The LITER good agency principles

Annetje Ottow discusses how competition and regulatory agencies should navigate complex environments

Over the years it had become apparent to me that the same basic principles were coming back time and time again when we discussed and sought to understand the framework in which market and competition authorities operate, not only within national context, but also at European and international levels.

These five principles can be identified as legality (L), independence (I), transparency (T), effectiveness (E), and responsibility (R). Taken together, these LITER principles drive good agencies; they are fundamental to a framework for agency design and actions. These five fundamental principles can be applied across a wide range of regulatory and supervisory bodies and agencies. Furthermore, they are of paramount importance in assessing independent agencies' work and behaviour.

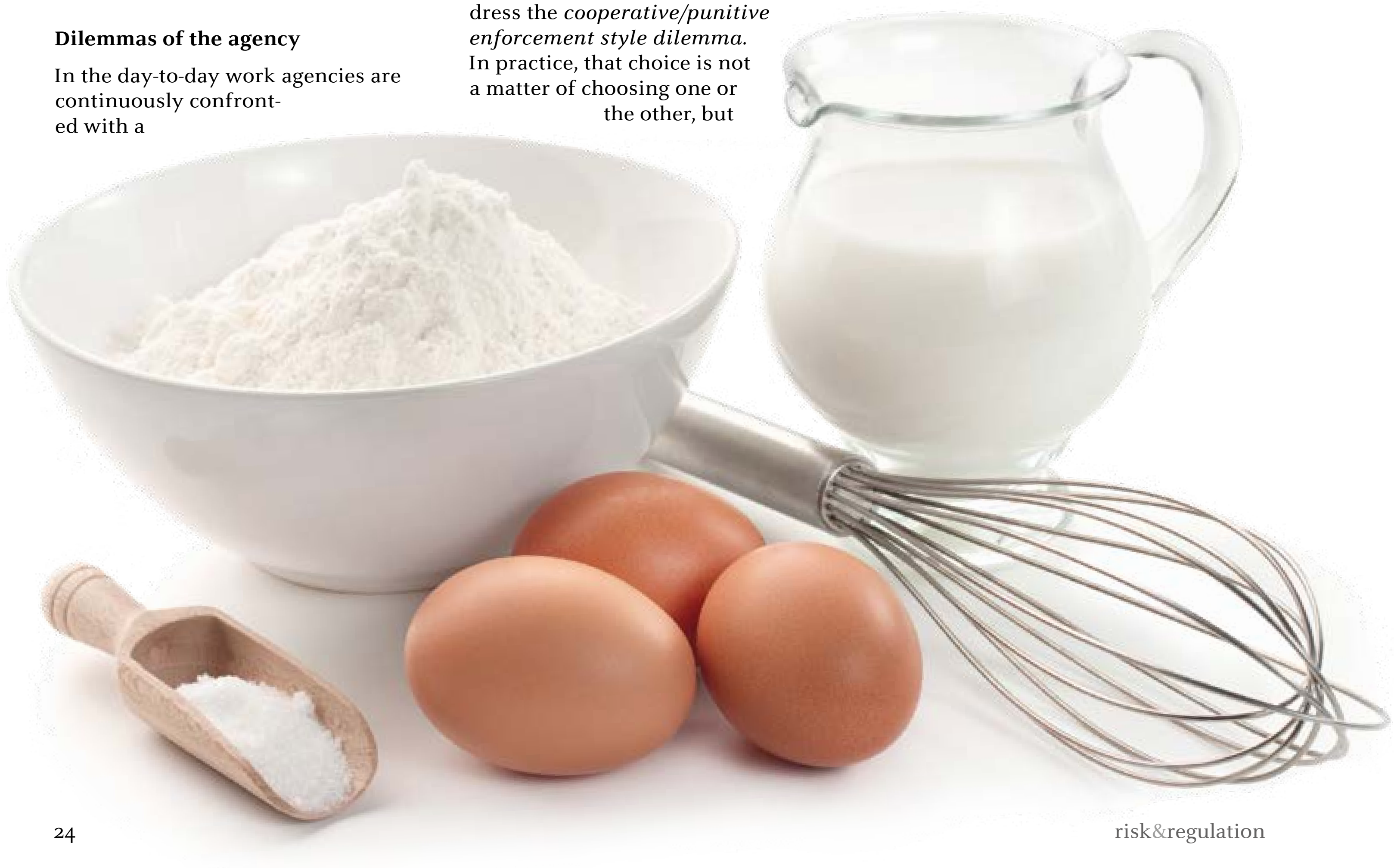
Dilemmas of the agency

In the day-to-day work agencies are continuously confronted with a range of dilemmas. Five agency dilemmas can be identified – and the LITER principles can guide agencies in tackling these.

The first and most tricky dilemma is the *regulatory dilemma:* whether to intervene or not. Calls for greater supervision following a crisis or incident are accompanied simultaneously by the fear of supervisory and regulatory overkill or the fear of excessive intervention. This dilemma means independent agencies are continuously under pressure when deciding whether to intervene. Secondly, there is the *trust/distrust dilemma:* agencies are highly dependent on the organizations they supervise for obtaining the relevant information, but, at the same time, they are required to keep a distance to avoid (the impression of) capture. Thirdly, agencies have to address the *cooperative/punitive enforcement style dilemma.* In practice, that choice is not a matter of choosing one or the other, but rather a matter of knowing when a specific approach, or combination of approaches, is required.

Fourthly, agencies have to balance between the interest to ensure transparency and the need to respect confidentiality. This *openness/confidentiality dilemma* can put agencies in a difficult position – to what extent do they need to protect the private interests of regulated organizations, or should they allow the interest of the wider public in greater openness to prevail?

Finally, there is the *efficiency dilemma:* market and competition authorities need to act promptly if they are to achieve their objectives. However, this need for efficiency can conflict with the need for carefulness as the various interests involved must be balanced against each other, the procedures followed must be fair, and any measure taken must be proportionate. The need for carefulness can, however, slow down the decision making process and therefore be criticized for reducing the agency's efficiency.



The LITER principles

What 'good' agency principles are, is inevitably, a matter of subjective choice. In my book, Market and Competition Authorities, I develop five broad principles. They contain the most common benchmarks that independent agencies and their stakeholders can use as a general framework.

Legality principle

The constitutional principle of legality is of particular importance: it forms the basis for all other principles and should influence any action by an independent agency. Following this principle, unilateral administrative action should be exercised on the basis of and in accordance with the legislative mandate authorized by Parliament. However, a mandate only offers limited guidance: agencies will always have to exercise their discretionary powers on the basis of complex legal and economic assessments. In a rapidly changing environment that is being driven by developments in technology, it is essential for powers, instruments, and procedures to be able to keep pace with these developments. An inadequate or delayed response to such changes will result in failure to meet the objectives of regulatory oversight. An independent agency requires flexibility in its decision-making powers; if its legislative mandate is too tight, it will be unable to intervene appropriately, and the purpose of the regulation will not be achieved.

Independence principle

Independence has long been considered an essential element in any market and competition supervision. Market and competition authorities, for example, are expected to apply rules and regulations impartially and independently of the interests of market parties, and also of the political arena. Independence from market parties is necessary in order to create a level playing field and to ensure market confidence in impartial decision making. A sufficient degree of independence is seen as an essential ingredient in allowing proper enforcement of policy more generally, and, therefore, also of competition policy. Ensuring independence also requires that board members have sufficient expertise and leadership qualities – board members represent an important buffer against capture and undue influence. The right expertise and leadership is key for organizational success.

Transparency principle

Market and competition authorities are bound by the need for transparency. Their procedures have to be seen as fair, accessible, and open. They need to make sufficient room for consultation and stakeholder participation. Decisions and interventions have to based on sufficiently reliable and sound justification, and legal and economic reasoning. Transparency can create certainty and better compliance, and thus prevent enterprises from committing infringements. Transparency also includes accountability. Independence of an agency is reinforced by transparency and accountability.

Effectiveness principle

Oversight has to be effective. Interventions have to meet objectives and innovations in instruments should be encouraged. Central to effectiveness is, therefore, a focus on enforcement. Enforcement styles and instruments need to consider how compliance is achieved in effective and efficient ways. Nevertheless, enforcement-related activities need to be seen in the light of other activities; they should therefore not come at the expense of advocacy or compliance work. Ultimately, it will always be difficult to establish an optimal level of enforcement. However, it is essential that effectiveness is seen in light of an efficient use of resources – inputs in terms of effort and work force, and the resultant costs need to remain reasonable and affordable.

Responsibility principle

The responsibility principle applies to both agencies and corporate actors. Agencies need to take responsibility for their actions, but, at the same time, they should encourage companies to take responsibility for their actions. They should not become reliant on regulators to make decisions for them. Instead, companies need to be encouraged to take responsibility to comply with rule and to manage risks themselves.

Market and competition authorities operate in a complex environment that is characterized by conflicting stakeholder demands. Balancing the various interests of the authority and stakeholders in an objective and impartial manner is critical for achieving the goals of the legislation imposed. Applying the five LITER principles can help agencies achieve these goals.

Prof. Annetje T. Ottow is Dean of the Faculty of Law, Economics and Governance, Utrecht University, The Netherlands, and professor of public economic law at that faculty. She is also non-executive director to the board of the UK Competition and Markets Authority, a member of the supervisory board of the Dutch legal helpdesk (Het Juridisch Loket) and she was Vice President and non-executive board member of OPTA, the Dutch Post and Telecommunications Authority. She is the author of Market and Competition Authorities: good agency principles (Oxford University Press, 2015).