New Powers- New vulnerabilities? A critical analysis of Market Inquiries Performed by Competition Authorities

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Abstract

In the past two decades the number of jurisdictions which have empowered their Competition Authorities to engage in market inquiries (MIs) has grown substantially. Although jurisdictions differ in the scope and procedure adopted for such studies, they all share an important common trait: attempting to allocate the roots of limited competition in the studied market. Market studies differ from traditional competition law tools in their triggers, range, object, and the level of pro-activity of the Competition Authority. They are not triggered by a suspicion of anti-competitive conduct of specific firm(s), but rather allow the Authority to use a broad prism which focuses on a wider set of potential obstacles to competition, including the Authority's own past conduct, in order to find ways to enhance competition. MIs entail many advantages. Yet, bestowing this power upon a Competition Authority is not self-explanatory. Furthermore, it is far from costless. Beyond the direct costs imposed on both the Authority and market participants, MIs often carry less tangible price tags. They raise a host of constitutional, democratic and practical issues that have not been thoroughly studied as of yet, which are the focus of this paper. In so doing, the paper builds, inter alia, on the recent administrative law literature which focuses on multi-agency interactions. Accordingly, this paper seeks to provide a synergetic analysis of MIs for the benefit of policymakers.

Introduction

In the past two decades the number of Competition Authorities (CAs) which have been empowered to engage in market inquiries (MIs) has grown significantly. Whereas twenty years ago only a handful of CAs possessed such powers, currently more than 45 Authorities can perform MIs[2], and the number is growing. MIs allow CAs to study in depth market failures that do not necessarily result from competition law infringements.

To be sure, MIs are not a new phenomenon. Data and insights acquired in the studies of markets have long enriched and improved legislation and regulation. For example, the US Congress,[3] as well as several executive departments,[4] have inherent

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[2]Until 2008-2009 at least 40 jurisdictions empowered their Competition Authorities to perform MIs. International Competition Network (ICN) Advocacy Working Group, 'Market Studies Project Report' (2009) 18-20 <http://www.internationalcompetitionnetwork.org/uploads/library/doc363.pdf> last accessed 18 September 2013; The number is still growing: ICN Advocacy (Market Studies Project) Working Group, 'Draft- Market studies Good Practice Handbook' (2010) <http://www.internationalcompetitionnetwork.org/uploads/library/doc646.pdf> last accessed 18 September 2013.

[3]'The Congressional Research Service' (2013) <http://www.loc.gov/crsinfo/> last accessed 18 September 2013.

[4]Examples include the Office of Financial Research within the Department of the Treasury: U.S Department of the Treasury (2012) <http://www.treasury.gov/initiatives/ofr/Pages/default.aspx> last accessed 18 September 2013; Or 'The National institute of justice' (2013) <http://www.nij.gov/about/welcome.htm> last accessed 18 September 2013.

market research units, and the EU Joint Research Center serves as a scientific and technical arm of the Commission.[5] Alongside such permanent research bodies, ad-hoc ones are sometimes established to perform inquires into specific issues.[6] The performance of MIs by CAs is also not a new phenomenon.[7] Some Authorities have long possessed such powers. For instance, in the US the power dates back to the beginning of the 20th century,[8] in Japan to the late 1940s[9], and in the UK to 1973.[10]

Yet a clear increase in the number of jurisdictions that empower their agencies to engage in MIs is evident. From a handful in the late 1990s, currently more than one third of CAs can perform MIs, and additional proliferation is expected. This trend is further strengthened by the revival in some jurisdictions of the power to engage in MIs, which has been dormant.[11] For instance, in the EU the power to launch MIs dates back to 1962, but the Commission only began to regularly apply it in 2004[12]. Accordingly, it is timely to evaluate this policy tool.

The performance of MIs by Competition Authorities offers many advantages. It makes use of the Authority's expertise in studying the competitive conditions in a market, and allows for a more holistic analysis and remedial suggestions. It can also potentially overcome, at least partially, some of the limitations of direct regulators. Yet MIs are far from costless. Besides the direct costs bestowed upon the Authority and market participants, MIs involve less obvious but nonetheless important price tags through the political economy reactions they generate, given that they strengthen the Authority's stand relatively to other regulators, thereby tilting the subtle status quos within the executive branch. MIs also raise a host of constitutional, democratic and practical issues that should be recognized. Yet only a few, although insightful, attempts were made to study these issues.[13]

Accordingly, this paper analyzes MIs from several relevant perspectives in order to reveal their benefits as well as limitations and provide a synergetic analysis. Its road map is as follows. Chapter I describes the scope of powers to perform MIs across jurisdictions. Chapter II focuses on the benefits that empowering CAs to perform MIs

[5]The JRC engages in research and provides the scientific advice and technical know-how to support a wide range of EU policies, <http://ec.europa.eu/dgs/jrc/index.cfm?id=1370> last accessed 18 September 2013.

[6]For a survey of some authorities see the Australia Law Reform Commission, *Making Inquiries (Report) A New Statutory Framework* (Report 111, 2009) 51-58, 83-87 <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC111.pdf> last accessed 18 September 2013.

[7]The descriptive layer of this paper substantially builds on two studies, namely the ICN Report (n 2); OECD Directorate for Financial and Enterprise Affairs Competition Committee, Policy Roundtables: Market Studies (Competition Law & Policy OECD, 2008). <http://www.oecd.org/regreform/sectors/41721965.pdf> last accessed 18 September 2013; Factual changes might have occurred as of the dates these major comparative studies were completed, due to legislative amendments or policy changes. Absent explicit notes, the factual data mentioned below is thus correct as of 2009 or 2008, respectively.

[8]OECD Report (n 7) 7, 207.

[9]Ibid 7, 61, 210.

[10]Ibid 114, 222; As of the 25.4.2013, the Enterprise and Regulatory Reform Act 2013 (ERRA) came to force. The ERRA changes the regulatory structure and partly the substantial powers. We shall mainly refer to the previous structure. Enterprise and Regulatory Reform Act 2013 (ERRA 2013).

[11]For instance, the competition regime in Norway dates back to 1993, yet MIs were performed as of 2004. OECD Report (n 7) 89; In Poland the power dates back to 1993, but MIs were performed only from 2007. Ibid 97; In Spain this power dates back to 1989, yet relatively confined resources were devoted to that task until the entry into force of a new Act in 2007. ibid107, 109.

[12]A Jones and B Sufrin, *EU Competition Law: text cases and Materials* (4th edn, 2010); According to the OECD Report the power to conduct MI was included in Article 17 of Regulation EEC 17/62, yet MIs are "recent"; OECD Report (n 7) 153, 235.

[13]See, e.g., R Whish and D Bailey, *Competition Law* (7th edn , 2012) 451486; H Andersson and E Legnerfalt, 'Dawn raids in Sector Inquiries - Fishing Expeditions in Disguise?' (2008) 29(8) E.C.L.R. 439; Derek Ridyard, 'The Competition Commission's Northern Ireland banking market investigation: some unanswered questions on the role of market investigations' (2008) 29(3) *E.C.L.R.* 173.

may bring. Chapter III explores the possible limitations and downsides such MIs entail. Chapter IV focuses on the inter-regulatory effects created, and asks whether adding MIs to CAs' plates improves the overall design of the regulatory system. The analysis builds on and expands the recent administrative law literature that focuses on multi-agency interactions. Chapter V offers some conclusions by way of applying our findings to the two most common models of MIs.

Chapter I: The scope of powers granted in MIs

The powers granted to CAs to perform MIs differ from traditional competition law tools. Most importantly, the aim of MIs is to study obstacles to competition, whatever their roots.[14] Resultantly, MIs allow the CA to use a broad prism, focusing not only on privately erected barriers but also on governmental ones, including the Authority's own past interventions. Possible recommendations for change are also much broader than traditional remedies and may include, inter alia, structural and behavioral changes in the market and changes to the regulatory system, including the lowering of governmental artificial barriers to entry. Such remedial suggestions are not limited to a predetermined list but rather provide the CA with a broad palate. Furthermore, MIs are not triggered by pre-specified potentially anti-competitive actions of private parties, such as predatory pricing. Hence, they allow the CA to actively step into the scene at an earlier stage. In addition, MIs may potentially affect a much larger number of market participants in comparison to the number of parties involved in a typical enforcement activity.

These traits are common to most MI powers granted to CAs. However, implementation powers often differ across jurisdictions. Below we explore four relevant parameters: the power to initiate MIs; the exact ends MIs serve; investigative powers; and the ability to impose the recommended remedies.

A. The power to initiate MIs

The power to initiate MIs is often granted to the CA, which has discretion in selecting such inquiries.[15] It is also quite common that the legislature or the executive branch may request the CA to perform an MI.[16] In a small number of jurisdictions MIs can only be externally mandated.[17]

The selection criteria applied to choose the subject of an MI often correspond to the types outlined in the next section. The most common criterion is the malfunctioning of a market.[18] Most jurisdictions apply additional considerations such as the importance of the market to the economy as a whole,[19] or its significance to consumers,[20] as well as the ability to remedy the perceived market or regulatory failures. Certain selection criteria are unique to specific jurisdictions, most notably "the importance of the industry for the poor" in South Africa[21], and reaction to an unusual situation in a market following a natural disaster in the US and Canada.[22]

[14] OECD Report (n 7) 209.
[15] Examples include the Czech Republic, Poland and Spain, in the OECD Report, ibid 27, 105, 109.
[16] Examples include the US, Norway, Russia and Greece. Ibid 142-143, 219, 218, 190, 215.
[17] Only one Authority that participated in the ICN survey reported that MIs are conducted solely at the request of the relevant government ministers. ICN Report, (n 2) 30; The UK regime offers an interesting example, as a trade off existed up until recently between enhanced independence with regard to initiation and enhanced powers thereafter; the OFT who has confined power, may select its subjects independently, while the CC enjoys substantially enhanced powers to investigate and apply remedies, but it cannot independently select the MIs it performs. Ibid 121, 139.
[18] In some jurisdictions, such as Italy, the focus is solely on public restrictions or inefficient equilibrium OECD Report (n 7) 213.
[19] Ibid; See, eg 215 (Romania), 234-235 (Mexico).
[20] Ibid; See, eg 69 (Korea), 215 (Romania), 143 (US), 234-235 (Mexico).
[21] Ibid 217. This led to MIs in the food sector, health care and pharmaceuticals.
[22] Ibid 143, 229.

B. The exact ends to be served

As the OECD Report notes,[23] MIs are "a very flexible tool which can accommodate a number of objectives." Yet three main types of MIs can be identified:[24]

1. **Identification of market failures in a specific market**- This is the most common type of MIs, which explore and analyze in depth the causes of underperformance or market failures across a whole market or sector. Such MIs attempt to reach a thorough understanding of the nature of the prevalent market conditions and dynamics, and the resultant obstacles to competition, in order to structure (suggested) remedies accordingly.

2. **Enforcement-orientated inquiries**- Such MIs attempt to detect generally suspected yet evasive (and thus not sufficient for initiating a formal investigation) anti-competitive conduct that may explain the underperformance of a market. This type is the closest and most related to traditional competition law tools.

   Jurisdictions substantially vary in their approach to this possibility.[25] Some, including Mexico and Canada, stress the division between MIs and enforcement activities.[26] In others, such as the EU and Italy, the linkage to enforcement is welcome.[27] Other jurisdictions, including the US[28], UK[29] and Japan,[30] preserve some degree of separation between the different tools, while recognizing their complementarities. As elaborated below, the tension between efficiency and constitutional concerns underlies these different approaches.

3. **Competence building studies**- Such MIs aim at endowing the CA with in-depth knowledge and insights across markets.[31] They may, for example, enhance the familiarity with dynamic and innovative sectors or practices,[32] explore certain aspects of competition policy and its interface with other types of regulation, search for efficient ways of analyzing competition problems, or test economic theories.[33] As noted by Kovacic, such inquiries may create "economic precedents" that "demonstrate the validity of hypotheses" and can be referred to in the future to support specific activities.[34] Retrospective inquiries are a subset of competence-building inquires**.** They focus on evaluating the impact of legislative or executive reforms or regulatory interventions on a market. They might also be inwards looking, aimed at self evaluation of the wisdom and effects of the CA's past predictions, decisions and performance, and eventually seek to guide future

[23] OECD Report (n 7) 8.
[24] Of course, an inquiry can foster more than one end, and partial overlaps exist among the outlined types. Yet each of these types has a clear distinctive core.
[25] ICN study 2009 (n 2) 32-33, 96, 107.
[26] OECD Report (n 7) 211. In such jurisdictions MIs "do not commonly lead to law enforcement" and are "quite separate from law enforcement".
[27] Ibid 213-214.
[28] In the US MIs are not used as a substitute for enforcement. However, there is a frequent targeting of markets where expertise was gained during past enforcement actions. At times MIs reveal information that leads to enforcement, while at times enforcement activity enlightens the need for a specific MI. Id 145.
[29] UK contribution, ibid 112-119.
[30] Japanese contribution, id 210.
[31] ICN Report (n 2) 94.
[32] OECD Report (n 7) 69, 211, 220, 227.
[33] ICN study 2009 (n 2) 98.
[34] WE Kovacic William , 'Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development' [2004] Antitrust L.J 72 861, 865.

steps.[35] As several scholars observe, constant reassessment of the CA's capacities and efficacy and the upgrading the theoretical comprehension of rapidly changing market realities is important in order to avoid repeated mistakes and strengthen the CA's abilities.[36]

In this paper we shall focus mainly on the first type of MIs, since its expansion of the mandate of the CA beyond its traditional mandate is the largest.

C. **Availability of investigative tools and follow-on enforcement actions**

An important parameter, which will be analyzed in depth below,[37] involves the ability of the CA to use its general investigative powers to obtain data and information while performing an MI. In some jurisdictions, including the EU, Japan, Norway, Italy, Spain and Hungary, the CA may use its regular powers.[38] In others, only gathering of voluntarily-provided data is possible.[39]

A divergence also exists with regard to the ability to use the information gathered in MIs in follow-on enforcement actions. Yet the majority of CAs have used information obtained in MIs to help enforcement activities.[40]

D. **The implementation of recommendations**

Two main models can be identified. In most jurisdictions the CAs' role is mainly advisory. At the end of the inquiry it presents its findings to the relevant governmental bodies and suggests potential routes to overcome obstacles to competition, such as changes in legislation, regulation or policy, recommendations to change market participants' conduct, or suggestions for consumer education. The EU[41], US[42], South Africa[43], Romania[44], Mexico[45], Ireland[46] and Italy[47] adopt the **Advisory Model**, to name a few.

More rarely, jurisdictions take a blunter path and adopt a **Supervisory Model,** under which the CA is empowered to act in a proactive manner and take active steps to remedy at least some types of market failures, much like a direct regulator, intervening and changing market conditions in order to further competition. Adopting such a model creates significant tectonic changes in the regulatory status-quo, as elaborated below. Given that the supervisory model is the furthest from

[35]See, eg Norway. OECD Report (n 7) 212, 217- 218; In the US such studies are not preformed "unless there is another enforcement matter in the industry", because they are highly resource-consuming, and causality is difficult to establish absent substantial information. ibid 220-221.

[36]WE Kovacic , 'Rating the Competition Agencies: What Constitutes good performance?' (2009) 16 George Mason LR 903, 923; WE Kovacic, 'The Digital Broadband migration and the Federal Trade Commission: Building the Competition and Consumer Protection Agency of the Future' (2010) 8 Journal of Telecommunications and High Technology Law 1 6, 14; K Ewing, *Competition Rules for the 21st Century: Principles From America's Experience (2nd edn, Kluwer Law International 2006)*; M Greenstone, '*New Perspectives on Regulation- Towards a Culture of Persistent Regulatory Experimentation and Evaluation'* (The Tobin Project, D Moss and J Cisternino eds, 2009) 113, 120-122.

[37] This issue is further discussed below as part of the constitutional dimension.

[38]OECD Report (n 7) 8, 208 (General discussion), 155 (EU), 65 (Japan), 91, 218 (Norway), 57 (Italy), 109-110 (Spain) and 226 (Hungary).

[39]The Mexican regime serves as an example. Ibid 234; In the US, the FTC has investigative powers, while the Antitrust Division lacks them. ibid 142, 147, 229-230.

[40]ICN Report (n 2) 105, 70-71.

[41]Jones and Sufrin (n 12) 850-851.

[42]OECD Report (n 7) 220 (US), 217 (South Africa), 215 (Romania), 234 (Mexico), 54 (Ireland), 213 (Italy).

traditional competition law tools since it involves at least some degree of market-engineering, let us explore some examples.

The Greek CA, for example, can impose "behavioural or structural measures to improve market performance" at the end of an MI.[48] In Spain the CA is empowered to "bring actions...against administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets are derived."[49]

The UK regime offered until recently a mixed model: the Competition Commission (CC) had extended supervisory powers[50], while the OFT had only advisory ones. The CC performs MIs following references from sectoral regulators with competition powers or from Ministers. The OFT may also issue a market investigation reference (MIR) to the CC, if as a result of an MI the OFT performs, it reaches the conclusion that mandatory remedies, rather than traditional enforcement steps, are needed. An MIR is most likely where serious but potentially remediable barriers to entry and restrictions on rivalry in oligopolistic or monopolistic markets exist. The CC has the power to apply binding remedies which are perceived as necessary to address structural or behavioral elements that prevent, restrict or distort competition. The range of such remedies is very broad, including conduct rules, changing agreements between firms, and divestment of assets. However, fines are not included. The remedial action may be taken by the CC or it may recommend that other governmental bodies take action. The newly legislated Enterprise and Regulatory Reform Act creates the single Competition and Markets Authority.[51] The supervisory powers remain, and are vested in a "Market Reference Group" that the Authority's chair may establish.[52]

In Israel, the CA was recently empowered to actively change market conditions in markets characterized by a high degree of oligopolistic coordination, even when no competition law offense was found. The CA may act in a proactive manner, inter alia, mandating firms that engage in oligopolistic coordination to eliminate or reduce switching costs or to increase transparency in the market. It can also apply to the Competition Tribunal for structural remedies. Where a direct regulator in the relevant market exists, the CA is mandated to consult with it if the CA's aim is to prevent significant harm to competition, and is mandated to receive the agreement of the regulator when it aims to increase competition in the market. The importance of this new power stems from the fact that it enables the CA to overcome one of the most troubling Achilles' heel in competition law: dealing with oligopolistic coordination. This is a big loophole, especially in small economies in which the natural conditions in the market can only support a small number of firms in most of the markets and entry barriers are often quite high. Indeed, other tools which attempted to deal with this problem have been problematic. In addition, the CA was also recently empowered by the government to engage in a broader set of MIs, yet this power has not, as of yet, been embedded in the legislation and thus its boundaries are still not clear.[53]

[48] Ibid 215; See also Hellenic Competition Commission (2007) <http://www.epant.gr/content.php?Lang=en&id=85>last accessed 22 September 2013.
[49] OECD Report (n 7) 110, 108: "… regulatory recommendations contained in market studies could be followed by further and more drastic actions. Thus, this new instrument gives the [Authority's] opinions and calls for action more strength than ever".
[50] Ibid 113-118, 129, 139, 224. The following description builds on the OECD Report.
[51] ERRA (n 10) 19, ss. 25-26.
[52] Ibid, ss. 163, 133A. The ERRA empowers the CA to make a reference to its chair for the constitution of a selection group under Schedule 4 of the ERRA. Section 133A sets the functions the market reference group exercises, including "the duty to remedy, mitigate or prevent the adverse effect on competition".
[53] Proposed Law for Socio-Economic Change (Legal Amendments), 2012, PL 706 s 44A (Israel); The proposal adopts the advisory model.

Under both models, the (suggested) remedies are not confined to specific firms which created artificial barriers to competition. This is an important difference when compared to other policy tools at the CA's disposal, such as the EU commitments procedure.[54]

In sum, while diversity exists along different aspects of MIs, they all share an important trait: the ability to comprehensively study the roots of market or regulatory failures even if the competition law was not infringed.

The next two chapters focus on the justifiability and efficacy of performing MIs by CAs: the first analyzes the justifications and benefits of performing MIs by such bodies, while the following one performs a critical analysis of such MIs.

Chapter II: Justifications and Benefits

MIs performed by CAs offer important advantages, by harnessing the Authorities' comparative advantages to MIs. This chapter is based on the assumption that MIs are a good tool for improving public policy, and only touches upon this assumption if it directly relates to MIs performed by CAs.

One of the main benefits involves the CA's **expertise** in performing market studies. Although the Authority's regular analysis focuses on anti-competitive conduct, it must also often analyze the effects of the general market conditions on conduct and performance. For example, in determining whether to allow a merger, market conditions in the pre and post-merger situation must be analyzed. Performing MIs may strengthen the CA's expertise even further. This is especially true when the CA engages in studies which have implications on related activities, including retrospective and competence-building inquiries.

Let us pause and analyze this argument more carefully. MIs tie the Authority's expertise in competition issues to the in-depth study of markets or sectors. Yet a question arises whether this is the main essential capacity for accomplishing successful MIs, or whether the Authority's confined expertise in other areas justifies conferring this power on others. CAs might not be well suited to study industries in which highly specialized and on-going knowledge is necessary. In such markets, specialized direct regulators enjoy a comparative advantage with regard to expertise. Perhaps more importantly, since the CA is exclusively oriented towards eliminating anti-competitive behavior, it might not be able to objectively evaluate all the implications of a change on social policy and might not possess the expertise to trade off all conflicting considerations (e.g., competition vs. stability).[55]

In addition, MIs move from eliminating anti-competitive conduct into the field of increasing competition. When the UK Authority decides on divestment of assets or the Israeli Authority applies the power to give instructions to firms operating in markets characterized by high degree of oligopolistic coordination, they perform a much more interventionary role than in traditional antitrust. Instead of scrutinizing the decisions of market players, the Authority determines some of the market conditions by dictating (or in the advisory model- recommending) a specific business decision, intended to increase competition. Such a role necessitates adequate

[54] Y Svetiev 'The Tools of Experimentalist Enforcement: Competition Policy as a learning Platform" in this volume.
[55] M Gal and I Faibish, 'Six Principles for Limiting Government-Facilitated Restraints on Competition' (2007) 44 *Common Market L Rev 10-11*

practical business wisdom to choose the optimal path, which the Authority's staff might lack.

Yet these arguments do not lead to the conclusion that MIs should not be performed by CAs, but rather that their scope should be limited in cases in which their comparative advantages are less relevant. Some examples follow. First, where another regulatory body has expertise in the market, it might be more efficient to require it to perform the MI. If it is assumed that the regulatory body cannot perform it efficiently or effectively, the CA should be required to take active steps to bridge its gap of expertise. The new UK legislation suggests an interesting layout for encountering the issue of MIs that involve public interests other than competition:[56] It grants the Secretary of State extended powers to appoint a "public interest expert" who has particular knowledge or expertise in the related matters.[57] Yet, the CA retains substantial powers even when broad public interests are involved.[58] At the end of the day, the question is whether another governmental entity is preferable in term of expertise, objectivity and readiness to engage in the MI, across the administrative landscape.

Second, it might be wise to distinguish between the legal and economic analysis of the obstacles to competition performed by the Authority, and the remedies it recommends (or attempts to implement). With regard to the former, the Authority usually acts in its field of expertise, while in shaping broad remedies- it does not. Accordingly, when remedies are challenged, the appellate body might give less weight to the expertise of the CA. Also, minding the democratic concern, where trade-offs between competitive and non-competitive considerations are required, the balancing should be performed at a higher level of government.

Endowing the CA with the power to engage in MIs can also potentially **overcome**, at least partially, some of the **limitations often attributed to direct regulators**. Such limitations focus on the competence and efficiency of the direct regulator, who may be plagued, inter alia, by an inadequate ability to evaluate the real causes of limited competition and the ways to remedy it, by regulatory capture, and by its concern with losing its sphere of influence. In contrast, the CA's expertise lies in competition issues, and its mandate includes a wide range of markets and thus it is not as susceptible to regulatory capture and to concerns with its sphere of influence. [59] Moreover, the Authority's enhanced powers and impact also urge other regulators to mind competition considerations in advance. Relatedly, the incentives of pressure groups to invest resources in influencing the regulator might be weakened, if they assume that a supervisory agency might undo the effects of such influences.[60]

MIs can also serve as vehicles for providing the empirical and theoretical basis to **justify and move along modifications in long-standing status-quos** in regulated sectors. Along these lines, Stiglitz argues that an important way to prevent

[56] Ibid; ERRA (n 10) s. 35.
[57] Ibid ss. 141, 141A, 141B; See also pp. 30-32 for additional powers of the Secretary of State.
[58] Ibid ss. 146A, 147A, 148A; For instance to decide whether adverse affects on public interests exist, to recommend that other persons take actions, or what actions should be taken. The CA only needs to "have regard" of the views of a public interest expert that the Secretary of State may appoint.
[59] DEM Sappingtonand DL Weisman, 'Regulating regulators in transitionally competitive markets' (2012) J Regul Econ 19 31, 36; JC Cooper and W Kovacic , 'Behavioral Economics: Implications for Regulatory Behavior' (2011) 41(1) Journal of Regulatory Economics <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892078> last accessed 22 September 2013.
[60] J Freeman and J Rossi, 'Agency Coordination in Shared Regulatory Space' (2012) 125 *Harv. L. Rev.*, 1133 1186.

regulatory failure is "multiple oversight, a broad system of checks and balances. The costs of duplication are far less than the costs of mistakes." [61]

MIs performed by the CA can also help **refute mistaken public assumptions** that anticompetitive behavior takes place, most notably in cases of price increases. Thus, MIs can prevent mistaken and costly regulatory interventions or public outcries. The UK Agency's power to give an industry a "clear bill of health" serves this end. [62]

MIs can also create **positive reputational effects** on both the wide public and the government. For one, MIs serve as valuable opportunities to demonstrate the CA's contribution, professionalism and relevance to economic policy. In particular, MIs that lead to visible and positive changes in market conditions, as well as those that affirm the positive effects of previous CA's interventions, can strengthen its reputation. Such reputational effects, in turn, may contribute to the enhancement of competition in the long run, through increased resources or readiness to take into account the CA's suggestions. However, MIs can also create negative reputational effects. MIs might harm the CA's reputation if it is required to make decisions on issues that involve a non-obvious tradeoff among different values. As noted elsewhere, "distributional issues are inherently more political than might be considered optimal for a body that needs to be regarded as an impartial overseer devoted to advancing the general public welfare."[63] One way to overcome such effects is to narrow the mandate of the CA to perform only MIs that focus mainly on obstacles to competition.

In sum, MIs by CAs entail substantial merits.[64] At the same time, the power to engage in MIs gives rise to some costs that we now turn to evaluate. Acknowledging such costs is essential for ensuring the efficient responsiveness of the regulatory toolkit.

Chapter III: Possible vulnerabilities and downsides

Adding MIs to the CA's mandate involves a dramatic change, as it breaks some of the traditional lines between *ex post* and *ex ante* regulation and broadens the CA's powers significantly to include "market engineering". This chapter outlines the possible costs of moving from a reactive model to a proactive one. As elaborated, MIs are far from costless, even in their more benign advisory model form. Beyond the direct costs imposed on both the CAs and market participants, MIs often carry less obvious but nonetheless important price tags which we seek to unveil. This chapter focuses on intra-regulatory costs while the next focuses on inter-regulatory ones. It explores capacity constraints (Section A), shift of focus (Section B), constitutional concerns (Section C) and regulatory capture (Section D).

Two main questions lead our inquiry. The first is whether the CA is the right body to perform the analysis, and the second is whether MIs should be performed only as a last alternative or at least in the most moderate manner possible, where traditional competition law enforcement tools cannot provide a reasonable solution to market failures, or whether once granted MIs stand in the regulatory toolbox in line with all other tools, and the Authority may freely navigate among them. To answer these questions one must look at all the different aspects that are relevant, and aggregate the pieces of the puzzle.

[61] J Stiglitz 'Regulation and Failure' D Moss and J Cisterino (eds), *New Perspectives on Regulation* (The Tobin Project, 2009) 13, 20
[62] OECD Report, (n 7) 8, 118, 233.
[63] Ibid 8, 218, 234.
[64] Of course, the exact powers granted to the CA affect such merits. Such specifications are beyond the scope of this paper.

A. Capacity Constraints

Assuming that adding MIs to the CA's regulatory plate was not accompanied by increased funding, diversifying the Authority's toolkit may result in diluting the resources designated to traditional tasks, leading to inferior performance and deterrence.

Several counter arguments can be raised. First, MIs' broad prism, which does not focus on a specific firm but rather on a sector, a type of agreement, consumer conduct patterns, regulatory frameworks etc., has a higher probability to reach the genuine roots of market or regulatory failures, and allows for more holistic remedial suggestions. Furthermore, MIs can also tailor solutions to market failures that are not dealt with effectively by competition laws. Most importantly, they may deal with the Achilles' heel of competition law: oligopolistic coordination in highly concentrated markets. Accordingly, the goal of furthering competition may in some cases be better achieved through MIs.

Second, the new powers create synergies between regulatory tasks. Economic insights derived thorough MIs may be applicable to the Authority's other activities. They provide a solid and thorough knowledge base to draw upon in traditional investigations in the studied markets, thereby reducing asymmetric information problems.[65] Furthermore, general insights and lessons from an MI can carry over to traditional inquiries, as well as improve its advocacy activities by incorporating a wider set of examples that correspond with recognized public concerns and perceptions. Thus, even if diluting the resources vested in each task, MIs may still enrich the Authority's expertise and compensate for dividing the resource pie into smaller pieces.

Third, MIs may spare the implementation of costly and lengthy traditional enforcement steps. If firms identify the potential for enforcement steps through an MI that may affect their markets more than traditional enforcement activities, they might even end their anti-competitive conduct to avoid such steps.[66]

B. Shift of focus

A related concern involves a shift in the CA's *modus operandi*. Remedying the ails of a market might be easier and shorter through an MI, especially if the Authority is operating under the Supervisory Model. This is especially true in jurisdictions in which the CA cannot impose significant remedies by itself even in traditional competition law violations but needs to prove in court that an anti-competitive conduct has indeed taken place. Accordingly, it may choose the MI path whenever possible, thereby limiting traditional enforcement activities.

This raises the question whether this is good public policy. No dichotomic answer can be given. A straightforward no is problematic. Oftentimes the first-best solution to limited competitive performance is to lower or eliminate entry barriers and let competition have its way. When barriers are not caught by the competition law (e.g., oligopolistic coordination or government-erected barriers), MIs may be more efficient. A straightforward yes is also problematic, since a regulator may tend to take the easiest path, with short-term visibility and reputational effects and decreased costs of effortful litigation, even if this is not the path that increases social

[65] Stiglitz (n 56) 15.
[66] OECD Report (n 7). The Report provides two examples. In Italy, once the agency opened an investigation into the banking sector, many banks immediately decided to eliminate certain practices. Ibid 213-214. In the UK the OFT "focused on getting the industry to agree to change its practice through a market study", in the context of car warranties, although the situation could have alternatively be encountered by using Article 81. Ibid 209.

welfare in the long-run. Social welfare might be decreased if remedies imposed through an MI are not sufficiently deterrent or because of the level of uncertainty MIs create in the market. Accordingly, a balance must be found between the different regulatory tools, which is based on each tool's comparative advantages and disadvantages.

An additional type of shift of focus occurs when the CA is required not only to prevent specific types of conduct that limit competition, but also to introduce or increase competition in a market. This increases uncertainty in the market: What degree of intervention is warranted and which tools for achieving it are preferable? Conceptually, until all market imperfections are remedied, improvements are possible. MIs actually change the rules of the game from "everything that is not explicitly forbidden is permitted" to "certain things that are not forbidden, may be subject to authoritative prescriptions (or recommendations)." Accordingly, moving from the black zone of anti-competitiveness into the grey zone of increasing competition may create a high degree of uncertainty. This, in turn, might negatively affect firms' conduct, especially investment decisions. One counter-argument focuses on the fact that the government's mandate generally allows it to change market conditions where such a change is highly conducive to social welfare, regardless of whether this role is performed by the CA or by another governmental entity.

C. Constitutional issues

Empowering the CA to apply MIs raises some constitutional issues, given that MIs may entail significant social, economic or political consequences which might limit rights such as freedom of occupation and property rights.[67]

At the legislative stage, a question arises whether the Authority can engage in MIs which require broad public policy decisions, given its **democratic mandate**[68] and the fact that the CA is a professional agency, not directly nominated by the public. We argue that the answer partially relies on the way that the power was granted to the Agency. Any deviation from its traditional powers should be specifically embedded in clear legislation or in a clear delegation of powers from the government. The relevance of this argument becomes apparent in light of the ICN survey, which found that 11% of the surveyed jurisdictions (4 out of 38) perform MIs without formal powers to carry out such inquiries. Of course, such delegation is especially crucial under the Supervisory Model. But even under the Advisory Model MIs can lead to dramatic changes in market conditions.

Once legislated, a question arises as to **whether**, from a constitutional point of view, MIs should be performed only as **a last alternative**. On the one hand, MIs may have significant effects on market players that go well beyond traditional competition law remedies, and might change market conditions radically. Accordingly, one may argue that changing the conditions of the market that are not the result of private anti-competitive conduct changes the rules of the game for market players and thus such steps should be taken as a last resort, if at all. On the other hand, MIs can in some cases be seen as a measure to limit more intrusive regulatory activities, since they may detect the potential for anticompetitive patterns prior to their full realization and their elimination might necessitate less drastic regulatory steps. Furthermore, MIs do not generally lead to criminal or civil litigation. But most importantly, market players do not have an inherent right that current market conditions will remain

[67] Of course, the tension between constitutional rights and effective enforcement is not unique to MI. For one excellent analysis in the context of cartel enforcement see W Wils, *Efficiency and Justice in European Antitrust Enforcement* (HART Publishing, 2008).

[68] We relate only to the first type of MIs.

unchanged. This is especially true if barriers are artificial.[69] The social contract in a capitalistic society does not promise to protect the status quo, but is based on a dynamic model in which firms must deal with changing circumstances, to increase social welfare. Yet this last argument does not imply that constitutional issues are not relevant. Rather, proportionality is required: ensuring that the expected social benefits from MIs outweigh the potential harm from the inquiry itself and its outcomes.

Constitutional issues should also affect the procedural aspects of MIs. An important issue surrounds **the investigative powers** that can be used in MIs. Such powers can potentially range from collecting information supplied voluntarily, through compelling the supply of information, to the use of search and inspection powers. Jurisdictions differ in the point chosen along this spectrum. For instance, in Canada, an amendment to the Competition Law proposed in 2005, which eventually was not adopted, granted the CA formal powers to subpoena documents, but not to search premises.[70] Conversely, the Italian CA has search powers in performing MIs.[71]

We argue that any investigative power, beyond voluntary requests for information, should be specifically granted in the legislation. This implies that the powers to perform inquiries of anti-competitive conduct should not be automatically expanded to apply to MIs. A tougher question regards requests by the CA for voluntary divulgement of information. On its face, such requests do not harm any rights, given that market players can simply not comply. Yet the interaction of market players with the CA is a long-term and multifaceted one, and such an objection might create negative externalities on the market player, thereby creating incentives to comply with voluntary requests that might impose significant costs on it.

Accordingly, we argue that such powers should also be legislated and be also subject to judicial scrutiny and constitutional constraints such as proportionality. In this vein, the legality of "fishing expeditions" and especially of dawn raids by the European Commission performing MIs was questioned by Andersson and Legnerfalt.[72] The authors point to the lack of compatibility between the costs and burdens and the utility derived of such steps, and stress not only the immediate costs but also the damage to the integrity of the firms involved firms.[73] Such costs should be evaluated against the aims to be achieved and the other methods for obtaining information at the CA's disposal, such as obtaining it from other governmental agencies.[74] We also argue that proportionality should also relate to the possibility that in extreme cases MIs might harm competition, if they impose a disproportional and high burden on small firms. In such cases the CA should apply extra care before requesting the information and should even consider covering some of the expenses of firms. External mechanisms that *ex ante* verify the reasonableness of the CA's requests for information may reduce constitutional concerns.[75] Lastly, while preserving the elasticity of the MI tool is legitimate and efficient as it enables the exact tailoring of the CA's activity to various circumstances, specifying the borders of legitimacy of

[69] A Ayal, 'Counter-Intuitive Fairness in Antitrust: Protecting the Monopolist and Balancing among Competing Claims' (2012) 8(3) JNL of Competition Law & Economics) 627.
[70] OECD Report (n 7) 229.
[71] Ibid 57 2nd para; pointing to EC Regulation n. 217/98.
[72] Andersson and Legnerfalt, (n 13); The paper relates to the EC inquiry into the pharmaceutical market that began by dawn raids despite the absence of any suspicion of wrongdoing by any specific firm.
[73] Ibid.
[74] OECD Report (n 7) 231; ICN Report, (n 2) 39-41.
[75] The US regime integrates into the process of crafting a mandatory information request, both an opportunity for the public to comment on draft requests, and a need to gain the clearance of an independent public figure, the Office of Management and Budget (OMB), according to the Paperwork Reduction Act. Ibid 146-151.

investigative powers is required. The ICN Draft Handbook advises agencies to be clear about the purposes of the request and the legal constraints on using it.[76]

An important constitutional question involves the **transition** between the two tools: whether the findings of market inquiries can be used for **proving an antitrust violation**. This question arises in its strongest form when information is voluntarily supplied. In recognizing the difficulties involved, many jurisdictions adopt some limitations on moving from an MI to traditional enforcement. For example, In the EU the Authority cannot use information collected in MIs in subsequent litigation unless it requests it again from the parties. [77] In Italy, when an MI reveals an infringement, the Agency must open a separate antitrust investigation into the specific issue.[78] The US CA cannot base enforcement solely on the basis of information collected in an MI and additional information must be gathered through a separate investigation. [79]

Yet, a concern arises that such safeguards are largely lip service, affecting mostly the expediency of the enforcement. Once the information is known, the Authority can easily comply with the requirement for issuing new formal demands to deliver a specific document. Accordingly, if MIs lead to actual enforcement, there is a need to **apply rules that go beyond such limited safeguards**. Such rules should balance between the need to adequately exploit public funds and protect the public interest (including from abuse of an MI to reveal information and then argue that it cannot be used against the firm providing it), and the integrity towards market participants who have cooperated with MIs, assuming that this vehicle is distinct from enforcement as well as creating conditions of certainty and confidence that can facilitate cooperation in future MIs. Accordingly, CAs should be required to seriously evaluate in advance whether the issue should better be channeled to enforcement or to an MI. Once the decision to engage in an MI was adopted, the CA should avoid a "zigzag" approach, staying at the edge of enforcement, ready to jump into its deep water whenever possible, unless severe infringements of competition prohibitions are revealed. This, in turn, will also increase motivations to comply with information requests that lead to better and more informed MIs.

D. An increased risk of regulatory capture

It is generally accepted that direct regulators might be more vulnerable to regulatory capture.[80] Yet, as the CA's powers broaden, if it nevertheless falls prey to capture, the implications might be more worrisome.

Three conditions join to facilitate capture: the pressure group has the motivation and ability to engage in it; the public officials are willing to cooperate with capture attempts; and there are practical opportunities to successfully realize capture. MIs increase two of these conditions: The more substantial the implications of a regulatory power, the stronger the motivation of those whose interests are at stake to try and achieve capture. MIs, especially under the Supervisory Model, may result in significant changes in the market and thus strengthen such motivations. MIs also increase the opportunities to realize capture.[81] Beyond the many ways open to CAs to structure their conclusions and recommendations, MIs enable regulators to enjoy

[76] ICN Draft Handbook (n 2) 80.
[77] OECD Report (n 7) 212.
[78] Ibid 214.
[79] Id 146.
[80] Regulatory capture "occurs when one particular interest group is able to obtain favors from a legislative body or regulatory agency". H Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* (2nd edn 1999) 681. For the theory of capture see, eg, G Stigler, 'The theory of economic regulation' *The Bell Journal of Economics and Management Science* (1971), *2*(1) 3–21; S Peltzman, 'Toward a More General Theory of Regulation' (1976) 19(2) Journal of Law and Economics 1 3-21; F McChensey, *Money for Nothing: Politicians, Rent Extraction, and Political Extortion* (1997).
[81] OECD Report (n 7) 9, 219, 226, 241; ICN Report (n 2) 49-51, 59, 61, 102.

the fruits of capture in a rather concealed way that is harder to detect, does not generally raise resistance, and is thus less risky and more tempting.

Yet the relevant question is not whether the CA might be subject to regulatory capture, but rather if the risk is sufficiently worrisome or larger than under other regulatory alternatives so that MI powers should not be granted. The answer is generally negative. At the same time, recognizing possible capture effects increases the need for devising ways to recognize and fight it. One method is to recognize the potential interest groups in each MI and their motivations and aims, and keep them in mind during the inquiry. Stiglitz teaches that cautiousness is necessary even with regard to MIs into theoretical foundations since "..capture also occurs in a more subtle way: through the promulgation of ideas."[82] He urges agencies to ensure that the voice of those whose interests are likely to be hurt by regulatory failure is well represented in the regulatory procedures.

Chapter IV: Intra-Regulatory Effects

So far the analysis focused mainly on the ability of CAs to efficiently, effectively and constitutionally perform MIs, given the CA's characteristics. An important yet often overlooked aspect of MIs focuses on the intra-regulatory effects they create, that is their effects on the CA's interactions with other governmental entities as well as their effects on the conduct of such entities. This is the subject of this chapter. Section A analyzes the effects of MIs on the inter-regulatory status-quo. Section B explores the new administrative law literature regarding coordination mechanisms in shared regulatory sphere. It critically evaluates the desirability of implementation of coordinated processes, in each of the two relevant models.

A. Effects on the inter-regulatory status quo

Empowering the CA to engage in broad MIs that analyze and make (or apply) remedial suggestions for overcoming market and regulatory failures changes the status-quo within the executive branch. In fact, it enables the CA to act as a Super-Regulator (or super advisor) in markets that are not functioning well. Especially under the Supervisory Model, it changes the CA's role from Robin (the assistant, who acts through advice) to Batman (the super-hero who leads the fight) as it subordinates the other regulators' decisions to those of the CA.

Let us first explore the extent of change in the regulatory status-quo. Of course, it is most pronounced in markets in which direct regulators operate. In most countries the general status-quo grants superiority to direct regulation over antitrust in cases of clashes between the two regimes.[83] Both the Advisory and the Supervisory Models change this situation. In both, the CA is authorized to perform studies and suggest remedies in markets regulated by other governmental bodies. The Supervisory Model goes further by enabling the CA to determine changes in regulation of the market. Interestingly, as the ICN survey revealed, among the five most studied sectors, four are subordinated to direct regulation.[84] This may result from the importance of regulated markets to the economy, that justifies additional

[82]Stiglitz, (n 56) 13, 20. He notes as one example that "the financial sector in recent years actively promoted the idea that markets could be self-regulating".

[83]For such a rule in the US see, eg, T Sullivan, H Hovenkamp and H Shelanski, 'Antitrust and Other Forms of Regulaion' *Antitrust Law, Policy and Procedure: Cases, Materials, Problems* (5th edn, LexisNexis Matthew Bender 2003) ch 9, 981-985; P Areeda, L Kaplow and A Edlin, *Antitrust Analysis: Problems, Text, and Cases (6th edn, Aspen Publishers 2004) 83-84;* Shelanski argues that "The Supreme court has redrawn the boundary between antitrust and regulation in a way that reduces the applicability of antitrust law in regulated markets". See H Shelanski, 'Justice Breyer, Professor Kahn, and Antitrust Enforcement in Regulated Industries' (2012) 100 California LR 487.

[84]ICN study 2009 (n 2) 98.

inquiries in order to find the most effective regulatory path, or concerns that direct regulation- or a direct regulator- are not functioning well.[85]

A less evident yet still important change in the status-quo can also be created even when no direct regulator exists in the market. Indeed, the carrying out of an MI resembles the throwing of a pebble into a river, as it creates several widening circles of impact. The relevant ministry, or even the whole government, can be affected by the conclusions of the MI. An MI which points to regulatory shortcomings or to policy decisions that created (or failed to lower) obstacles to competition in the market may well have a negative impact on public perceptions of the government. Such an impact might be stronger if indeed the CA's recommendations are applied in practice and reveal the cost that the public has paid for inefficient regulation.

As a result, a direct regulator may wish to avoid such studies. One way is to pressure the government that MIs into its sector (or at all) not be performed. Another way is to take active yet covert steps to cut its budget of the CA or to harm its reputation, to ensure that its recommendations are not given much weight by the government or in the public eye.

Conversely, the empowerment of the CA to perform MIs might create positive externalities on other regulators or governmental bodies, as it re-shapes their incentives in a way that may spare the need to perform some MIs. It strengthens the incentives of other regulators to act more proactively to find solutions to market failures in order to limit scrutiny (or intervention) by the CA.[86]

Parallelly, an MI may strengthen the stand and prestige of the CA, and may endow competition considerations with increased weight in diverse policies and activities, due to enhanced awareness. Of course, when an MI does not lead to any change, the reputation of the CA might be harmed.

B. Coordination among regulators?

This section explores the applicability to MIs of some of the insights offered by the recent administrative law literature, which takes the focus from a single agency and moves it to multiple agencies' interactions.[87] In their recent paper, Freeman and Rossi praise coordination as the response to the challenges faced when multiple agencies interact in a "shared regulatory sphere".[88] This section questions the desirability of applying cooperation mechanisms between the CA and the direct regulators while performing MIs.

Freeman and Rossi describe modern governance as often characterized by fragmented and overlapping delegation of powers to several agencies, each responsible "for part of a larger whole."[89] They contend that in such a reality coordination "has significant promise for overcoming concerns of dysfunctions".[90] Accordingly, we analyze the possibility of integrating coordination into MIs.

The benefits of coordination are contingent on the type of coordination and the initial reasons that have led lawmakers to design the specific shared regulatory

[85] OECD Report (n 7) 120, 145 (UK), (US): "The purpose of these reports was to create greater public awareness of the costs of regulation and thereby to encourage greater consideration of the benefits of competition and of market-based solutions".
[86] See, eg, Sappington and Weisman, (n 54) 32
[87] See E Biber, 'The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship' (2012) 125 Harv. L. Rev. 78.
[88] Freeman and Rossi (n 55).
[89] Ibid 1134.
[90] Id 1136-1137.

space.[91] With regard to the first stage of an MI, the market analysis, CAs can definitely benefit from coordination, which may save information-gathering costs and generate more accurate analysis given the input of those generally involved in regulating the specific market. It also decreases duplication and inconsistency.[92] Coordination facilitates these gains while preserving the independence of each agency, which is important for productive interagency competitiveness and the ongoing operation of distinct laboratories for policy ideas. Another beneficial byproduct of coordination is that it inherently involves more individuals that pertain to more than one organization. This guaranties additional independent inspection that can locate, and thus deter and prevent, unconstitutional or otherwise disturbing misuse of MIs. Yet we argue that even at this stage the CA should keep in mind the political economy limitations that may affect the direct regulator.

A more complicated question arises with regard to policy conclusions and remedies. Coordination might increase the possibility that remedies be workable. Moreover, in case an MI is a fruit of cooperation, the regulator might view the report as partly its own, thereby refuting some of the potential criticisms by indicating that it is open to self-assessment and change, and thereby increasing the prospect of affirmation and actualization. On the other hand, coordination has its costs when criticizing the conduct of a regulator, as it is not simple to simultaneously nourish a cooperative and a competition-prone conscientiousness. This is because cooperation creates personal affiliation between officials across agencies, habitualness of co-existence and possibly convenient reduction of required tasks. Accordingly, coordination in structuring remedies might be least beneficial in regulatory sunset situations, in which changes in the market (most likely technological) suggest a change in the regulatory function towards greater reliance on market forces. As a result, caution is required in order to avoid fostering coordination mechanisms that protect a given inefficient regulatory mechanism. If we expect the CA to advance the realization of conditions that lead to turning the lights off in other regulatory agencies, coordination might in some situations be counterproductive.

In cases in which coordination is beneficial, which tools are most efficient? Freeman and Rossi recognize three types of Coordination tools: consultation, agreements and joint policymaking. Consultation seems most applicable to MIs[93], preserving the CA's lead and limiting the danger of stagnation of regulatory methods. Mandatory consultation[94] may be advised: requiring the CA to consult, but leaving it with full discretion as to whether to accept the direct regulator's inputs.

In practice, many jurisdictions foster cooperation while performing MIs. For instance, while the Hungarian agency in not obliged by law to do so, in practice it circulates drafts of reports to governmental agencies which operate in the same policy space. It also consults with government institutions, to hear opinions and discuss the draft prior to holding hearings with firms. It finds this approach useful for verifying the soundness of the analysis and improving the final report's quality.[95] Indeed, the ICN Draft Handbook[96] advocates the consideration of cooperation with sector regulators while performing MIs.

Some jurisdictions go further and engage in partly joint MIs, mostly as a way to ensure the provision of information and overcome budgetary constraints.[97] Others

[91] Id 1137, 1144.
[92] Id 1182.
[93] Id 1192.
[94] Id 1157-1161.
[95] OECD Report (n 7) 226.
[96] Ibid 33.
[97] See, eg, the contributions of the following jurisdictions to the OECD Report. Ibid 163 (Chile), 157 (Italy), 227 (France), 76 (Mexico).

adopt an opposing position[98], warning of negative effects on the public perception of the CA's independence, risks of delays and clash of interests. The ICN Draft Handbook[99] seems to warn more than encourage joint reports. In our view, much depends on the circumstances. Especially when the core aim of the MI is to consider the continuance of direct regulation or part thereof, joint MIs might lead to a deadlock.

Chapter V: Instead of a Conclusion: Comparative Evaluation of the Supervisory and Advisory Models

As this paper attempted to show, MIs performed by CAs may create significant benefits. Although they create both direct and indirect costs, such costs can largely be reduced by acknowledging them and structuring the MI accordingly. For example, the strengthening of the CA's powers requires taking stronger precautions against regulatory capture than previously applied.

That said, instead of a regular conclusion, we apply our above conclusions to the two main models of MIs: the Advisory and the Supervisory Models, to determine which one is more effective and efficient.[100] Of course, the answer depends, inter alia, on parameters that are unique to each jurisdiction, such as the level of performance of other regulators and the extent of corruption. These parameters, which should also be taken into account when making a decision in a specific setting, are beyond the scope of this paper.

The clear tendency worldwide to embrace the Advisory Model accompanied by rare exceptions to follow the Supervisory one, raises the question of whether the majority miss substantial utilities created by the blunter alternative, whether the minority overlooks important pitfalls of its choice, or whether different circumstances justify different models. We hope to shed light on this question.

As noted, the models differ in the extent that the CA can independently enforce the remedies it reaches at the completion of the inquiry. Under the Advisory Model, the CA presents its findings and suggestions to the relevant governmental bodies and has no power to act upon them, while under the Supervisory Model it is empowered to take active steps to remedy at least some types of market failures. This difference affects the future implications of the inquiry, and also affects backwards the process of the inquiry, and side-wards the interfacing agencies.

With regard to the CA's **expertise**, both models make use of its analytical capabilities in analyzing market failures. The Supervisory Model further makes use of this expertise when the imposed remedies pertain to introducing more competition, but moves the CA into unknown territory if balancing of competitive and non-competitive considerations is required. Although consultation and cooperation are possible, the Supervisory Model usually makes less use of the expertise of other governmental bodies in structuring remedies, as it lacks one layer of critical assessment of such remedies by other governmental bodies, that is inherent in the Advisory Model.

The Supervisory Model proscribes one entity- the CA- as responsible for performance, substantial conclusions, choice of remedies and course of implementation of the MI. This fact **stimulates** the Authority to vest efforts, act

[98] See, eg, the Irish contribution to the OECD Report. Ibid 50.
[99] Id 23-24.
[100] Part of the measurements for comparatively evaluating the two models follow the thresholds outlines by Freeman and Rossi (n 55).

professionally, and strive for the best possible result. In addition, the fact that one agency carries out the project from start to end may increase the MI's **coherence**.

The type of model applied also affects the **risks of capture**. As elaborated, CAs are assumed to be relatively immune to such risks. Yet, endowing the Authority with substantial power over direct regulators implies higher risks of capture, as it is "..most likely to arise where the delegation scheme allows a single agency to block, dominate, or neutralize others".[101] This risk is of course higher under the Supervisory Model. In the Advisory model, even if the Authority is captured, the implementing governmental agencies may negate the capture. Another kind of capture relates to political capture, where political entities may wish to make political usage of the CA's substantial powers in order to foster agendas unrelated to competition, especially if MIs can be initiated as a result of a reference by politicians.

Yet the main difference between the two models regards the MI's **effectiveness**: the potential that conclusions will turn into actions. Under the Advisory Model, the risk that important changes will not take place due to their rejection, circumvention or abandonment by other governmental agencies, and the related risk of eroding the CA's relative stand, is higher. Furthermore, as noted in the OECD Report, under the Advisory Model, when the MI is submitted, the work is not done. Rather it is often when the hard work starts: explaining and marketing the conclusions and convincing other governmental institutions to act upon them.[102] Moreover, anticipating such a reaction, the CA might have weaker incentives to invest in performing certain MIs altogether. In other cases it might tailor the remedies to avoid such reactions, even if this implies second-best solutions. The longer timetables for remedying market failure through an Advisory Model may further reduce incentives, since authorities tend to invest less in projects that will carry fruits in the distant future. Rather, public officials may prefer to pick the fruits of a successful inquiry during their own term. The Supervisory Model largely avoids such limitations, although expected criticism from other governmental bodies can sometimes have similar but weaker influence.

The importance of this difference depends, inter alia, on the frequency and the causes that prevent the actualization of an MI's recommendations. Indeed, the OECD Report finds that potential acceptance of an MI often depends on circumstances that may have nothing to do with the substance and desirability of their conclusions.[103] MIs that result in controversial conclusions have a higher risk of being disregarded, absent supervisory powers. To the extent that this outcome results from the mandate of the government to take into account broader considerations or to have the final word on controversial issues, this is a legitimate and desirable result. But when the political power of those enjoying the current situation leads to stagnation, the Advisory Model is inefficient.[104] The CA can reduce some of the deficits of the Advisory Model by creating counter-pressures through the general public. The public may leverage the MI into an action plan, by creating political incentives to policymakers to mind the public call for action. An additional tool is to require the

[101] Ibid 1186.
[102] OECD Report (n 7) 10, 222, 235.
[103] This reality was described in the Irish contribution to the OECD Report, ibid 53: "The effectiveness of market studies as a tool for reform depends on many factors, including the collective policy of the Government of the day, the receptiveness of individual Government Departments to change, the strength and organization of any entities who may wish to resist change and retain the *status quo*, the extent of consumer and other pressure for change, and so on. These dynamics will naturally vary from sector to sector, and from time to time, depending on individual and collective economic circumstances".
[104] The OECD report mentions the example of a historical US MI where the "Congress decided that the competition agency that performed the market study would no longer be allowed to study or report on a sector – the insurance sector -- precisely because the incumbents in the market sector applied political pressure on Congress to do so". Ibid 208.

government to respond to the MI recommendations in a limited time frame.[105] While this does not offer any guarantee that the recommendations will be accepted, the mandatory demand to consider them and to explain their rejection, slightly increases the potential for their acceptance. The Supervisory Model largely avoids such deficits.

The Supervisory Model spares the **burden of persuasion, lobbying or educational activities**. Rather, the CA can swiftly implement the proposed changes. Yet change might often best be achieved through persuasion rather than force. Accordingly, the Advisory Model may increase the prospects of urging a genuine and durable internalization of the merits of competition, as well as compliance that is based on acceptance as opposed to calculation of risk and sanctions. In addition, the effectiveness of the Supervisory Model is not necessarily long-term. Rather, the shorter way to implementation may turn out to be inefficient. Governmental bodies or pressure groups which oppose the remedies might try to harm the reputation of the CA or use their influence to clip its wings. In recognizing such caveats, the ICN study notes that CAs have developed multiple measures, aimed at the government, the business community, and third parties, that may serve to increase the possibility of adopting their recommendations.[106]

In sum, each model has strengths and weaknesses. The Supervisory Model has clear merits. It reduces political economy distortions; it stimulates responsibility and coherence; it strengthens incentives to engage in MIs; it spares persuasion resources following the completion of MIs, and it enjoys a higher effectiveness of implementation of remedies. Parallelly, the Advisory Model also enjoys some merits: it allows for external balancing of competition and non-competition concerns by policy makers, it is based on persuasion that results in less resistance thereby creating a higher potential to achieve genuine and lasting internalization and compliance, it does not entail substantial concerns of political manipulations, and it reduces motivations to harm the reputation of the CA.

Accordingly, it seems to us **that each of the models is preferable in a different set of cases**.[107] The basic condition for applying the Supervisory Model, in our opinion, is that the inquiry focuses almost solely on competition and does not require the balancing of competition and non-competition considerations. Once this condition is fulfilled, the Supervisory Model may work best if the inquiry is focused on the efficacy of some form of regulation or its scope; where the inquiry is anticipated to provoke strong pressure groups and change is critical to avoid welfare-reducing stagnation; and where a high level of corruption and a low level of professionalism can be assumed in higher levels of government.[108]

The Advisory Model is recommended where it is important to gain other regulators', the government or the public's acceptance to the recommendations; where the decision is multifaceted and involves not only competition but other considerations such as security, environmental concerns, employment or strengthening the weaker

[105] As required in nine jurisdictions according to the ICN study 2009, (n 2) 74.

[106] The Irish contribution to the OECD Report (n 7, 54) puts this forward clearly: "Market studies also have intangible benefits. If they are drawn up properly, and presented professionally, skillfully and (most importantly) accessibly, they both stimulate public debate on the issue at hand and get people talking about competition issues in general".

[107] This approach goes along the idea of "matching" suggested by Freeman and Rossi Ibid 1191.

[108] One might argue that in such situations the government will not give up its power to decide. Yet the political economy literature indicates that even in such situations the decision-making might be placed upon a professional agency. See, eg, E Salzberger and S Voigt, 'Choosing Not To Choose: When Politicians Choose To Delegate Powers' (2002) 55(2) Kyklos 289-310.

parts of society. In such cases, democratic consideration mandate that the CA only deliver its suggestion to the government which is better equipped to balance the competing consideration.

Thus, in order to maximize the utilities of MIs, it is suggested that jurisdictions consider outlining in their legislation the exact conditions under which each of the models may be implemented, instead of adhering to a single model. This increases legal certainty while allowing for the matching of the CA's capabilities to diverse cases.