

The Modernisation of European Competition Policy: networks, convergence and corporate governance

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Disclaimer: none of the views expressed in the paper or
presentation should be attributed to the Competition
Commission.

Speculative approach

- Questions as much as answers
- Research in progress
- Feedback welcome

Context of the paper: 'Modernisation'

- Regulation 1/2003
- Familiar contents
 - Articles 81 & 82
 - abolition of notification
 - pre-eminence of European law
 - pre-emption rights for DG Comp
 - empowerment of national agencies
 - enforcement through the ECN

Central concern

- **Convergence/ Divergence**
- ‘golden oldie’ of EU studies
- Paradox of decentralisation of enforcement but convergence of policy
- Convergence of economic approaches?
- Convergence across the Atlantic?
- Driving convergence of economic governance?

Four hypotheses

- i) that the ECN is operating successfully under the control of DG Comp
- ii) that Network dynamics may lead to the emergence of a group of leading, activist and agenda-setting NCAs
- iii) that European convergence is energised by, and is facilitating, transatlantic convergence
- iv) that effective policy will clash with the Rhenish or 'Coordinated Market Economies' and will challenge German-style corporate governance

Hypothesis i)

‘The ECN is operating successfully under the control of DG Comp’

- Creation of the ECN – European Competition Network
- Design of the Network
- Apparent smooth operation

Creation of the ECN

- 1999 White Paper
- Concept of a Network of NCAs (National Competition Agencies)
- About implementing law
- European law must be used when inter-state trade
- DG Comp has oversight and ability to
- 'take over' cases

Design of the ECN

- Rules for case handling, 3+ countries handled by DG Comp
- Arrangements for cooperation in information exchange and investigation
- Meetings and sub-groups
- Essentially 'virtual' operating through DG Comp website
- Highly confidential, no private access, 'shadowy'?

Apparent smooth operation

- Many fears of incoherence and conflict
- BUT few overt complaints from within or outside the ECN
- NCA opening case (almost always) keeps it
- Table 3 - decentralised enforcement:
 - 650 cases to Nov 2006
 - only 20% handled by DG Comp
 - wide spread, French and Dutch very active

Hypothesis i)

- Early days, operational for three years
- Relatively little academic research
- BUT
- **Seems that hypothesis i) provisionally confirmed**

Hypothesis ii)

‘Network dynamics may lead to the emergence of a group of leading, activist and agenda-setting NCAs’

- Diversity of NCAs
- Sources of instability
- Explanation 1 – sectoral agency solidarity
- Explanation 2 – common competition culture

Diversity of NCAs

- Table 1 – the ‘global elite’
- Table 2 – the range of EU agencies
 - Variations in peer review ranking
 - Variations in resources – staff and money
 - Variation in economic expertise
 - German, French, Italian – Dutch and the UK (especially UK?) NCAs all potential ‘leaders’?

Sources of instability

- Centrifugal forces – potential challenges to centralisation and DG Comp:

(Wilks has ‘form’ - 2005 *Governance* art.)

- Diversity in competence?
- Case allocation – prestige to DG Comp?
- Economic analysis: economists & doctrine
- DG Comp politicised?
- Treatment of major national companies?
- Resentment at displaced national Law?
- **BUT** – ECN still stable – WHY ?

Explanation 1

- **Sectoral agency solidarity:**
- NCAs typically legally independent
- Jealous of independence
- Look to ECN to support their independence
- Network 'as a bearer of reputation'
- A 'transnational' independent Network?
- NCAs could be caught in a vice between national governments and the Commission?

Explanation 2

- **The common competition culture:**
 - An epistemic community
 - A legal discourse
 - A 'market' discourse
 - A 'depoliticised' discourse

An 'epistemic community'

- Become almost the standard framework for analysing change in competition policy
- Rests on a community of specialists who share an epistemic framework – like 'creationists' - but here legal specialists in government, academia, courts and law firms
- Generates policy advice based on 'natural' and consensual views on policy initiatives

A legal discourse

- Legal basis of the competition rules
- Regime built through supportive judgements from ECJ
- Agencies staffed in the German tradition by lawyers
- Ideal of a legal framework, legal tests
- Legal norms ubiquitous – process/ rights/ precedent/ AND self-interest ??

A market discourse

- Commission uses market rhetoric
- Building economics into the mix of expertise
- But not yet clear what sort of economics
- **ECONOMISTS** are now central players
- But is there a shared sense of economic goals, doctrines and analytical methods?
- come back to this

A depoliticised discourse

- NCAs and DG Comp independent, largely 'depoliticised'
- But competition rules themselves have an elevated status
- Argue that the competition rules should take precedence over, eg. environment, energy
- Competition rules have a 'quasi-constitutional' status (OECD)
- Which may make the ECN insular/ arrogant?

Hypothesis ii)

- **‘Network dynamics may lead to the emergence of a group of leading, activist and agenda-setting NCAs’**
- **Hypothesis NOT confirmed**

Hypothesis iii)

‘European convergence is energised by, and is facilitating, transatlantic convergence’

- Convergence widely accepted?
- DG Comp expanding economic expertise
- Discuss two aspects:
 - the ‘turn to economics’
 - the promotion of private actions

The 'turn to economics'

- Interesting US history and move to an economic welfare focus
- In EU alternative foci, stress on market integration also SMEs and a doctrine of 'responsibilities of dominance'
- Parallel EU shift to consumer welfare post 1997?
- Does this imply a shift to a neo-liberal or Anglo-Saxon policy stance (Wigger)?
- Is it a US-style assessment of welfare?
- What are the implications for efficiency and the Lisbon agenda?

Promotion of private actions

- US regime rests on private actions
- Modernisation has allowed DG Comp to make this 'the next frontier'
- Akin to 'The Protestant Reformation'
- Green Paper 2005, White Paper coming
- Risk – US litigation culture?
- DG Comp 'surrendering responsibility'
- **OR** a subtle additional reinforcement of an individualistic 'Anglo-Saxon' enforcement of policy (Wigger again) ?

Hypothesis iii)

‘European convergence is energised by, and is facilitating, transatlantic convergence’

- US practice does appear to offer inspiration
- The convergence of EU enforcement opens up a route for insertion of US practice into member states
- **Hypothesis Confirmed**

Hypothesis iv)

‘effective policy will clash with the Rhenish or ‘Coordinated Market Economies’ and will challenge German-style corporate governance’

- Varieties of capitalism
- Strength of EU policy and enforcement
- Impact on non-Anglo-Saxon systems of economic governance?

Varieties of capitalism

- Classic contrast of Rhineland and Anglo-Saxon capitalism (Albert)
- Extensively refined, one influential distinction, Hall and Soskice:
- Coordinated Market Economics (CMEs) vs Liberal Market Economies (LMEs)
- US-style competition policy attuned to LMEs

Impact on CMEs

- Classic CME is Germany
- Aspects of German coordination are vulnerable to competition policy challenge:
 - Cross shareholdings
 - Bank coordination
 - Trade association coordination
 - Non-compete tendencies arising from trade union influence
 - Resistance to hostile takeovers
 - In fact many aspects of German Corporate Governance

Hypothesis iv)

- Invites consideration of a converging and unified European competition policy operating to control a still divergent set of European economics
- Those divergent European economies each have alternative (and effective) sources of competitive advantage
- BUT they are not necessarily recognised by the current orthodoxies of competition policy research on this in progress.....
- **SO Hypothesis iv) remains unresolved**

Conclusions

- The four hypotheses – in addition:
- Is the ECN a model for other policy areas?
- EU competition policy and enforcement currently in transition
- If new shape become more economic, more Americanised and more neo-liberal will it pose risks?
- Does the French Non in the Constitutional Referendum provide an example – does EU competition policy continue to provide an acceptable ‘economic constitution’ for Europe?

Thank you for listening.....

Feedback very welcome to:

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