The Origins of the Chief Economist Team: Mission, early achievement and challenges

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I am very pleased to be invited to this anniversary celebration. Thank you Johannes, Carles, Tommaso. Surrounded as I am by the succession of eminent Chief Competition Economists whom DG Competition has been privileged to welcome into its organisation, I am reminded of a lady who announce to a reception that she was delighted to announce that she was celebrating 40 years of marriage… albeit with four different husbands. She aggregated… In this case, there is an understandable reason that there are five Chief Economists in fifteen years: in order to guarantee the independence and academic integrity of the Chief Economist, it was agreed, when we first defined the mandate and mission of the Chief Economist that his or her mandate was to be limited to three years. At least one Commissioner since then thought that the rule should be forgotten about but it has nevertheless been adhered to. The underlying reasoning for it seems after all to be correct.

The creation of the post of Chief Competition Economist and his team was formally decided by the Commission at the beginning of July 2003 (the precise date needs further extensive research in the Commission's historical archives!) and the appointment of Lars-Henrik Röller to the post was made in July of that year with effect from 1st September. But the genesis of the idea was much earlier.

It would also be incorrect to link it only with the Commission's response to its celebrated series of merger defeats before the Court of First Instance in 2002. It is true that the Commission's prohibitions of these mergers were overturned, in some cases and in part, because the Court held that the Commission had not afforded the necessary evidence and argument to validate its alleged theories of harm to competition. Broadly speaking, the Court said that the more complex your theory of harm was, the more argument and evidence you would need to support it.

Yet the pressures for a more economic approach to European competition law enforcement began much earlier with the increasing recognition in the 1990's that a purely form-based assessment of transactions or conducts could often result in wrong decisions, whether type 1 or 2. However much the German Kartellrecht tradition placed emphasis on assessing impacts on the process of competition ('Wettbewerb in sich') and the freedom to compete, there was increasing pressure for the Commission to focus more on actual and potential effects on consumer welfare, especially within its newly acquired competences to vet European-wide mergers. And the pressure was overt from the United States, where criticism of Commission competition decisions taken against US companies, whether objectively justified or not, highlighted the uncomfortable fact that whereas the DoJ and the FTC had Chief Economist Teams to match the weight of opinion from the legal side of their houses, DG Competition had no visible presence of economists within its walls. This gave the impression that the Commission's investigations were perhaps not as thorough and comprehensive as on the other side of the Atlantic.

This was of course not completely true. A significant proportion of DG Competition staff had qualifications in economics and economists elsewhere in the Commission were frequently consulted by it. The Commission had also started progressively to revise block exemptions and develop guidelines (particularly for horizontal mergers) based on sound economic principles. Towards the East of Brussels, a number of respected Professors of Kartellrecht were already quaking in their boots. What became to be known in Berlin and Bonn as the 'more economic approach' had already got underway…

When I became Director general of DG COMP in September 2002, the idea of appointing a Chief Competition Economist was already the subject of active debate inside and outside the Commission. In private, Commissioner Mario Monti was favourable to the idea. I too became rapidly persuaded that, combined with other changes, it would enhance the effectiveness and efficiency of DG Competition as a competition authority. In the wake of the three Court defeats on mergers, it would in addition signal to the Court and to the outside world that the Commission had listened to the criticisms of its investigations and analysis and was resolved to improve things.

Within the mandate of the Chief Competition Economist, we envisaged four areas in which he or she would provide guidance:

- On the economic methodology in competition investigations;
- On individual competition cases from their early stages;
- On analysis of key competition cases involving complex economic issues and requiring sophisticated quantitative analysis; and
- On the development of general policy instruments.

I am not sure whether it was Mario Monti or I who gave the first real hint to the outside world that we would ask the Commission to let us appoint a Chief Economist. I think we were egging each other on. In parallel, I was also fully engaged in reorganising DG Competition to focus more on key market sectors rather than on the legal instruments of intervention (merger, antitrust and State aid law). I was personally convinced then, and I am still convinced, that outside the area of cartels, intervention in markets requires either full knowledge of them or a capacity to analyse them effectively and accurately before you take any final decision on how you should intervene. This will not be the automatic reflex of lawyers who have acquired experience in applying one or other legal instrument. In addition, how could you handle a merger or a State aid without benefiting from the knowledge and experience of colleagues who are taking action in the same sector? The combination of the proposal to move towards a more sector-specific organisational structure on the one hand and the plan to appoint a Chief Economist, with a strong team of economists around him, appeared to us to meet the need to build sectoral knowledge and to sharpen analysis of new sectors and problems.

You will not be surprised to hear that there was some grinding and gnashing of teeth over the adoption and implementation of these organisational changes. After all, an organisational structure based primarily on sectors brings both advantages and disadvantages, not least because there would be less visibility at that time for the élite storm troopers of merger control. On the function and mission of the Chief Economist, our colleagues in DG ECFIN were not happy about his being called Chief Economist because obviously for them if there was any Chief Economist in the Commission, he would have to sit in DG ECFIN. This is why the title is Chief Competition Economist. Inside DG Competition, there was also concern about the independence of the Chief Competition Economist and his team compared to the line case managers and directors. It was agreed that he could second members of his team to a case team and that the case team's work programme was fixed by the case manager, but that this did not prevent the Chief Economist expressing an independent view about the course of the investigation or the recommended outcome. Obviously this could lead to friction unless handled diplomatically by the CCE and the line directors. I have to say that under my watch Lars-Henrik and Damien were forceful in argument but excellent in handling their relations with client services.

As to independence of the Chief Competition Economist vis-à-vis the Commissioner and the Commission as a college, there was also a serious discussion as to whether the Chief Competition Economist's Opinion on any proposal would be available outside the Commission. As with the opinion of the Legal Service, some discretion is necessary. But I think in the end everyone recognised that we were all working for the same organisation and that differences of opinion could be reflected in texts without those texts calling into question the political decisions of the college.

I am going to leave it to Lars-Henrik and Damien to talk in detail about their early achievements and challenges. All I will say is that the Chief Competition Economists and their teams made from the beginning an immense contribution to research, debate and decision-making – within DG COMP's own structures, with the Commissioner, his or her Cabinet staff and externally, with the valuable aid of their Economic Advisory Group. They had the refreshing approach in bringing a solution to your problems rather than a problem to your solution. They also promoted within DG Competition a vocabulary which was then less familiar than that of requests for information, statements of objections or access to file. Colleagues – even our friends in the Legal Service – started to talk easily about theories of harm, about Type 1 and Type 2 error (and even from Damien the Type 3 of providing the right answer to the wrong question), about elasticities. Concepts such as market failure, the counterfactual or positive correlation came to roll easily off the tongue of the most ordoliberal of colleagues. That has been a major cultural achievement of the Chief Competition Economist's Team which reflects their increasingly strong influence on the decision-making process in merger, antitrust and state aid cases.

There is of course a trade-off to be achieved between carrying out a thorough effect-based analysis and reaching enforcement decisions within reasonable timelines. I have a clear memory of two statements (which will remain unattributable) made in front of our Commissioners by colleagues which illustrate this dilemma. The first was from one of our then directors. "Commissioner, we have a solid theory of harm to enable you to impose a heavy fine in this case. We may need more facts but we will ask the parties to provide them in a final information request". The other was from one of the esteemed Chief Competition Economists. "Commissioner, if we can have six more months to examine the bidding data, we can solve this case". Vive la difference!

Sir Philip Lowe joined the European Commission as a junior official in 1973. He later held a range of senior posts in the Commission until 1997 when he was first appointed Director General: for Development 1997-2000, for Competition 2002-2010, for Energy 2010-2014. He served 2013-2016 as a non-executive director of the UK Competition and Markets Authority. Since then he has been is a senior adviser to FTI Consulting and now to Oxera Economics. He is Chair of the Florence University Institute Competition Law Workshop.