature when allocating enforcement powers. This concerns not only the available authorities but also their role in relation to the judiciary.

### A. Options for the Allocation of Enforcement Competences: Competition Authorities and Sector Regulators

#### 1. Competition Authorities

Competition authorities typically have the power to enforce competition laws across all industries, including those most relevant for fintech competition, namely the digital industry and the financial sector. Furthermore, it is quite common that the authority responsible for enforcing competition law also has the power to enforce other bodies of law. The most common combinations seem to be competition law with public procurement law and/or consumer protection law.[11] The latter combination appears to make sense in particular because of consumer protection law's impact on the level of market entry barriers and thus possible repercussions on competition: On the one hand, it will often be easier for incumbent players with a large user base to meet high consumer protection standards. On the other hand, consumer protection rules can lower the switching costs for consumers and, thus, their rigorous enforcement may lower barriers to entry and promote competition.

In addition, competition authorities can also be entrusted with the enforcement of particular legislative measures that aim at facilitating market access.[12] A case in point is Article 8 of the Interchange Fee Regulation,[13] which is meant to ensure that payment card issuers have the option of co-badging and that consumers may even require their bank to co-badge a single device – which may be a card or a smartphone (wallet app) – 'with all other brands offered as compatible apps (for a wallet) or other card products offered by the bank (for a card)'.[14] Various Member States, including France, the Netherlands,

[11] William E Kovacic and David A Hyman, 'Competition Agency Design: What's on the Menu?' (2012) 8 *European Competition Journal* 527, 533.
[12] Franck (n 9) sub IV.4.c, 28–29.
[13] Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions OJ [2015] L 123/1.
[14] European Commission – Fact Sheet, Antitrust: Regulation on Interchange Fees (9 June 2016) <https://ec.europa.eu/commission/presscorner/detail/de/MEMO_16_2162>.

and Denmark,[15] assigned to their respective competition authorities the power to enforce this provision.[16] Moreover, the enforcement of the DMA by the European Commission can also be seen as an example of a competition authority enforcing procompetitive legislative intervention: as far as is known, the Directorate-General for Competition (DG COMP) will be responsible for the case handling, while the Directorate-General for Communications Networks, Content and Technology (DG CNCT) will mostly supply the technical expertise required for monitoring compliance and enforcement of the DMA.[17]

### 2. Sector Regulators

#### a. Financial Market Regulators

Financial markets are typically supervised by one or several authorities the core competence of which is the implementation of financial regulation. In practice, we find jurisdictions where a single authority is competent to supervise the entire financial sector. A case in point is Germany's Bundesanstalt für Finanzdienstleistungsaufsicht ('BaFin') (Federal Financial Supervisory Authority). In most jurisdictions, including the US and the UK, but also at EU level,[18] we may observe a division of responsibilities among different authorities. Such a division can be based on institutional criteria (banks, dealers), functional criteria (banking, securities, insurance) or regulatory objectives (stability, market efficiency, consumer protection etc.).[19] While the enhancement of competition does not typically lie at the heart of financial market regulation, in the UK, for example, the legislature has clarified that the promotion of effective competition must be considered a crucial objective of the Financial Conduct Authority (FCA). For this purpose, the FCA has even been granted responsibilities for competition enforcement, which it can exercise alongside the Competition and Markets Authority (CMA), the UK's essential competition enforcer.[20] Furthermore, authorities responsible for the supervision of the financial sector have not uncommonly also been entrusted with the enforcement of rules that are meant to enhance competition. This also applies to procompetitive regulation in support of fintech. Thus, the German BaFin is responsible for enforcing provisions designed to facilitate the market entry of payment initiation services.[21]

#### b. Network Regulators

In some jurisdictions, network regulators, traditionally responsible for sectors such as energy and telecommunications, have also been given powers to enforce regulation affecting digital services. In Germany, for example, the Bundesnetzagentur (Federal Network Agency) has been assigned the enforcement of the Geoblocking Regulation.[22] Consequently, it seems not far-fetched that some network regulators will also get involved in the enforcement of procompetitive rules in fintech markets.

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[15] Note that in these Member States the authority competent for competition policy is also responsible for the enforcement of consumer protection laws.

[16] A list of the competent national authorities may be found on DG Comp's website <https://ec.europa.eu/competition/sectors/financial_services/national_competent_authorities.pdf> accessed 15 September 2022.

[17] See Euractiv of 5 July 2022 <https://www.euractiv.com/section/digital/news/commissioner-hints-at-enforcement-details-as-eu-parliament-adopts-dsa-and-dma> accessed 15 September 2022.

[18] For an oversight see John Armour et al., *Principles of Financial Regulation* (OUP, 2016) 538–45.

[19] ibid, 534–35.

[20] For a brief oversight see Carletti and Smolenska (n 1) 27–28.

[21] ss 48–52 PSSA, transposing arts 64 and 66 PSD2.

[22] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC OJ [2018] L 60 I/1.

### c. Digital Industry Regulators

As far as can be seen, there is as yet no example of an independent authority established specifically to enforce rules imposed on the digital sector. This hesitancy may have various reasons. Established authorities certainly have little interest in relinquishing competences in such a prestigious and attention-grabbing field. Further, the relevant business models are so heterogeneous that it seems doubtful how such a thing as a 'digital industry' should be properly defined. Nevertheless, to designate an authority responsible for the supervision of digital gatekeepers seems a plausible option to create enforcement synergies and to ensure a coherent digital competition policy. The question would then remain whether this authority should only be competent for the enforcement of rules that address only those gatekeepers (as in the case of the DMA) or also of provisions that are otherwise enforced by specialised authorities (such as in the case of competition law or data protection law).[23]

The UK's Digital Market Unit (DMU) comes quite close to the model of a 'digital industry regulator'. While the DMU is located within the CMA, its creation rests on the notion of a supervisor authority for the digital economy, bundling regulatory powers that go beyond the enforcement of competition law.[24]

A remarkable example of a separate authority designated for digital business models in finance is Dubai's Virtual Assets Regulatory Authority (VARA), which was established in 2022[25] 'as the competent entity in charge of regulating, supervising Virtual Assets[26] … and Virtual Asset Service Providers … conducting authorised Virtual Asset activities'.[27]

## 3. Modes of Competence Allocation

Where enforcement competences are distributed among different authorities, a multitude of variants and combinations are conceivable. In any case, it is indisputable that the mandates of the respective authorities should be defined as clearly as possible.

With an allocation of competences based on the principle of *exclusivity*, on the one hand, competences can be divided so that, for example, the competition authority is exclusively responsible for the enforcement of competition law and the enforcement of other procompetitive regulation is in the hands of sector regulators. On the other hand, responsibility for all procompetitive measures can lie exclusively with either the competition authority or a sector regulator.

Alternatively, legislatures may rely – across the board or in part – on *concurrent powers* to enforce competition laws and other procompetitive regulation. As mentioned above, in the UK the FCA has concurrent powers for competition enforcement with the CMA. Certainly, it requires additional resources to keep parallel enforcement structures in place and to avoid inconsistent enforcement activities.

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[23] Franck (n 9) 28 n 122.

[24] Niamh Dunne, 'Pro-competition Regulation in the Digital Economy: The United Kingdom's Digital Markets Unit' (2022) 67 *Antitrust Bulletin* 341, 346 and 349–350.

[25] Art (4) of Law No. (4) of 2022 Regulating Virtual Assets in the Emirate of Dubai <https://dlp.dubai.gov.ae/Legislation%20Reference/2022/Law%20No.%20(4)%20of%202022%20Regulating%20Virtual%20Assets.html>.

[26] Defined as 'a digital representation of value that may be digitally traded, transferred, or used as an exchange or payment tool, or for investment purposes. This includes Virtual Tokens [a digital representation of a set of rights that can be digitally offered and traded through a Virtual Asset Platform], and any digital representation of any other value as determined by VARA.' Art (2) of Law No. (4) of 2022 Regulating Virtual Assets in the Emirate of Dubai.

[27] Introduction to the Administrative Order No. 01/2022: Relating to Regulation of Marketing, Advertising and Promotions Related to Virtual Assets < https://www.vara.ae/media/administrative-order-01-regulatory-guidelines-18aug2022.pdf>.

However, those costs may be kept within reasonable limits through communication and division of responsibilities between the authorities. With concurrent power regimes come clear benefits: if one authority fails in enforcement, the other may step in. In fact, rivalry among authorities might drive better performance and practice.[28]

Cooperation between authorities should be encouraged not only when they have parallel powers to enforce pro-competitive rules, but also between authorities supervising the same market activities for different regulatory purposes. This can be done by facilitating the exchange of information between authorities; through granting a right or imposing an obligation to make submissions in proceedings before each other; or even in a regime that makes intervention by one authority conditional on the approval of the other.[29]

The Digital Clearinghouse is a notable initiative at the European level, initiated by the European Data Protection Supervisor, to achieve coherence in law enforcement in digital markets through closed roundtables for regulatory authorities with a focus on data protection, consumer and competition law.[30] In the UK, the Digital Regulation Cooperation Forum was set up in 2020 to provide for an institutional framework to foster exchange and cooperation with a view to regulating digital markets between various authorities. The forum was initially established by the CMA, the Information Commissioner's Office, and the Office of Communications, with the FCA joining in 2021.[31]

## B. The Bureaucracy and the Courts

Looking at the various institutional frameworks of bureaucratic enforcement powers, we see that there is a significant difference between an authority that believes to have identified a breach having to bring a case before a court to enforce the law and it having not only investigatory powers but acting as a first instance decision maker as it may require that an infringement be ceased and/or to impose behavioural or structural remedies and/or even a fine.

The latter is true for most Member States and the EU, as competition proceedings there follow what may be called an 'administrative model'. In contrast, a 'judicial model' can be observed in Ireland and Austria, where competition authorities investigate cases, yet, where an infringement is found, must bring the case before a court. In Sweden, until 1 March 2021 a separation between investigation and sanctioning applied; since then the competition authority may impose sanctions for infringements. In Denmark and Finland, which for fining decisions follow a 'weakened' judicial model, the authority may render a decision establishing that there has been an infringement, but then must bring the case before court if it wants the infringer to be fined.[32]

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[28] See William E. Kovacic, 'The Institutions of Antitrust Law: How Structure Shapes Substance' (2012) 110 *Michigan Law Review* 1019, 1035–37, posing the effects of rivalry in view of the partly overlapping responsibilities of the Department of Justice and the Federal Trade Commission as enforcers of US antitrust law as a question open to research.

[29] An illustration of the latter regulatory technique in a competition context can be found in the German law on the transposition and implementation of the Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain OJ [2019] L 111/59. To avoid inconsistencies in the enforcement of the German law transposing the Directive and competition enforcement, the authority responsible for enforcing the Directive's prohibitions (as transposed into German law) may establish infringements and impose remedies only 'in agreement with' the Bundeskartellamt. s 28(2) 1st sentence of the Agri-Organizations and Supply Chains Act (Agrarorganisationen-und-Lieferketten-Gesetz).

[30] See <https://www.digitalclearinghouse.org/>.

[31] See <https://www.gov.uk/government/collections/the-digital-regulation-cooperation-forum>.

[32] For an overview of these models see ECN Working Group Cooperation Issues and Due Process, Decision-Making Powers, Report, 31 October 2012, 5–10.

The choice among those models, in essence, involves trade-offs between the promptness of decision-making and the quality of control and legitimacy.[33] Moreover, having at its disposal the option to sanction without going to court provides an authority with more leeway for a dynamic enforcement strategy of credibly holding out the prospect of adapting its enforcement activities to the regulatees' attitude in a tit-for-tat manner.[34]

## C. Private Enforcement

While the focus here is on the bureaucratic facet of enforcement, possible interrelations with enforcement initiated by private actors and implemented through the court systems need to be mentioned.

### 1. No Private Enforcement Available

Interrelations between public and private enforcement naturally do not exist where private parties cannot take direct action in court against alleged infringers. Authorities then carry a particularly high responsibility for effective law enforcement. In some jurisdictions, however, private individuals may have the option to file suit against an authority to force it to take enforcement measures. This scenario may be classified as a hybrid between private and bureaucratic enforcement as it involves both private initiative and public enforcement capacities.[35]

A complete absence of private rights of action can have negative repercussions on the effectiveness of public enforcement because it may weaken incentives to provide the authorities with private information about violations of the law. This is because the option of claiming damages may not only incentivise direct actions against (possible) infringers[36] but also create incentives to inform authorities, trusting that they will prosecute the case, which in turn may facilitate subsequent suits for damages (so-called follow-on actions).[37]

### 2. Private Enforcement as the Sole Enforcement Avenue

In some regulatory contexts, legislatures do not provide for public enforcement but rely solely on private rights of action. In a procompetitive fintech regulation context this is the case, for example, with the so-called 'Lex Apple Pay' under German law, the right of payment service providers to access 'technical infrastructure' that contributes to mobile and internet-based payment services (including, eg, the NFC interfaces of Apple's mobile devices).[38] With a view to the big players in the payment services markets, this regulatory choice may seem appropriate. However, the availability of only private enforcement seems less convincing regarding (smaller) fintech firms, such as app developers, for whom the prospect of having to bring a case against a big tech player like Apple may appear quite daunting.[39]

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[33] Kovacic and Hyman (n 11) 535–36.
[34] Ian Ayres and John Braithwaite, *Responsive Regulation* (OUP, 1992) 51–52. See also below text accompanying n 50.
[35] Jens-Uwe Franck, 'Private Enforcement versus Public Enforcement' in Franz Hofmann and Franziska Kurz (eds), *Law of Remedies. A European Perspective* (Intersentia, 2019) 107, 108.
[36] See eg a recent class action complaint against Apple, filed on 18 July 2022: *Affinity Credit Union v. Apple Inc.*, N.D. Cal., Case 5:22-cv-04174.
[37] Franck (n 35) 122–23.
[38] s 58a of the German Payment Services Act (PSSA).
[39] Franck (n 9) sub IV.4.b, 27–28.

### 3. Parallel Availability of Private and Public Enforcement

As it is true in general, it is also true in fintech markets that in most cases both public and private enforcement instruments are provided for competition enforcement or for the enforcement of other procompetitive provisions. Ideally, the mechanisms complement each other and compensate for each other's weaknesses.

However, in the real world, parallel enforcement mechanisms can weaken each other's impact and lead to inefficiencies. A cartelist may be reluctant to file a leniency application for fear of damages claims.[40] The accumulation of fines and damages can lead to overdeterrence.[41] The availability of private rights of action may thwart a cooperative enforcement strategy[42] – which might serve compliance best in the long run – based on which an authority had (reasonably) opted for not pursuing a particular infringement.[43] Trade-offs between public and private enforcement must therefore be considered when designing institutional enforcement. They may be mitigated (for example, leniency applicants can also be privileged when it comes to damages actions[44]) but hardly ever avoided completely.

## III. ENFORCEMENT STYLES

### A. The Stylised Dichotomy of Adversarial ('Deterrence-Oriented') and Cooperative ('Compliance-Oriented') Enforcement

In the sociological literature on bureaucratic enforcement and regulation, two base models of enforcement strategies are distinguished: the deterrence model and the compliance model. As an analytical tool, these stylised conceptions are useful when reflecting on the institutional design of fintech competition enforcement.

An enforcement style according to which the authority focuses on detecting infringements and identifying, prosecuting, and sanctioning those responsible for them[45] has been characterised as 'legalistic' and 'deterrence-oriented'.[46] It will typically lead to a rather adversarial relationship between the authority and the regulated who are (potentially) subject to enforcement measures.

In contrast, a 'compliance-oriented' enforcement strategy has been identified and characterised as follows:

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[40] See Olivia Bodnar et al., 'The Effects of Private Damage Claims on Cartel Activity: Experimental Evidence', (2021) *Journal of Law, Economics, and Organization* <https://doi.org/10.1093/jleo/ewab010>.

[41] See on the concept of 'optimal deterrence' and on the possibility of over-deterrence Ioannis Lianos et al., *Damages Claims for the Infringement of EU Competition Law* (OUP, 2015) 219–235; Jens-Uwe Franck and Martin Peitz, 'Toward a Coherent Policy on Cartel Damages', *ZEW – Centre for European Economic Research Discussion Paper No. 17-009* 13–15.

[42] On enforcement styles and strategies see below section III.

[43] Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 *Osgoode Hall Law Journal* 461, 485–87, 503; Matthew C Stephenson, 'Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies' (2009) 91 *Virginia Law Review* 93, 117–19.

[44] See art 11(4) and (5) of Dir 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union OJ [2014] L 349/1.

[45] Hawkins and Thomas (n 10) 15.

[46] Eugene Bardach and Robert A Kagan, *Going by the Book* (Temple University Press, 1982/3rd Printing, Transaction Publishers, 2006) 57.

> the style is conciliatory and relies upon bargaining to attain conformity. Enforcement here is prospective: a matter of responding to a problem and negotiating future conformity to standards which are often administratively determined.[47]

This concept thus rests on the assumption that, to ensure an optimal level of compliance, it might be preferable not to pursue each infringement, or, in other contexts, to leave it at a cease-and-desist order where it would also have been possible to impose a fine. This is seen as crucial for effective enforcement as it may avoid strategies of 'minimal' or 'creative' compliance and to prevent the regulated from becoming entrenched in an attitude of resentment and resistance. The latter is one of the main themes of the work of Bardach and Kagan: rigorous, inflexible enforcement of rules may entail resentment and resistance among the regulated that may in fact undermine the regulatory objectives.[48] Instead, enforcement should aim to make the regulated genuinely aware that it makes good sense to comply with a rule, thus promoting a 'willingness to comply'.[49] This model of enforcement is thus based on a cooperative relationship between authority and regulated.

In 'Responsive Regulation', Ayres and Braithwaite have argued that, in order to translate the awareness of the inconsistencies and discontinuities in the attitudes and actions of real-world corporate actors ('profit-maximizing' vs. 'law abiding selves') into a robust enforcement policy, one will have to find a sophisticated balance between strategies of persuasion and punishment.[50] Therefore it is crucial to acknowledge and account for the dynamic character of the 'enforcement game'. In this sense, a tit-for-tat strategy may be most appropriate for ensuring compliance: the enforcer waives deterrent responses as long as the regulated firm cooperates. If it becomes apparent that the authority's cooperative attitude is being exploited, enforcement has to switch from a cooperative to a deterrent attitude. For such a dynamic enforcement strategy to work, the authority must firstly have an armoury of deterrent instruments at its disposal and secondly it must use them in a skilful manner, tailored to the respective offence. The authority is advised to explicitly display an 'enforcement pyramid' of measures that allow it to escalate enforcement in several stages if defection from cooperation is identified.[51]

## B. Financial Markets Authorities' Enforcement Style and Fintech Competition Challenges

There are good reasons to believe that authorities responsible for supervising financial markets tend to take a more 'compliance-oriented' approach to enforcement – compared to, for example, competition authorities. While scholars have identified a broad spectrum of factors that may determine the enforcement style of an authority,[52] this assumption is based on the fact that their activities are restricted

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[47] Keith Hawkins, *Environment and Enforcement* (Clarendon Press, 1984) 4. See also Hawkins and Thomas (n 10) 5, 15.

[48] Bardach and Kagan (n 46).

[49] Julia Black, 'Talking about Regulation' (1998) *Public Law* 77, 87.

[50] Ayres and Braithwaite (n 34) 9–53. The work of Ayres and Braithwaite is particularly well known for their concept of 'enforced self-regulation', according to which the regulatees design their own compliance strategy which the regulatory authority then needs to approve. This and other innovations in the design of regulatory instruments, their interplay with each other and with classical regulatory techniques, and more generally the relationship between various forms of state and private social control and conflict resolution in the pursue of regulatory goals are discussed under the label 'smart regulation'. See Neil Gunningham and Peter Grabosky, *Smart Regulation* (Clarendon Press, 1998).

[51] Ayres and Braithwaite (n 34) 35–38.

[52] Kagan has grouped these factors into four sets: legal design factors; task environment factors; political environment factors; and leadership factors. Robert A Kagan, 'Regulatory Enforcement' in Richard D Schwartz and David H Rosenbloom (eds) *Handbook of Regulation and Administrative Law* (Marcel Dekker, 1994) 383, 390–91. See Black (n 49) 87 ('the nature of the breach … and judgments as to its seriousness … the nature of the regulatees

to one particular sector and that financial service providers, as it has been noted, often 'engage with regulators on a more or less continuous basis in the context of day-to-day supervisory relationships'.[53] Indeed, it has been remarked in the literature on enforcement styles that the adoption of a compliance strategy is more likely where enforcers are dealing only with a 'limited sector of the public'.[54] More specifically, it has been argued that compliance orientation 'tends to be adopted where there is an on-going relationship between regulator and regulated, and particularly where the individuals involved know one another or share a common background or outlook'.[55] Where an authority is monitoring one particular sector and supervising a defined set of firms, and where this goes hand in hand with a continuous exchange and the developing of an ongoing relationship with the regulated that will often even entail a personal acquaintance of some type, it seems plausible to assume a tendency for a cooperative enforcement strategy.

Yet, while a compliance-oriented enforcement style might indeed be a rational strategy for the enforcement of financial regulation, it will likely lead to the authority developing a deep understanding of the interests and positions of the incumbent market participants,[56] which may eventually discourage them from tearing down entry barriers through rigorous procompetitive interventions and which may even make an authority more vulnerable to regulatory capture.[57] Certainly, one may well assume that financial market authorities can play tit-for-tat, switching gear and change into a more adversarial enforcement style if they discover to have been cheated in compliance. However, they will prefer to do so within the framework of an enforcement pyramid tailored to their regulatory domain and objectives. Therefore, all in all, it seems plausible that a financial market authority is rather hesitant to take selective confrontational, escalating action for market opening against incumbent market participants such as the traditional banking industry, towards whom they prefer to continue to act in a more cooperative enforcement style regarding financial market regulation.

Things would be different if the financial market authorities had to enforce procompetitive regulation against market participants – for example, in the digital industry – whom, incidentally, they do not supervise because they do not offer financial services. In this case, there is no (or at most a quite small) basis for a more 'compliance-oriented' enforcement style that may be generally cultivated by the authority: neither the authority nor the addressee of the regulation has a particular interest in investing in a long-term relationship of trust. However, a financial market authority would have to act then outside its comfort zone and to use an enforcement style it is rather unfamiliar with – a scenario which it will typically try to avoid.

In sum, an authority that has established a participatory, cooperative enforcement style does not seem to be the ideal promoter of fintech competition. This may be a challenge for financial market authorities when they are entrusted with enforcing procompetitive regulation, be it in fintech markets or elsewhere.

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(whether they are well or ill-intentioned, well or ill-informed, and whether the breach was careless, negligent or malicious), and the social and moral legitimacy of the regulation being enforced').

[53] Armour et al. (n 18) 561.

[54] Hawkins and Thomas (n 10) 14. In addition, the authors identify two main reasons for the adoption of a compliance strategy: 'rule-breaking behaviour' not consisting of 'clear-cut acts' but being 'episodic, repetitive, or continuous' and victims being 'not dramatically evident to the enforcement agent'.

[55] Black (n 49) 88.

[56] Martin Hellwig, 'Competition Policy and Sector-Specific Regulation in the Financial Sector', *Discussion Paper of the Max Planck Institute for Research on Collective Goods Bonn* 2018/7, 10 ('Specifying and enforcing a desired behavior requires expertise and information, which the regulator can only obtain through constant interaction with the people he supervises. This interaction creates social ties and potential biases as the people involved on the side of the authority come to understand the firms' point of view too well').

[57] On 'agency capture' see below sub V.A.

### C. Competition Authorities' Enforcement Style and Fintech Competition Challenges

Competition authorities are experienced with and tend not to shy away from taking confrontational action against the top dogs in a market. The fact that competition authorities have typically developed a rather adversarial enforcement style may have its roots above all in their fight against cartels. Indeed, cartelisation is precisely the expression of an 'unwillingness to comply', rather not indicating a compliance-oriented enforcement style. Hawkins and Thomas have observed that

> The deterrence system tends to be associated with *incidents* or *acts* of wrongdoing that by their very nature, are relatively unpredictable, thus allowing no personalized relationships to be established between enforcement agent and rulebreaker.[58]

Given its clandestine nature, cartelisation seems to be exactly the kind of rule-breaking that is included here and which will thus trigger a 'deterrence-oriented', confrontational enforcement style. Moreover, also beyond the prosecution of cartels, competition authorities are typically not involved in the continuous monitoring of specific companies.

With respect to fintech competition, the challenge for the enforcement style of a typical competition authority therefore lies rather in switching to a participatory mode when this appears useful or even necessary for effective intervention. As emphasised at the beginning of this chapter, the market entry of fintech firms may depend, inter alia, on access to competitors' facilities, the enabling of data portability, and the possibility of connecting their own offerings with those of their competitors. Consequently, to open up markets, it might for example be necessary to grant access rights to technical infrastructure or to impose obligations to provide for application programming interfaces (APIs). Implementing such elaborate and technically ambitious remedies necessarily requires cooperation with the undertakings addressed. An authority that generally pursues a confrontational enforcement strategy may find it difficult to develop the necessary relationship of mutual trust with the regulated base.

## IV. EFFICIENT USE OF ADMINISTRATIVE RESOURCES

As with any other form of organisation, bureaucratic enforcement is subject to resource constraints. An essential requirement of its institutional design is therefore to promote the efficient use of resources. An important aspect here is to enable institutions to generate economies of scale and scope. Technical, economic, legal and other expertise should be accumulated to create synergies, be it in the form of employees who are specialised in enforcing a particular set of legal rules or in enforcing the law in specific factual scenarios, or be it in the form of technical devices, such as databases, which allow for an efficient processing of information.[59]

Competition authorities with a broad mandate may realise synergies. If an authority, for example, knows and understands data accumulation, processing and exploitation by big tech, not only will this know-how be useful for enforcing competition law but it may also be fruitfully used for implementing privacy law or consumer protection law. However, an expanded scope of responsibilities will only create synergies if, as Kovacic and Hyman aptly put it, 'the functions to be combined are true policy complements and do not consist of a rubbish bin of dissimilar'.[60]

The challenge in promoting fintech competition is to combine sector-specific knowledge with an understanding of a novel business case and the technical innovations behind it. At this point, financial market authorities, which deal with this anyway due to their sector-specific regulatory responsibilities,

[58] Hawkins and Thomas (n 10) 14.
[59] Franck (n 35) 107, 125.
[60] Kovacic and Hyman (n 11) 533.

can be at an advantage. Competition authorities typically try to build up and make use of sector-related know-how through internal specialisation. How effective such special expertise may be developed depends, among other things, on the size of the jurisdiction. Only a certain number of cases justify, for example, entrusting a unit within a competition authority exclusively with financial services, as, for example, in the European Commission's Directorate-General for Competition.[61] Although the internal organisation is functionally different and thus not readily comparable, it is noteworthy that the Bundeskartellamt (to take one example) has a total of 12 so-called decision divisions (Beschlussabteilungen), one of which is responsible for financial services and insurance, but also for transport as well as tourism and the hospitality industry.[62]

The specific – as it were, 'natural' – advantage of competition authorities lies in their clear focus on the protection of competition, which is why the highest level of expertise – in fact, legal and bureaucratic expertise combined with economic and technical know-how – on the implementation of a procompetitive policy should be found in a jurisdiction's competition authority.[63] It is precisely for this reason that legislatures should consider also entrusting competition authorities with the enforcement of market-opening, procompetitive regulation outside of competition law proper.[64] However, competition authorities may have little routine when it comes to the drafting of detailed behavioural instructions and in procedures by which external technical expertise needs to be included. They are also traditionally reluctant to invest resources in the ongoing monitoring of firms' compliance with rules and remedies.[65]

Sector regulators, such as financial market authorities, are also free to pursue internal specialisation and thus concentrate the enforcement of those rules that are intended to promote competition in one unit. This unit could then also act as an 'advocate for competition' within the authority. However, we are not aware of any institution in which such a design has been implemented.

## V. REGULATORY OBJECTIVES AND MOTIVATION OF STAFF MEMBERS

Public servants' interests may lie not with optimising enforcement in the general interest but with maximising their own benefit. Such a focus might entail, for example, a tendency to raise those cases that promise public attention or those that promise acknowledgement by superiors if they are handled successfully.[66] Certainly, such agency problems can be minimised through internal organisation, behavioural guidelines, and monitoring mechanisms.[67] Moreover, leadership seems to be crucial: the tone from the top is an essential aspect in public authorities, so that each individual staff member does his or her best to ensure that the regulatory objectives are achieved in the best possible way.

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[61] See the organization chart valid as of 16.6.2022 <https://ec.europa.eu/info/sites/default/files/organisation-chart-dg-comp_en_19.pdf>.
[62] See the organization chart valid as of 1.9.2022. <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sonstiges/Organigramm.html>.
[63] See Niamh Dunne, *Competition Law and Economic Regulation* (CUP, 2015) 287, and 'Commitment Decisions in EU Competition Law' (2014) 10 *Journal of Competition Law and Economics* 399, 411–412.
[64] Franck (n 9) sub IV.4.c, 28–29.
[65] Franck (n 9) sub III.3.b, 18–19.
[66] Armour et al. (n 18) 556 ('Self-interested unelected officials … may exploit their delegated discretion with a view to seeking re-appointment, enhancing their current or future career prospects … expanding their power base, procuring additional human and financial resources for their agencies, pursuing pet projects, avoiding disputes with their political masters or the industry they regulate').
[67] ibid, 567–74 (discussing five institutional arrangements to constrain regulatory failure with a view on financial market regulation: transparency requirements, independent oversight, precommitment mechanisms, compensation, and liability).

While, prima facie, there is no reason to believe that agency problems are in general dealt with more or less effectively in competition authorities compared to financial market or network regulators, in the following we will touch on two aspects that deserve special attention for the institutional design of fintech competition policy: sector regulators are regarded as being more vulnerable to agency capture, and effective procompetitive interventions require a procompetitive mindset of the acting officials.

### A. Corruption and Agency Capture

Public enforcement is often associated with officers who are under-incentivised for effective and efficient enforcement.[68] Staff members cannot pocket fines they impose on violators and typically have no other (direct) monetary incentive to optimize enforcement. Performance-based compensation is quite a rare phenomenon and difficult to design.[69] This poses a systematic risk of corruption, namely of collusion between infringers and public enforcement agents, which results in a socially suboptimal level of enforcement.[70]

However, one should not be too quick with a critical evaluation of civil servants' incentive structure.[71] For one thing, while civil servants indeed typically receive a fixed salary, in a well-organised public bureaucracy they might rightly expect that doing a good job will pay off through a rise in the hierarchy, which will in turn lead to more power and a higher salary. For another thing, civil servants might be sufficiently eager to enforce the law encouraged through non-monetary payoff. They act in the awareness that their work serves the general interest and the public good ('public service ethos'[72]). Indeed, it seems plausible that those who enforce the antitrust laws and other procompetitive regulation draw their motivation (at least in part) from the conviction that they belong to the 'good guys'. It is therefore advisable for a bureaucracy to invest in generating an ethos from which the individual staff member can derive a non-material return.

Where the enforcement activities of an authority are corrupted, one speaks of agency capture: the regulated market participants have acquired a position to influence the enforcement process to their advantage.[73] It seems generally acknowledged that sector-specific supervisory authorities – such as financial market authorities – are more vulnerable to capture.[74] They typically have multiple contacts to representatives of the industry, compared to, for example, competition authorities that exercise cross-industry enforcement powers. Companies that are subject to financial market regulation often maintain a continuous exchange with the authority.[75] What is more, where an industry is subject to sector-specific regulation, industry participants have strong incentives to invest in maintaining good relations with the competent authority. Certainly, we may be hopeful that outright bribery and corruption will remain a

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[68] Thus, it is a common assumption that private enforcement, compared to bureaucratic enforcement, can be associated with efficiency gains. A Mitchell Polinsky, 'Private versus Public Enforcement of Fines' (1980) 9 *Journal of Legal Studies* 105, 107 ('the profit motive might be imagined to lead to lower costs under either form of private enforcement relative to public enforcement'); Mark A Cohen and Paul H Rubin, 'Private Enforcement of Public Policy' (1985) 3 *Yale Journal on Regulation* 167, 188–89.

[69] Armour et al. (n 18) 571–73.

[70] Gary S Becker and George J Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 *Journal of Legal Studies* 1, 3–4.

[71] Franck (n 35) 123.

[72] Armour et al. (n 18) 555, 572 n 71.

[73] See George J Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management Science* 3.

[74] Tamar Indig and Michal S Gal, 'New Powers – New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities' in Josef Drexl and Fabiana Di Porto (eds) *Competition Law as Regulation* (Edward Elgar, 2015) 89, 108; Hellwig (n 56) 5.

[75] Armour et al. (n 18) 561.

(rare) exception in the UK or EU Member States. However, it is fair to assume, as learned observers of financial market regulation have remarked, that 'there are a variety of other more subtle ways in which the regulator's agenda may be captured by the industry'.[76] First, it is not uncommon that enforcers, to ensure their expertise, are recruited from, for example, the financial industry, and that they will work (again) for the industry after their tenure. Those 'revolving doors' may tempt enforcers to act leniently in individual cases when they hope for later benefits.[77] Second, the prestige and budget of an authority may be related to the fact that the supervised industry is flourishing, as well as a general consensus that this condition is vital for the well-being of the society[78] – aligning the interests of enforcers and regulatees. Third, given the natural information deficit that each enforcer faces, regulated firms have strong incentives to coordinate and to strategically bias the information a sector-specific enforcer will get hold of so that the latter gets a systematically distorted picture of the state of the industry and its impact on social welfare.[79]

One may safely deduce from this that – at least in the abstract – the risk that a financial markets authority enforces the law with a bias towards the interest of the industry is greater than with a competition authority.[80] The latter may therefore prove to be the more appropriate authority when it comes to enforcing rules aimed at facilitating market entry for fintech firms in the face of resistance from incumbent firms in the financial industry.[81]

### B. Procompetitive Mindset

Anyone who wants to understand the functioning of a bureaucracy should also look at how its individual members perceive the world. Their perception of the 'public interest' they are bound to serve is derived from their individual view of the usefulness, reasonableness, and legitimacy of the commands they are supposed to enforce, as well as of the interests of the regulated market participants and the stakeholders affected by enforcement and non-enforcement of the regulation. Thus, it has been observed that agency policy is driven by 'shared values that, in effect, become ideologies'.[82] The internalised ethos of a public authority should not simply be conceived as an aggregate of the beliefs and policy preferences of all its staff, but as something that can be purposefully guided into a certain direction. Again, leadership and the tone of the top seem to be crucial: studies indicate that the values of key officials in an organisation tend to have a crucial impact on the value system internalised by staff members when pursuing violations.[83]

Members of staff that are entrusted with the enforcement of competition law or other procompetitive regulation should ideally share the conviction that the regulatory objective of lowering entry barriers and enhancing competition is (at least broadly) in the best interest of society at large. For

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[76] ibid, 92.
[77] ibid, 561. Some doubt whether 'revolving doors' result in significant capture effects: Toni Makkai and John Braithwaite, 'In and Out the Revolving Door: Making Sense of Regulatory Capture' (1992) 12 *Journal of Public Policy* 61, 72 (arguing that 'it would be misguided public policy to put any limits on recruitment from the industry or on leaving the regulatory agency to work for the industry').
[78] ibid, 562 (pointing to the US financial services industry's efforts to foster a widespread belief that a large and sophisticated financial services sector was in the best interests of all Americans and aptly dubbing this 'soft' capture).
[79] ibid, 92.
[80] However, competition law, given its (supposedly) open-ended goals and, at any rate, open-textured provisions, appears to be particularly susceptible to 'intellectual' capture: Ariel Ezrachi, 'Sponge' (2017) 5 *Journal of Antitrust Enforcement* 49, 70–71.
[81] Franck (n 9) sub IV.4.a, 25–27.
[82] Hawkins and Thomas (n 10) 17 ('social constructionist view' of the regulatory process).
[83] Hawkins and Thomas (n 10) 18.

promoting such a procompetitive mindset,[84] it is certainly helpful if an authority's activities are consistent in pursuing one regulatory objective. Herein lies a comparative institutional advantage of competition authorities in enforcing procompetitive interventions.

In detail, however, it may turn out that competition authorities feel uncomfortable with the kind of procompetitive intervention that is called for to open up the market in favour of fintech. This can be seen, firstly, in the enforcement of competition law when it proves necessary to impose detailed behavioural requirements on an infringer which are technical in nature, and which have to be negotiated and monitored. A competition authority might well prove reluctant here as it wants to avoid drifting into the role of a quasi-regulator. It may fear for its procompetitive spirit, which rests on the belief that a competition authority should avoid the temptation to engage in market design, but that competition enforcement should be limited to *ad hoc ex post* control and the prohibition of certain defined elements of market conduct.[85]

For similar reasons and a fear of the consistency of their procompetitive ethos, it may also be that competition authorities are sceptical about expanding their competences to the enforcement of procompetitive regulation. In fact, there is no denying that the enforcement of (procompetitive) sector-specific law follows a different pattern from competition enforcement. While the latter usually requires assessing and weighing up the market circumstances and the likely consequences of intervention in each individual case, infringements of hard rules – simply put – need to be detected and sanctioned. The authority's leeway may then be limited to deciding whether or not to take up a case in the first place, and which sanctions to impose if an infringement is found. This might seem quite unsatisfactory to a competition authority that is used to have the mission and the means to get to the root of an identified competition deficit.[86]

## VI. CONFLICTING REGULATORY OBJECTIVES

Fintech markets are subject not only to regulatory interventions aiming at enhancing competition but also to regulation that pursues other policy objectives: stability of the financial sector, security and technical integrity of trading systems, consumer and investor protection, data (privacy) protection or the fight against money laundering.[87] In individual cases, the pursuit of these policy objectives may directly contradict procompetitive measures. Furthermore, a high level of regulation in terms of consumer protection, data protection, investor protection etc. may in any case favour incumbents over (potential) newcomers as it creates barriers to entry. In fact, it is not the exception but the rule that enforcement procedures are confronted with policy trade-offs. Institutional design will have implications on how these trade-offs are managed. It will make a difference, for example, whether a sector regulator such as the FCA[88] is entrusted with the enforcement of both competition policy and protectionist regulation or whether separate authorities implement the various regulatory regimes in parallel.

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[84] The terminology is borrowed from Thomas Ackermann, 'Excessive Pricing and the Goals of Competition Law' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar, 2012) 349, 369.
[85] Franck (n 9), sub III.3.b, 19–20.
[86] Franck (n 9), 29.
[87] All these protective goals can be identified, for example, in the German Federal Financial Supervisory Authority's legal mission profile. Explicit mention is made of these goals, for example, in s 6(4) of the Banking Act Kreditwesengesetz - KWG) ('stability of the financial system'); s 10(2) 3rd sentence PSSA ('high level of technical security'), s 4(1a) 1st sentence of the Financial Services Supervisory Act (Finanzdienstleistungsaufsichtsgesetz – FinDAG) ('Within its legal mandate, the Federal Agency is also obliged to protect the collective interests of consumers.); s 10(2) 3rd sentence PSSA ('high level of … data protection'); s 50 no 1 in conjunction with s 4(1) Money Laundering Act (Geldwäschegesetz – GwG) ('prevention of money laundering and terrorist financing').
[88] See n 20 and accompanying text.

While the expectation of creating useful synergies[89] may speak for the former arrangement, there have been warnings against bundling competences for the enforcement of procompetitive measures and those with conflicting objectives.[90] This may be seen as particularly problematic with a view on the competence portfolio of financial market authorities. Those authorities' priorities will typically lie with the stability of the supervised sector. Rigorous enforcement of rules that are intended to open markets and provoke fiercer competition may be seen as problematic in this respect, because when the traditional business models of the banks or other incumbents are challenged this may entail risks – in part real, in part only perceived[91] – for the stability of the financial sector.[92] The supervisory authority may therefore find itself to be in a conflict of objectives and might be tempted to take the latter effect into account when deciding how vigorously it will work to enforce rules designed to open up markets to newcomers.[93]

In addition, financial market authorities also have to focus on the technical stability of trading platforms or payment systems, for example. The special relationship of proximity between regulators and regulated parties in the financial industry, based on a continuous exchange of information and monitoring – which has been emphasised above with regard to enforcement style[94] – can also have an impact here. There is a risk that sector regulators, who are very familiar with the business models and technical systems of the regulated industry, will at the same time develop a particularly good understanding of their interests and thus be inclined to give (too high) a weighting to them in the event of trade-offs in the administrative process. With a view to the payment industry, this can be illustrated with some anecdotal evidence.[95] When staff members of the German BaFin discussed the market entry of payment initiation services in an article published in its journal, it solely focused on the technical risks (in particular, the possibility of 'man-in-the middle attacks'), which were presented, as it seems, in an overly general and exaggerated manner.[96] In contrast, when elaborating on the same issues in a decision on payment initiation services, the Bundeskartellamt put those risks into perspective and pointed to the fact that the banks themselves offered services that entailed exactly the same risks.[97]

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[89] See above sub IV.

[90] Kovacic and Hyman (n 11) 533.

[91] Carletti and Smolenska (n 1) 19 ('However, given the risks perceived to be posed by FinTech, the regulatory framework might lead to raising barriers to entry into the market (eg by introducing licencing regimes)').

[92] See on the interrelation between financial stability and competition Dean Corbae and Ross Levine, 'Competition, Stability and Efficiency in Financial Markets' in *2018 Jackson Hole Symposium: Changing Market Structure and Implications for Monetary Policy* (Kansas City Federal Reserve <https://www.kansascityfed.org/Jackson%20Hole/documents/6988/Corbae_JH2018.pdf>) 357–409, who conclude at 395: '1. An intensification of bank competition tends to (a) squeeze bank profit margins, reduce bank charter values, and spur lending and (b) increase the fragility of banks. There is a competition-stability trade-off. 2. Policymakers can get the efficiency benefit of competition without the fragility costs by enhancing bank governance and tightening leverage requirements.' See also Xavier Vives, *Competition and Stability in Banking. The Role of Regulation and Competition Policy* (Princeton University Press, 2016) 228. An overview of the economic literature and its ambiguous results on the interrelationship between intensity of competition and stability of financial markets is provided by Juliane K. Mendelsohn, *Systemrisiko und Wirtschaftsordnung im Bankensektor. Zum Ende von Too Big To Fail* (Nomos, 2018) 146–166.

[93] Carletti and Smolenska (n 1) 20; Hellwig (n 56) 5.

[94] See above sub III.2.

[95] Franck (n 9) 26.

[96] Josef Kokert and Markus Held, 'Zahlungsdiensterichtlinie II – Risiken und schwerwiegende Folgen für Nutzer und Kreditinstitute' ('Payment Services Directive II – Risks and Severe Consequences for Users and Credit Institutions'), *BaFin Journal* (June 2014) <https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Fachartikel/2014/fa_bj_1406_zahlungsdiensterichtlinie_II.html> accessed 15 September 2022.

[97] Bundeskartellamt, 29 June 2016, B4-71/10, *Zahlungsauslösedienste*, paras 351–358, 417–422.

In sum, there are indicators that financial market authorities may not be perfectly incentivised to enforce procompetitive regulation and one might doubt, for instance, the wisdom to entrust the German BaFin with the enforcement of provisions that are meant to facilitate market entry of payment initiation services.[98]

## VII. LEGITIMISING ELEMENTS IN COMPETITION PROCEDURES

Where the legislature promotes fintech competition through market-opening intervention, its democratic legitimacy is straightforward: enacted provisions are approved by elected representatives who may be held accountable by the people. Authorities that enforce procompetitive rules and standards and thus put the law into action bear likewise great responsibility for the formation and development of competition policy. Hence, their practice also requires democratic legitimacy and accountability.[99] Robert Baldwin has identified five main arguments that are consistently employed to justify administrative rulemaking: legislative mandate, accountability or control, due process, expertise, and efficiency.[100] These rationales also carry persuasive power with a view to competition enforcement: competition authorities act based on competences granted to them by the legislature and with a mandate with a (relatively) clearly defined set of tasks. Competition proceedings follow the rule of law and measures imposed on firms are scrutinised by courts.[101] Authorities are considered to have special professional and technical expertise. Consequently, judicial review may be restricted.[102]

The constitutional requirements for the democratic legitimacy of bureaucratic measures may vary considerably among jurisdictions. Authorities may be held accountable for their activities either (directly) by parliament or by ministries. A distinction must be made between exerting influence and exercising control over financial matters ('power of the purse'), staff and/or substantive orientation of the authority. Analysing those governing constitutional framework(s) is beyond the scope of this article.[103] What is of interest here, however, is a functional dimension to legitimacy and accountability: enforcement processes should yield decisions and create norms that are widely accepted among the addressed market players and the relevant stakeholders. This in turn may depend on the institutional design of the enforcement process, which should, ideally, promote a 'willingness to comply'[104] among the regulated and a conviction to intervene legitimately on the part of the bureaucracy.

In practical terms, that appears to be particularly relevant for the regulatory facet of competition enforcement, which may be crucial when it comes to facilitating market access for innovative fintech firms. In fact, competition proceedings against an industry-dominant firm upon which behavioural remedies are imposed or against multiple firms in one industry with the imposition of uniform behavioural remedies may ultimately come close to industry-wide rulemaking. It would seem quite conceivable that competition authorities are reluctant to act as quasi-regulatory market openers (even if

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[98] See above n 21.
[99] Franck (n 9) sub IV.2, 21–23.
[100] Robert Baldwin, *Rules and Government* (Clarendon Press, 1995) 42–48.
[101] See above sub II.B.
[102] See eg, the Commission's margin of assessment regarding economic matters as confirmed in the ECJ's case-law. Case C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala*, EU:C:2008:392, para 69.
[103] Note, however, that the ECN+ Directive sets a harmonised minimum standard for competition enforcement by Member States with regard to essential relevant aspects such as independence of authorities (art 4) and resources (art 5). See Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market OJ [2019] L 11/3.
[104] Black (n 49) 87.

perfectly within the remedial leeway entrusted by the law) as they do not see themselves as being sufficiently legitimised for this kind of rulemaking.[105]

A legislature that wishes that competition authorities feel comfortable in an active role to open markets through competition enforcement seems well advised to provide for procedural elements that promote legitimacy and accountability of competition remedies. Authorities should have the option to hold public oral hearings where the representatives of the business segment affected – but also stakeholders – can state their case and make their voices heard. Moreover, procedural rules should facilitate the involvement of external experts if considered useful by the authority or the parties.[106] The implementation of such a participatory enforcement style seems indeed a major challenge for conventional competition proceedings. At this point, a significant advantage of rulemaking via UK-style market investigation becomes apparent. The UK's Open Banking initiative, for instance, aiming among other things at the promotion of fintech, has shown how this instrument may work particularly well for the opening of markets and where competition enforcement may hit its institutional limitations as a regulatory tool.[107]

## VIII. CONCLUDING REMARKS

This chapter has shed some light on various factors that have an impact on 'the way the agency bureaucracy develops and implements enforcement policy'[108] and which may be of relevance with a view on what has been dubbed here 'fintech competition enforcement'. As might be expected, the insights that can be grasped are for the most part quite abstract and general; the aspects elaborated do not necessarily point in one direction and their interaction can prove to be complex. In fact, much depends on the political, social, and economic framework into which an institutional design is 'placed'. Crucially, moreover, it also depends on the persons who act within a given institutional structure. In fact, quite different competition policies may be yielded using the very same institutional design.

Does that mean we are none the wiser as to normative implications? The complexity of these institutional design issues should, first, remind us that the best we can strive for are robust second-best solutions. Yet, no jurisdiction is locked into an existing institutional arrangement. Building on the status quo, incremental improvements for a better competition enforcement and implementation of procompetitive policies are always possible.[109]

That is true in general but also regarding the promotion of fintech competition. Some detailed suggestions are given. For instance, the institutional design of competition proceedings could be adapted to improve enforcers' capacity to establish market-opening rules. That might include facilitated options of stakeholder and external expert involvement as well as public hearings. Moreover, a few cautious statements of a more general type can be made. There are sound reasons to be sceptical about seeing financial market authorities as agile enforcers of a procompetitive agenda, facilitating fintech market entry. In contrast, there are good arguments in favour of assigning the competition authorities, in addition to their original role as enforcers of competition law, competences for the implementation of other

[105] This can be different if a cartel authority is granted quasi-regulatory powers – beyond classical competition enforcement. This is the direction taken by the new instrument introduced under s 19a of the German Competition Act. See Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 *Journal of European Competition Law & Practice* 513.
[106] Franck (n 9) sub III.3.b, 18–19.
[107] Overview provided by Franck (n 9) sub V.3, 32–33.
[108] See above n 10.
[109] Kovacic and Hyman (n 11) 537.

procompetitive regulation, including those provisions specifically aimed at enhancing fintech competition.

Beyond the actual enforcement activities, a major challenge for fintech competition is to ensure that possible anticompetitive effects are considered when regulating to protect the stability and technical integrity of financial markets, but also when implementing the law for the protection of consumers and investors, as well as privacy laws and law against money laundering. Ideally, competition authorities could act here, beyond their actual enforcement powers, as 'advocates' of open and competitive markets.[110] Admittedly, this may be quite delicate as it reaches into the competences of other authorities and into the political sphere. Therefore, the pursuit of an 'advocacy function' could be supported through institutional design, for example if competition authorities need to be informed about certain proceedings and are given a right to submit competitive concerns. In the case of an 'multi-purpose' institution, such as a financial market authority that has competition enforcement powers, it may prove beneficial to concentrate competition competences in one department whose staff internalise a procompetitive mindset and can then also take up the cudgels for low barriers to entry with a view to the various fields of protective regulation.

As an observer of legislative processes related to financial markets regulation and competition policy, one can get the impression that institutional design issues of bureaucratic enforcement are often decided ad hoc and pragmatically, but not reflected upon theoretically. In any case, lawyers rarely bring these theoretical aspects into the debate; this is not surprising, as both legal practitioners and legal academics tend not to deal with these questions in depth. The gap between socio-legal understandings of bureaucratic law enforcement and the rationalities that in practice determine the setting of the legal framework for it seems considerable, to say the least. This chapter has therefore already served a good purpose in stimulating reflection on institutional design of bureaucratic enforcement among those concerned with fintech competition and regulation. For there is no question that the practical effectiveness of any measure to promote fintech competition will depend on choices of institutional design.

[110] Carletti and Smolenska (n 1) 20.