

**MODERNISATION OF COMPETITION POLICY
AND EU GOVERNANCE***

**MODERNIZACIJA POLITIKE KONKURENCIJE
I UPRAVLJANJE EVROPSKOM UNIJOM**

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Abstract: “Re-shaping” policy provides the opportunity for an inclusive approach to EU decision-making in dialogue with existing member-states and anticipated new members. The purpose of this paper is to examine the extent to which the governance process that underpinned the modernisation of EC competition policy (Council Regulation (EC) N^o 1/2003, effective 1 May 2004) can be considered inclusive. This paper contributes to the small but growing literature that illustrates the complex interaction between governance and implementation of public policy.

A multi-level approach is used to describe EC governance with respect to the implementation of revised competition policy. The process is evaluated through the levels of involvement of the key stakeholders, i.e. firms (national, European and non-European), consumers, national competition authorities (NCAs), the European Commission, and member states. Ultimate authority, however, remains vested in the Commission through legislation and institutionalism.

Key Words: European regulations, European Union, Governance, Competition policy, Imperfect markets.

Apstrakt: „Preoblikovanje“ politike pruža mogućnost da se u proces donošenja odluka u Evropskoj uniji uključi dijalog sa postojećim državama članicama i očekivanim novim članicama. Svrha ovog rada je da se ispita u kojoj meri proces upravljanja podstiče modernizaciju politike konkurencije EZ (Uredba Saveta (EZ) br. 1/2003, stupila na snagu 1. maja 2004. godine). Ovaj rad daje doprinos maloj, ali rastućoj literaturi koja ilustruje kompleksne međuzavisnosti između upravljanja i sprovođenja javne politike.

Koristi se pristup od najnižeg do najvišeg nivoa da opiše upravljanje Evropskom unijom u vezi sa primenom revidirane politike konkurencije. Proces se procenjuje kroz nivo učesća ključnih stejkholdera, odnosno firmi (nacionalne, evropske i ne-evropske), potrošača, nacionalnih komisija za zaštitu konkurencije (NCAs), Evropske komisije i država članica. Međutim, najviša vlast je poverena Komisiji u smislu zakonodavstva i institucionalizma.

Ključne reči: evropski propisi, Evropska unija, upravljanje, politika konkurencije, nesavršena tržišta.

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1. Introduction

Competition policy is part of public policy, ostensibly it identifies the EU's commitment to fair competition to protect consumers against a distorted market price due to, for example the disproportionate power of multinational enterprises (MNEs). A competitive environment is of EU-wide benefit as it contributes to economic growth through increased efficiency, hence increased productivity (Nickell 1996). However, industrial economics has advanced substantially from its exclusively static foundations and its pre-occupation with *price* competition alone. In a dynamic economy competition in product and process innovations may have a more significant effect on welfare, at least in the long run, than does any likely variation in price. Competition policy is part of wider EC public policy undertaken in the interest of its citizens to maximise welfare. With this mandate in place it aims to achieve economic efficiency by encouraging conditions, which foster the growth of competitive markets. Developments in the productive efficiency of firms and the quality of their products, as well as their growth, and the ease, with which they can enter or exit, can be critical. Also, a public policy on competition is, however, not simply a question of applying economics, as Massel (1962, p. 83) states "*the formulation of public policies bearing on competition is strongly influenced by public goals and current government activities?*".

This paper evaluates the governance process initiated by the European Commission in the modernisation of European Community (EC) competition policy. Council Regulation (EC) N^o 1/2003 re-defines the powers of national competition authorities (NCAs) and the Commission. In particular EC policy re-shaping focused on Articles 81 and 82 of the Treaty of Rome (est. 1957) that prohibits the use of anti-competitive agreements and the abuse of a dominant position, respectively. These two forms of anti-competitive behaviour are central to the pursuit of a fair competitive environment.

2. Institutional and administrative framework of EC competition policy, pre and post-modernisation

The legislative framework that underpins EC competition policy was facilitated through Regulation 17 of the Treaty of Rome and has

explicit political and economic origins (Jones and Sufrin, 2001a). The EC competition policy is distinct from other non-EU competition policies given the additional explicit political intention of fostering (EU) integration in addition to the pursuit of fair competition.

Table 1 compares the objectives of competition policies in Japan and the US in relation to the EU. All three countries/region indicate the promotion of competition as a primary objective, and with the exception of the EU, the sole objective. The inclusion of European cohesion as a further, social and political, objective has direct bearing on policy administration and enforcement. The Commission has generally viewed co-operation agreements that fostered integration between member states favourably, even if they verged on the anti-competitive and threatened the viability of small undertakings (Hawk, 1980).

Table 1. Objective and originating year of competition policy

Country/region	Year	Objective
European Union	1962	Promotion of EU integration ^a ; promotion of competition within EU
United States	1890	Promotion of competition for the protection of consumer welfare
Japan	1947	Promotion of competition for the protection of economic welfare

Note: ^a Unique to the EU

Source: Compiled from Doern and Wilks (1996)

2.1 Pre-modernisation EC competition policy

The development of policy within the EU was contextually different from that of its member nation-states and other non-European nation-states of comparative economic power such as the US and Japan. The EU gains its legitimacy through the European Parliament, which represents the voice of the people, members are directly elected by EU citizens; the Council, its legislative arm representing the voice of the member states; the Commission, the executive arm overseeing the administration and enforcement of EU policy (Jones and Sufrin, 2001b).

Cognizant of divergent legal, socio-economic and political stances of its members ensured fairly tight control centrally from Brussels, by the director-

ate-general for competition (DGCOMP). Four groups of directorates were established to oversee the administration and enforcement of competition law. The emphasis appears to have been on developing appropriate legal procedures in keeping with the enforcement of competition legislation as it related to mergers, state aid and antitrust. In this context, therefore, an understanding of sectoral nuances became a residual by-product of the process.

Guidelines covering the prohibition, enforcement and powers of EU competition authorities are indicated in Articles 81-91 of the Treaty. In particular, Article 81 prohibits the use of anti-competitive agreements, unless subject to exemption and Article 82 prohibits the abuse of a dominant position. These two articles are the most referenced aspects of anti-competitive behaviour and were strongly influenced by earlier US antitrust law.

The administrative capacity of the EU is dependent on access to information (Smith-Hillman, 2002). Under Regulation 17 the Commission was granted sole power to give exemptions on any agreement, written or otherwise, which do not fall foul of Article 81(1) that prohibits anti-competitive agreements. Article 81(2) voids such agreements unless they were exempt under 81(3), usually because of their limited impact, given their small size. Horizontal agreements, unlike vertical agreements, which enjoyed blanket block exemptions, were subject to scrutiny prior to a decision.

Hence, the main body of EU competition law is comprised of Articles 81 and 82 of the EC Treaty¹ and the national competition laws of the EU Member States. Articles 81 and 82 govern trade between EU Member States, while national competition laws set the rules for intra-member state commerce. EU competition law is fairly uniform across the EU, as national legislatures have gradually amended domestic competition law, deliberately adapting it to the contents of Articles 81 and 82.

Given the dominant role of the model of static competition in the early years of industrial organisation analyses, it is not surprising to find that the European Union's competition law (which was framed in this era) pays homage to

this viewpoint. Article 81 outlaws agreements that create market power, while Article 82 restrains the use of market power. To a significant extent, Article 81 attempts to affect industry structure by restricting agreements that facilitate concentration and the creation of market power, while Article 82 emphasises anti-competitive conduct by outlawing abuses of market power.

Article 81(1) - see below - prohibits (while Article 81(2) declares void) a particular set of agreements that seek to create or enhance market power. The list emphasises agreements associated with static monopoly. Thus, a traditional price fixing cartel would fall foul of Articles 81(1) a-c, which deal with price fixing, output restriction and market sharing, respectively. Similarly, Article 81(1) d prevents an upstream monopolist from undertaking discriminating agreements with downstream firms when they lead to monopolistic pricing in downstream markets. In the same fashion extension of monopoly power by tying the purchase of a product in a competitive market to a complementary product in a monopolistic market is outlawed by Article 81(1) e.

In contrast, dynamic monopoly behaviour, such as excessive innovation activity by an incumbent firm in order to prevent a resource-constrained entrant from evolving into a more capable competitor, is not explicitly prohibited by Article 81(1). Perhaps it can be argued that Article 81(1) b can be invoked here, but the difficulty is that - in line with the concern over the limiting of production by static monopolies - Article 81(1) b emphasises *insufficient* rather than *excessive* innovation. Moreover, Article 81(1) does not deal with welfare reducing strategies associated with dynamic competition, such as pre-emptive patenting, excessive advertising, innovative rent seeking, excessive product differentiation, and weakening of the capability of resource constrained competitors.

Generally, analysts have noted two shortcomings from the viewpoint of dynamic efficiency in EU law: lack of clarity on the social welfare objective of the laws and an emphasis on static efficiency. They have argued that the economic prescription for competition policy is relatively simple only if one ignores such phenomena as variation in the abilities of different firms to exploit particular profit opportunities and the evolution of such capability with the passage of time, or the manipulation of barriers to entry or the incentives for innovation and its possible abuse as a means to undermine competition.

¹ The EU merger guidelines are set out in Regulation (EEC) No. 4064/89 while state aid and public enterprise are covered by Articles 86-89 of the EC Treaty.

2.2 Post-modernisation EC competition policy

The adoption of Council Regulation (EC) No. 1/2003 on 1 May 2004, heralds the beginning of a new era with respect to the enforcement, administration and application of EC competition legislation. Widely held acceptance of the importance of competition policy, as evidenced through the existence of competition policies within member-states, was not a feature of the community when Regulation 17 was conceived. The micro-level supervisory role had to be rethought to reflect significant growth in numbers coupled with impending enlargement. Stretched community resources dictated the need for new, more efficient systems that did not compromise the central integration tenet (EC 2000/0243).

Modernisation delivers decentralisation that gives member states greater involvement in policy decision-making. Member states will no longer be required to forward applications for exemption under Article 81(3) to Brussels. Companies will assume responsibility for determining whether or not they are compliant with Article 81(3). As a consequence designated NCAs and/or courts will now handle more cases.

The Commission (under Articles 5 and 6 of Council Regulation (EC) No. 1/2003) will only deal with those cases that have wider EU trade implications and/or raise novel issues. The administration of EC competition law is anticipated to become much more fluid and less fraught as bureaucracy is redirected at more significant cartel cases that involve multiple jurisdictions. However, recognizing the need for consistency, entrenched in the new legislation is the establishment of European competition networks (ECNs) (as provided through Article 11 of Council Regulation (EC) No. 1/2003). This provides the vehicle for the dissemination of information and consultation amongst all parties involved in the application of EC legislation.

The supremacy of EC competition legislation, however, remains sacrosanct as indicated through the parallel treatment of national competition law and EC law enshrined in Article 3(1) of Council Regulation (EC) No. 1/2003, "Where the competition authorities of the member states or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty"

(EC No. 1/2003, p. L1/8). Similar sentiments are also expressed with respect to Article 81.

Article 8 of Council Regulation (EC) No. 1/2003 extends the enforcement powers of the Commission to the ability to impose structural remedies. Additionally, the EC has extended its powers to access information through Article 21(1) to include the right to search private dwellings, but only with judicial approval. They will also have powers to seal premises in order to safeguard the evidence and prevent tampering.

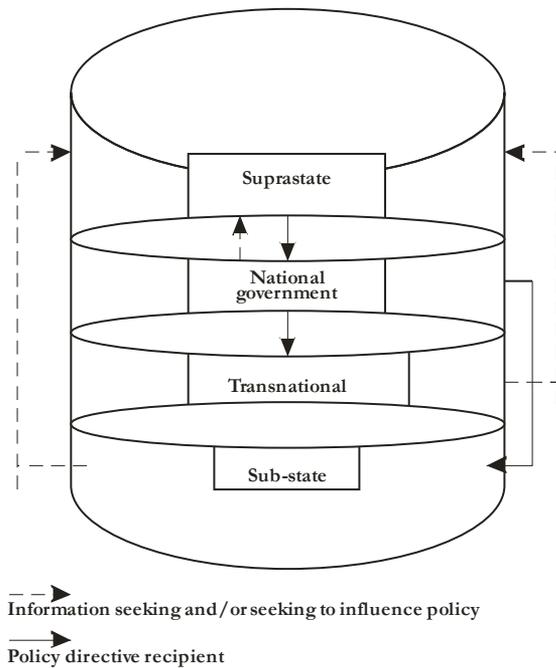
Administrative changes have brought structural reorganisation within DGCOMP, specifically through the appointment of a chief economist to liaise directly with the director-general. Additionally, the discipline-focussed approach to competition policy is to be replaced by a sector-specific focus. Prior to modernisation deputy director generals were charged with having "special responsibility" for mergers, anti-trust and state aid. The growth in member-states dictates a change in focus to the development of sector specific expertise which then informs decisions regarding mergers, antitrust and state aid (<http://europa.eu.int/comm>).

3. Governance models

Internationalisation of economic activity has vouchsafed an international approach to governance. Within the globalised context decision-making is dominated by international institutions, retreating government, less hierarchical systems and decentralization (Nelissen 1997). It is the multi-level genre (Figure 1), however, that represents the most attractive explanation of the EU experience (Hooghe and Marks, 1997). National government is perceived as one of four layers in the power system (Scholte, 1997). Supra-state (EC) bodies, occupy the uppermost layer and diffuse power from the centre to local and global bodies thereby widening and deepening participation.

Inter-governmental liaisons define the governance process as heads of state and/or their designate body undertakes decision-making. The member state/national government no longer has a monopoly on decision-making as interest groups, at the transnational and sub-state level, have access to the EC and seek clarification in order to influence policy directly, bypassing national representatives. The transnational layer gives voice to the "grass roots" as the views of civil society/consumers are transmitted through well-organised policy networks. The sub-state layer enables local governments to interact directly with global players.

Figure 1. Multilevel model of EU governance



Source: Compiled from Modelski (1972)

Multi-level governance models best describe the decision-making process undertaken by the diversity of nation-states representative of the EU. The EU's negotiation-approach to policy, as against clearly defined compliance guidelines that defines governance within national boundaries, defies placement within a unique prototype. The hybrid of national interests multiple interests and identities operating at both the national and supranational level, sectoral and institutional level, with equal legitimacy facilitate a "maverick" governance structure. Moravcsik (1998) suggests that national economic interests, and not EU strategic visions, are ultimately at the heart of all bargaining that involve EU policy-making.

Peterson (2001) is of the school that eschews attempts to neatly classify EU governance under one particular designation, instead he seeks to explain the outcome. Three basic types of EU decision-making are identified: history-making decisions refers to changes in EU policy that involves the heads of government/cabinet ministers, intergovernmental bargaining; policy-setting decisions determines the EU's scope of power following negotiation with EU institutions and involves primarily the Council and European Parliament; policy-shaping decisions describes the administration of the agreed policy action

which involves a varied middle ground of interest groups including technocrats and specialist bodies. The three levels are described with reference to the super-systemic, systemic and sub-systemic levels, respectively. Incorporated into these levels are varied governance explanations that draw on governance models.

4. Challenge to EU governance

The significant discretionary element in policy compliance vouchsafed through the EC negotiating style, has enabled a varied approach to competition policy, and policy in general, amongst member states. The administrative capacity of the Commission is in danger of being overwhelmed as it attempts to ensure a harmonised approach. The challenge lies in moving towards greater homogeneity without giving rise to alienation and/or disaffected parties. The international agenda driven by the US, and its arm the WTO, may prove to be the unwitting salvation for EC competition policy as they push for greater uniformity in global competition policy. However, this is an unlikely development as US interests are at the forefront of policy initiatives (Stiglitz 2002).

Greater uniformity does not necessarily embrace a synthesis of styles that draws on the best of all "worlds". There is the risk that the US/Anglo Saxon approach becomes the only option under consideration that effectively rules out other alternatives that may be better suited to conflict resolution, or indeed wider, more inclusive (less costly) participation. As globalisation facilitates exposure to a diversity of governance systems, the challenge lies in avoiding a single-minded focus that blinds one to the benefits that may derive from adopting a different approach. EU enlargement provides an opportunity to include a broader menu of choices such as arbitration and mediation that departs from our *modus operandi*, which might work better in facilitating governance (Anderson and Mailand 2002).

The issue of legitimacy is at the heart of attempts to implement change. The challenge lies in Brussels raising perceptions of its legitimate powers within member-states on par with elected government. Such attempts are frustrated through the well-documented tension that exists between the EU's strategic vision and the economic concerns of member-states. In spite of the principle of subsidiarity, that gives it legal supremacy, it is by no means widely held to be a legitimate body, as evidenced through the low, if increasing, rates of compliance (Jordan 1999; Ciavardini Azzi 2000). Perceptions of institutional balance

are not necessarily benign, as illustrated through the inter-governmentalist viewpoint of its being “a device to retain the supranational bureaucracy” (Smismans 2002, p. 90). Against this background the decision to modernise competition policy to give national courts greater power in decision-making suggests foresight.

Failure of institutional law to keep pace with the emergence of new institutions and liaisons has, however, been short-sighted on the part of the EC (Joerges 2002). The introduction of criminalisation into the UK’s most recent change in competition policy (Enterprise Act 2002) provides one such example. Criminalisation of directors ensues where companies are found guilty of anti-competitive behaviour. This initiative moves UK competition policy closer to their American cousins, but how compatible is this with a European integration objective? Does the EC perceive this as evidence of good practice that could be adopted in other member-states? Would this bring greater homogeneity and foster harmonisation?

5. Conclusion

The many analysts found that EU competition laws do appear to emphasise static welfare optimisation. It is also apparent that an economic analysis of dynamic markets is more complex and yields a much richer depiction of competition, than that of static markets. But much work still needs to be done before economics is in a position to provide a defensible and comprehensive set of prescriptions for an economy whose most enduring attribute is rapid change.

The process of modernisation has borrowed from an eclectic mix of governance models. Multi-level governance and policy network analysis feature most prominently in the process of EC decision-making and are likely to attract mixed reviews from key stakeholders. Insofar as profit motivated firms stand to benefit from cost-reducing procedures and consumers from greater accessibility and widened participation, the review will be positive. Member states may also be approving as perceptions of greater autonomy in decision-making raise their profile of being a powerful government.

The Commission, with sights firmly set on integration, may well be accused of having pursued an exercise as Article 83 of the Treaty ensures ultimate power remains vested in their

hands. NCAs are, therefore, the group least likely to be satisfied with the outcome as their actions are subject to even greater scrutiny from Brussels. Ultimately, policy-shaping has focused on the efficiency dimension of governance to the detriment of issues of democracy and legitimacy.

The EC approach to governance, and the legal framework within which competition policy is administered and enforced, is imbued with Anglo-Saxon traditions. Characteristic of this style are daunting hierarchical layers of reporting that are inimical of another era. Notwithstanding new avenues for widened participation, the process remains an expensive one. Full access remains limited on this basis and hence weakens the prospect for good governance and requires rethinking (Anderson and Mailand 2002, p. ...). A mediating approach within a less adversarial context is one such option suggested with less layers of representation and greater reliance on face-to-face meetings.

Within this context the power and influence of G8 members reverberates, however, poorer potential members are not necessarily powerless. Lessons are to be learnt from history and also current developments (for example UK Lome Convention that attempted to redress “colonial exploitation”).

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Zaključak: *Mnogi analitičari smatraju da zakon o konkurenciji EU naglašava statičku optimizaciju blagostanja. Takođe je očigledno da je ekonomska analiza dinamičkih tržišta kompleksnija i daje puniji opis konkurencije u odnosu na analizu statičkih tržišta. Međutim, potrebno je još puno da se uradi pre nego što ekonomska nauka bude u poziciji da pruži odbranljiv i obuhvatan skup pretpostavki za privredu čija je osnovna osobina stalna promena.*

Proces modernizacije je povezan sa eklektičnim miksom modela upravljanja. Upravljanje na više nivoa i analiza političke mreže se smatraju vodećim u procesu donošenja odluka u EU i, s tim u vezi, verovatno ključni stakeholderi imaju različita razmatranja. Pošto profitno motivisane firme imaju koristi od procedura smanjivanja troškova, a potrošači od veće dostupnosti informacija i šireg učesća, njihov izveštaj bi bio pozitivan. Takođe, zemlje članice mogu smatrati da veća autonomija u donošenju odluka privlači pažnju povećanjem moći vlade.

Komisija, sa stanovišta odlučnog stava u uspostavljanju integracije, može biti optužena da nastavlja pokušaj preko člana 83 Ugovora koji omogućava da najviša moć ostane u njenim rukama. Nacionalne komisije za zaštitu konkurencije čine grupu koja će verovatno najmanje da bude zadovoljna ishodom pošto su njihove akcije subjekat većeg ispitivanja u Briselu. Konačno, oblikovanje politike je fokusirano na dimenziju efikasnosti upravljanja, a na štetu pitanja o demokratiji i legitimnosti.

Pristup Evropske komisije prema upravljanju i pravni okvir unutar koga se upravlja i sprovodi politika konkurencije prožet je anglo-saksonskom tradicijom. Karakteristike tog stila su obeshrabrujući hijerarhijski slojevi izveštavanja koji su štetni u drugom periodu. Potpuni pristup ostaje limitiran na toj osnovi i

otuda slabost u pristupu dobrog upravljanja što zahteva ponovno razmatranje (Anderson i Mailand 2002). Posrednički pristup unutar manje protivničkog konteksta je jedna opcija koja se predlaže sa manje hijerarhijskih slojeva i većeg oslanjanja na sastanke licem u lice.

Unutar tog konteksta moć i uticaj G8 članica su rašireni, međutim, siromašnije potencijalne članice nisu nemoćne. Treba naučiti lekcije iz istorije, ali takođe i iz tekućeg razvoja (na primer Lome konvencija Velike Britanije, koja pokušava da ispravi "kolonijalnu eksploataciju").
