

Markets and Law: Competition Policy and the Juridification of the Economic Sphere

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Introduction

The term ‘juridification’ is intended to capture the process whereby areas of social and economic life become subject to systematic control through legislation, the application of legislation by state agencies and the adjudication of outcomes through the judicial process and the courts. The concept owes much to the work of Weber on the relentless rationalisation of social life and gained some popularity in the late 1980s through the work especially of Gunther Teubner (1987). Lately the concept has come back into fashion and is being used, especially by lawyers at the LSE, to emphasise the increased legalisation of several aspects of economic life including corporate governance and competition policy (Maher, 2000; Morris, 2003). This paper concentrates on competition policy as the empirical example but initially it is necessary to explore some of the dimensions of juridification and its significance for ordering economic activity.

Drawing on Frankfurt School insights Teubner outlines the broad historical argument that we are in the midst of a third thrust of juridification. The first thrust established the rule of law as the basis for the administration of the modern state. The second thrust formalised a political system which legally embodies the main features of what we now know as liberal democracy. The third thrust involves ‘the juridification of the modern world of industry and labour’ so that ‘the social state controls the economic system in a similar fashion to that in which the two previous thrusts of juridification controlled the political system’ (Teubner, 1987,11). The subjection of areas of free economic activity to legal prescription and control might be thought to be undesirable and the term juridification certainly has pejorative overtones but Teubner’s position is rather more fatalistic. He argues that juridification is inevitable, that it has certain dysfunctional effects, and that the role of analysts is to identify and compensate for those effects rather than to attempt a futile Canute-like effort to roll back legal tides.

We pick up some of the dysfunctional aspects towards the end of this paper but the utility of the concept of juridification is threefold. First it focuses attention on one of the most potent sources of policy convergence in the European Union, the power of law under the supremacy of the ECJ. Second, it draws attention to the nature of law in the regulatory state. The regulatory state uses law to achieve certain results and there is a tension between law as a

results-orientated activity and the traditional idea of formal law as a neutral and value-free activity. This raises a series of dichotomies in understanding the actual role of law, dichotomies such as public law versus private law; results orientated law versus formal law; and competition law versus contract law. Third, juridification also embodies an awareness that to employ law involves applying law to material situations which in turn means converting economic theory into legal doctrines and, depending on the nature of the economics involved, creates opportunities for political intervention. This takes us into a challenging analysis of how an ostensibly technocratic legal process maintains as awareness of societal priorities.

The particular example explored in this paper is that of competition policy (or antitrust to an American audience). The paper proceeds to explore the nature of recent juridification in the UK and across Europe in order largely to substantiate the claims to increased juridification. In the final sections it begins to explore some of the ramifications of juridification but those sections are more speculative and are areas where feedback and comment would be most appreciated.

European competition policy – content and reform

Competition policy has been the subject of extensive reform across Europe over the past ten years and provides an outstanding example of the spread of juridification at national and European level. The conception of Europe as an economic unit, a free trade area which would develop into a single market, led the authors of the Treaty of Rome to make an imaginative and controversial move to embed competition policy in the constitution of the Community. The economic advantages of free trade would be neutered if private restrictive practices, monopolisation and market segmentation were to be allowed to develop on the pre-war scale. Accordingly the competition rules were adapted from the ECSC Treaty and incorporated into the Treaty of Rome as articles 85 to 94 (now 81 to 90) (McGowan, 2000, Djelic and Bensedrine, 2001)).

From the mid-1980s the competition rules began to emerge as one of Europe's most effective ways of regulating and integrating markets. In addition to the original provisions designed to control restrictive practices, cartels, and abuse of a dominant position, the Commission expanded its jurisdiction. During the 1980s the Member States extended the delegated powers to allow the creation of an effective system for controlling state aid (subsidy to enterprises), in 1989 came powers to control European-scale mergers, and during the 1990s powers to liberalise regulated, and often state dominated, sectors such as telecommunications and energy. Between the 1960s and the 1990s the European economy moved from nationally segmented economies, each influenced by interventionist industrial policies, to a pan-European market with minimal selective state intervention. The competition policies of the

European Commission played a significant part in that transformation and served to ‘lock in’ and consolidate each step towards the neo-liberal goal of a freely competitive pan-European market. This steady process of policy development was built on what has become known as the traditional ‘Community method’ (Wallace and Pollack, 2005) of policy making with leadership by the Commission and a steady exploitation, refinement and expansion of legal powers reinforced by the European Court of Justice (ECJ) which made remorselessly integrationist judgements and consolidated a very substantial body of legal doctrine and case-based precedent.

In 1958, of course, the principles and the implementation of competition policy had little influence outside the United States, with its antitrust tradition, and Germany, with the ordoliberal debate over the cartel laws. Other than a group of enthusiasts in DG IV there was very little inclination in Brussels to apply the competition articles and no sense of how it was to be done. The first four years of DG IV (as DG–Competition was then known) were spent in drafting and negotiating a procedural regulation which would allow implementation. It was passed by the Council in 1962 as Regulation 17/1962 and proved hugely important. It implemented the system of ‘prohibitions’ on anti-competitive practices and abuse of a dominant position. The Commission was given extensive procedural powers to deal with private sector companies and, most important, a ‘monopoly’ of jurisdiction by reserving to the Commission the procedure for granting exemptions to the prohibition. With these powers the Commission, almost uniquely within its range of competences, enjoyed legal and administrative independence which allowed it to operate competition policy independently of the Council and the Member States, thus creating in DG IV one of the earliest, and in some quarters most resented, of the non-majoritarian institutions of the European Union.

Regulation 17 adopted a procedure borrowed from German law and thinking which treated every agreement between firms as illegal until it was notified and explicitly approved by the Commission either by giving it a ‘negative clearance’ (saying that it was outside the scope of the law); or by granting an explicit exemption (for instance by arguing that it was conducive to greater efficiency). The alternative approach, favoured by the French, was to require firms themselves to assess whether their agreements were illegal and leave it to the Commission to challenge them and if necessary find them illegal with retrospective effect. The choice of the German model created an immediate administrative overload which has overshadowed, and sometimes crippled, the Commission ever since. In 1962-63 the notification requirement meant that 920 multilateral agreements and no less than 34,500 bilateral agreements were lodged with the Commission (Goyder, 1998, 50). Regulation 17 was therefore both a blessing and a curse. The dilemma was that the 1962 Regulation was extremely permissive and gave the Commission far more power than the Member States would in most subsequent years have volunteered. If the Commission had proposed

amendments to Regulation 17 to deal with notifications and overload, the fear was that the member states would restrict the authority of the Commission. This was a Pandora's box which successive Commissions felt they could not risk opening

The point of this historical introduction is that the Commission did open the box in 1999 and the Council approved a new procedural regulation as 1/2003 which came into effect in March 2004. This 'modernisation' regulation re-wrote history by dropping the German model in favour of the French model, and by giving up the Commission's monopoly over the granting of exemptions. From now on each company will have to make its own assessment of the legality of agreements into which it enters, and the agreements will be assessed by national competition authorities (NCAs) and adjudicated by national courts. This appears as an almost stunningly revolutionary shift in the administration of competition policy. It raises a range of practical concerns and creates a series of theoretical questions including whether this creates a possible model for regulatory reform in other areas of European competence. Majone has recently suggested that the European Commission is facing a crisis of competence and has argued that "the only feasible solution seems to be offered by transnational regulatory networks" (Majone, 2002, 387). This case may therefore be seen as a potential model for economic regulation in all areas of the European market.

In relation to the governance of the European market it is difficult to judge how much difference 'modernisation' will make. From the point of view of the Commission modernisation is clearly intended to consolidate the supra-national governance of the European economy. It would therefore reinforce the bias contained in competition policy towards a neo-liberal vision of a free and open pan-European market. An alternative view, perhaps favoured by some Member States, is that decentralisation would offer an opportunity for 're-nationalising' competition policy by raising the salience and influence of the NCAs. This could provide an avenue for national governments and business lobbyists to inject a more 'old-fashioned' set of industrial and social policy preferences into the implementation of competition policy. In order to evaluate these contrasting possibilities we need first to take stock of the development of competition policy in the Member States and then to evaluate in more detail the modernisation reforms which include the creation of a pan-European 'European Competition Network' (ECN). To anticipate the argument, this paper offers two related, but distinct analyses of the modernisation of the application of European competition law. One, which appears to be shared by the majoritarian governments of the Member States, sees modernisation as a relatively revolutionary shift towards decentralising a major European competence. The alternative, more conspiratorial, reading, presents modernisation as an imperialist move by the Commission to centralise competition enforcement through juridification and to consolidate its control over an increasingly assertive group of National Competition Authorities (NCAs).

The view from the foothills.

Every member state has a competition authority but they vary enormously in size, in their legal powers, the structure of their domestic laws, in their procedures, powers of investigation, the sort of penalties they impose and in their decision and appeal processes. Some regimes, such as the Dutch, have laws now closely aligned with the European rules and may already have the power, granted by national law, to apply articles 81 and 82 directly. Others, such as the Austrians, have a different set of legal powers and do not have the power to apply 81 and 82 directly. All the ‘enlargement states’ have been obliged, as part of adopting the *acquis communautaire*, to create competition authorities and to enact legislation compatible with the European competition rules. Their powers and procedures are therefore already convergent but their staffing, confidence and competence often leaves much to be desired. The NCAs also differ in their degree of political independence and therefore the extent to which they are ‘non-majoritarian’. This problem is especially marked in the enlargement states where political independence is tentative (Riley, 2003, 659-61).

Some well resourced NCAs, such as the British and the Italians, will regard the technical aspects of the decentralisation reforms with equanimity. Others, the smaller and those such as the Irish which have expected Brussels to deal with all cross-border-trade agreements, are regarding the reforms with something close to horror. As the network develops it is inevitable that some NCAs will come to play a leading or constitutive role. The Network may vary in the degree to which it trusts some of the participants and it would not be surprising to see some sort of hierarchy emerging in which the lead role in investigating and prosecuting is taken by a small number of the more able authorities. It is therefore possible, if trends are sustained, that a corpus of leading NCAs will emerge to form a ‘first division’ of the network – clearly Britain, also France, Germany, Italy and perhaps the Dutch.

The position of the UK is especially interesting. As argued elsewhere (Wilks, 2003b) the recent reforms of British competition law and expansion of the agencies, means that Britain now has the most advanced competition regime in the world, with comprehensive legal provisions, sophisticated legal ability, advanced economic thinking, well resourced agencies and a body of laws, codes, procedures, and appeal mechanisms rivalled in very few other countries. These powers are contained in the Competition Act 1998 and the Enterprise Act 2002. The two Acts transform the law on restrictive practices, monopolisation and merger control. They take ministerial and political influence entirely out of the picture and create in Britain one of the most independent of Europe’s non-majoritarian competition authorities. This is an extraordinary exercise in juridification which transforms British competition law from an administrative to a legal basis (Morris, 2003). This abrupt and comprehensive juridification of UK competition law has excited much interest in how a legal dynamic will transform the operation of UK competition policy. In any event, the British

authorities are extremely well placed both to implement the decentralised European rules and to influence the development of the Network. In fact there will be concern in the UK that the comprehensive reform of the restrictive practices law has been overtaken by the European decentralisation. The framework in UK law will be applied ‘only’ to agreements of a strictly domestic nature. The UK law was itself modelled on Articles 81 and 82 and contained a novel provision, in Article 60, that UK law should be applied consistently with the legacy of European precedent and case law. It could therefore be argued that Britain had created a legal and administrative apparatus that offered a genuine harmonised national variant of European law. Regulation 1/2003 will now render a substantial element of that approach redundant and the OFT is likely to chafe at the obstacle to employing domestic law and at the supervision of the Commission.

The UK provides an extreme example of a secular process across Europe with every state enacting competition legislation, creating competition agencies, and adapting domestic policy to converge with the European model. In this process the role of law and lawyers has been paramount. Van Waarden and Drahos, for instance, review competing explanations for policy convergence and conclude that the major force for convergence is legal, in the form of an ‘epistemic community’ of legal professionals. “This community has functioned as a channel of information, exchange, learning, imitation and for the explicit transfer of legal concerns and arguments, thus contributing to convergence (van Waarden and Drahos, 2002). This is the sociological face of juridification and it provides a challenge for the European Commission to mobilise these agencies to a common competition purpose.

From Regulation 17 to Regulation 1: ‘modernisation’ of the competition rules

Regulation 1/2003 rises to the challenge of mobilising the substantial army of European competition agencies. It is ostensibly simply about implementation but has substantive implications. The Commission has set in train three elements of reform. The most dramatic is the ‘decentralisation’ of the application of the competition rules. The second is the ‘modernisation’ of the rules such that “the new system will change the focus of the Commission’s enforcement action. The Commission will in future concentrate on pro-actively investigating serious infringements following complaints or on its own initiative” (Gauer et al, 2003). The Commission will redirect the resources freed up by decentralisation and has been granted enhanced powers of investigation. It has adopted a new ‘leniency’ programme (granting immunity to whistle-blowers) and its aggressive stance towards hard core cartels is underlined by the imposition of very substantial fines. In 2001 Hoffman La Roche suffered the largest ever fine of E.462 for its vitamins cartel and, at E.1.87 billion, the fines imposed in 2001 exceeded the sum of fines imposed in the entire history of cartel enforcement in the EC (Venit, 2003). These reforms do not affect merger control but, thirdly,

the Commission is also revising the merger regulation. This is a more defensive measure which responds to some high profile defeats of merger cases in the Court of First Instance and proposes a more deliberately economic approach to merger analysis which has created a degree of angst in the legal community Bishop and Ridyard, 2003).

The reforms were conceived by Karel Van Miert as Commissioner, and Alexander Schaub as Director General of DG Comp. Their White Paper, published in April 1999, was accepted virtually in its entirety by the Council which adopted the modernisation regulation in December 2002. A previous Director General, and doyen of European competition lawyers, Claus-Dieter Ehlermann, observed that the White Paper

is the most important policy paper the Commission has ever published in more than 40 years of EC competition policy. It suggests a legal and cultural revolution in proposing the fundamental reorganization of existing responsibilities between the Commission, national anti-trust authorities and national courts” (Ehlermann, 2000, 537).

‘Revolution’ is a strong word, especially in the mouths of sober public lawyers. It underlines the risk for DG Comp and presents a puzzle for students of non-majoritarian institutions. The puzzle is posed by the appearance of the most powerful of the Brussels DGs surrendering the legislation which has been the very bedrock of its power. In this case it represents the agent apparently returning power to the principals (the Member States), or perhaps to the national agents (the national competition authorities). Gerber (2001, 126, 128) expressed the initial reaction:

under the modernisation proposals the courts and administrative bodies of the states will become the principal mechanisms for applying and enforcing Community law, and thus the importance of their internal political landscape will increase dramatically.....(this)represents a radical and uncharted revision of power relationships. The diffusion of knowledge among a vastly expanded group of decision-makers is likely to diffuse the power currently held by the Commission, and this will change the relationship to other EU institutions such as Parliament and the courts as well as to Member State competition authorities.

Why, then, did the Commission take the risk?

The orthodox rationale, presented to the Member States principals, was a combination of overload in the present system and a need for simplification in the face of additional overload from EU enlargement. This was enhanced by the flattering observation that since most Member States now have effective competition authorities so enforcement of competition law could “be shared more equitably” (Commission of the European Communities, 1999, 5). Overload necessitated revolutionary change. To read the 1999 White Paper is to enter in to an evaluation that verges on panic. DG Comp. used to struggle with the

caseload when there were only 6 Member States. The expansion to 15 and the increased salience and sophistication of the competition rules meant that the staff could barely cope (and the Commission has always been unaccountably reluctant to enlarge the personnel resources available to the D-G). The White Paper observed that over the period 1988-98 only 13% of new cases had been ‘own initiative’ procedures, in other words the Commission had become almost entirely reactive to complaints and notifications. The prospect of adding another 10 members, each with a competition authority, and each with formidable competition problems (including the lack of a competition culture in formerly centrally planned economies) looked certain to lead to breakdown. The White Paper noted that “In a Union with over 20 Member States, it will no longer be possible to retain a centralised authorisation system in Brussels, involving the individual assessment of thousands of cases. Such a system would be cumbersome, inefficient and impose excessive burdens on economic operators” (Commission, 1999, 18).

There were other contributory reasons including the sense that the system was working badly, companies were incurring significant expense in notification and having to wait months or years for responses. The various expedients to cut down the notification backlog included block exemptions and stereotyped legal formats, neither of which were conducive to the creation of constructive workable agreements. Above all the DG wanted to pursue the real cases of hard core cartels and wanted to free up resources. In a phrase that the Commission has used repeatedly it was felt that a ‘culture of competition’ had been established in Europe and that the national authorities were now mature enough to take up the torch of implementation. All the same the Commission was not reacting to any groundswell of public protest, it was not under majoritarian pressure but chose to move to reform in pursuit of its own agenda.

A deus ex machina? The ‘European Competition Network’.

The decentralisation of competition law application creates a series of 25 parallel competencies across Europe. It is axiomatic that these jurisdictions will vary in the enthusiasm, speed, competence and effectiveness of the manner in which they apply the law. We are talking not only about a range of competition agencies, we are also concerned with the courts, tribunals and other appeal mechanisms. Variations in application may be deliberate, inadvertent or opportunistic as the regimes respond to differing sets of pressures. Many respondents during the consultation phase, including the European Parliament, stressed the risk of deliberate variation if competition policy became ‘re-nationalised’ and began to respond to national (or nationalistic) economic and political priorities, rather than to the needs of European integration. But the centrifugal pressures could also be inadvertent as a series of practical and legal problems begin to have an effect. The authorities will be applying a

common body of European law but will also have recourse to separate national legislation in respect of purely domestic cases. They may vary in their interpretation of the European law, they will certainly vary in their competence and ability to cope with the pressure of work. Riley (2003, 658) notes that in 1997 the entire Belgian Competition Council resigned in protest at under-funding and the Irish NCA conceded in 2000 that it was so under-resourced that it could not discharge its statutory duties. Riley's analysis provides an insight into the inadequate resources, knowledge and independence of many of the European NCAs and the associated courts. Then there are the systemic problems of sharing confidential information across Europe and the 'case handling' question of who will take the lead in a multi-jurisdictional case. These variations will set up their own opportunistic dynamics. Companies will develop views as to which authority is preferable for their individual case, either because they are more efficient or more lenient and there is the risk of 'forum shopping' and regulatory laxity. The reforms are designed explicitly to encourage private actions and private parties may begin to take greater advantage of the possibilities of securing restitution through the courts when cartel offences have been established, again their opportunities will be better in some states than in others and the court's ability to cope will be variable.

Of course the Commission anticipated these potential problems. These were among the risks that held the Commission back from the renewal of Regulation 17. The response includes a number of legal stipulations and devices in the new Regulation 1/2003 which are designed to ensure consistency and to ensure the ability of DG-Comp to provide leadership and adjudication. The chief devices are explored in more depth below and they allowed the Commission to reassure the Member States that the decentralised system will operate smoothly and coherently. But there is scope to regard the Commission's public confidence as bordering on the insouciant (Gilliams, 2003, 469). Perhaps a more realistic interpretation of more private concerns is evidenced by the creation of, and the stress put upon, the 'European Competition Network'.

The new Regulation establishes a formal and legally satisfactory system for the application of the competition rules by the individual member states. But the key to success is the creation of informal modes of co-operation and understanding. It is therefore fascinating to see the Commission responding to these pragmatic challenges by engaging in a piece of creative organisational innovation. Chapter IV of the Regulation deals with 'cooperation' but makes reference only to the need for 'close co-operation' (Council, 2002, Article 11). The device to secure that co-operation, the *deus ex machina* is the 'European Competition Network'. The proposal for the Regulation noted that:

It is a core element of the Commission's proposal that the Commission and the

national competition authorities should form a network and work closely in the application of Articles 81 and 82. The network will provide an infrastructure for mutual exchange of information assistance [and] an efficient allocation of cases the creation of a network in which all members apply the same law and policy will greatly promote consistency and a level playing field throughout the single market (Commission, 2000, 6, 9).

The Regulation itself restricts discussion of the Network to the recital (Council, 2002, paras 15-18) but after adoption the Commission issued a Draft Notice on cooperation. This is a far more concrete document which spells out arrangements for allocation of cases, for sharing information, for handling the interests of commercial undertakings, and for ensuring consistency in application. The Network is very much an inter-governmental system which will transmit large amounts of highly confidential information, will operate largely electronically and has no legal status,

consultation and exchanges within the network is a matter between public enforcers and does not alter any rights or obligations arising from Community or national law for companies. Each competition authority remains fully responsible for ensuring the due process of cases it deals with.

The Notice puts even more emphasis on the Network, thus:

Together the NCAs and the Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition [the network] ... is the basis for the maintenance of a common competition culture in Europe The network formed by the competition authorities should ensure both an efficient division of work and an effective and consistent application of EC rules (Commission, 2003, paras 1, 3, 38).

It is hard to predict how the Network will operate. One parallel is offered by the United States where many States have their own antitrust laws and some state attorney generals have been very activist, as the joint action by Federal and State authorities in the Microsoft case demonstrated. It is not hard to find extended criticism of the complexity, expense, and sometime the triviality of State-applied antitrust in the US but it has been pointed out that in Europe the Commission has in prospect far more effective powers of coordination than the Federal Department of Justice (Calvani, 2003, 422). They will surely need more powers. The US enjoys the same language, a common industrial and antitrust heritage, and all the common cultural and social characteristics which so obviously do not exist in Europe.

What is clear is that the entire implementation landscape has been transformed and the implications for accountability, and indeed for legitimacy, will be substantial. As far as the Commission is concerned The Commissioner, Mario Monti, and the Director-General, Philip Lowe, face a dual challenge of taking more own initiative actions while exerting

effective control over the Network. There must be a danger that the resources saved on abolishing notifications will instead be expended in negotiating, pre-empting and guiding the national authorities. The direct lines of accountability either to the national or to the Brussels authorities will become blurred. Equally, for companies, there will be a far greater degree of uncertainty as they lose the simplicity and comfort of a 'one stop shop' with cases decided in Brussels and appealed to the CFI. The dilemmas are illustrated by the example of the leniency provisions which are becoming fashionable across Europe but which vary markedly from country to country.

Leniency programmes provide immunity or reduction in penalties for the first company in a cartel or illegal agreement which is willing to 'blow the whistle' and cooperate with the authorities. It can be a fine distinction to decide who merits immunity and there are time limits, criteria and varied levels of exemption across Europe. The Commission Notice points out that 'an application for leniency to a given authority is not to be considered as an application for leniency to any other authority', and it advises the company 'to apply for leniency to all competition authorities which have competence' and, further, 'to file leniency applications with the relevant authorities simultaneously' (Commission, 2003, para 38). The whole leniency area is extraordinary sensitive with companies submitting incriminating and highly confidential information. For companies and lawyers faced with multiple filings under several different regimes the complexity and the workload would push at the boundaries of manageability.

The creation of the European Competition Network thus creates a whole series of uncertainties. We see a series of national and European non-majoritarian bodies coming together into a Network. To the extent that it clouds the avenues of accountability the non-majoritarian dilemma is sharpened. To whom is DG Comp. accountable? To whom is the OFT accountable? Both these questions can be answered by reference to published criteria, parliamentary bodies, bureaucratic hierarchies and boards, legal processes and media coverage. To whom in the European Competition Network accountable? This is a question that demands an assessment of the Network. Is it simply a system of communication or will it become a coherent force, analogous to a 'regiment' of 25 NCAs under the command of the Commission?

The idea of a 'policy network' is well established in the study of public policy and public administration (Kickert et al, 1999; Van Waarden, 1992). Of course the European Competition Network is a peculiar creature. It is restricted to a set of legislatively defined competent competition authorities, it is centrally sanctioned and supported by the Commission, and it could be argued that it operates through something approaching 'soft law' defined in edicts such as the Commission's notices. But it also shares many of the informal and sociological characteristics of a policy network

From a policy implementation perspective there are uncertainties as to whether the nature of competition policy application will lend itself to the creation of an effective network. From a legal perspective many authors have voiced doubts about the ability of the legal provisions and of the Commission to ensure consistency (Drahos, 2001, 438; Gilliams, 2003, 472-73). In particular, Riley draws evidence from previous experience with the Commission notices published in 1993 and 1997 encouraging cooperation between national courts and NCAs and the Commission. His review indicates that cooperation was minimal and was impeded by multiple legal, attitudinal and procedural barriers. On this evidence the Network faces an up-hill struggle. From an economic perspective things should be easier since economic principles are in theory universal. However, in practice the sort of industrial economics favoured in Vienna might have a different emphasis from that in London and, in any case, the principles are being interpreted by Courts that have exceedingly variable and uncertain levels of economic expertise. In summary the European Competition Network faces extensive problems and it cannot yet be assumed that it will work effectively.

Interpretations of ‘modernisation’: war is peace, freedom is slavery, ignorance is strength - and decentralisation is?

The orthodox interpretation of competition policy ‘modernisation’, outlined above, portrays a beleaguered Commission moving to decentralise implementation. An alternative perspective takes a more sociological institutionalist approach and is in the tradition of analyses of the Commission as a ‘policy entrepreneur’ (Majone, 1996, 74). It suggests that the Commission has engineered an audacious coup which has extended its powers, marginalized national competition laws and corralled the national authorities. Adapting Orwell’s rendering from 1984 - ‘decentralisation is centralisation’. Riley, for instance, suggests that

the Commission has orchestrated a political masterstroke. It has given the impression of radical reform to the Member States by abolishing the notification procedure and offered decentralisation provisions which in no way undermine its central roleDG Competition has in fact managed to centralise European competition law even more than under Regulation 17” (Riley, 2003, 657).

He argues that the notification burden was not nearly as great as the Commission maintained. Notifications were being by-passed by both the Commission and undertakings. Hence the law was operating adequately and the administrative resources, whilst scarce, were not pre-empted by ritualistic notification work. Enlargement will create challenges but he sees huge problems in delegating implementation to the NCAs and courts of the enlargement countries. Those NCAs are under-resourced, have limited experience and expertise, face huge cultural and industrial challenges, and are working with inexperienced courts who are often ‘illiterate’ in antitrust thinking. In this context decentralisation makes little sense.

The spectre of incoherence and re-nationalisation of competition law allowed the Commission the design a regulation which centralised power in four respects. First, Article 3 requires that Union law, Articles 81 and 82, should be used for all agreements which could fall within their scope (in practice which fulfil the test of having an effect on inter-state trade). This provision entirely marginalizes national law on restrictive practices and will effectively substitute European law for national law in the smaller member states. Second, the Regulation sets up a system of supervision and control by requiring that all decisions by NCAs be notified to DG Comp who can displace the national authorities and substitute its own proceedings (Article 11(6)). Third, the Regulation requires close cooperation through the Network already described. For Riley the Network is based on Commission dominance, not real cooperation. He observes that

at the core of this weak co-operation is a refusal of the Commission to accept a real partnership with the NCAs, which would involve real sharing of the caseload and the development of the law. Instead we have the red meat of increased supervision and intervention decorated with the tinsel of co-operation” (Riley, 2003, 665).

Fourth, the Regulation extends the Commission’s direct powers by enhancing its powers of investigation, the size of its procedural fines, and its ability to negotiate legally binding structural and behavioural commitments to avoid prohibition decisions.

In principal-agent terms this diagnosis presents a classic instance of the control problem. The agent has used its expertise and established position to negotiate an additional grant of delegation. In this case there are multiple principals, the Member States. There may also be multiple agents which include the Commission and the NCAs of at least the bigger Member states. It would seem that the Commission negotiated additional delegation with at least the tacit complicity of the NCAs.

The sociological institutionalist approach provides a different emphasis based on the Commission’s status as the core institution of the European Union. It engages with Member States from a position of virtual equality and is no longer vulnerable to the ultimate principal-agent sanction, that of abolition. This would apply especially to the central DGs, such as Competition, which not only performs the major function of regulating the European economy but has a quasi-constitutional role as guardian of market principles, market integration and Treaty powers (Wilks, 1996, 2003). Majone, a major proponent of principal-agent approaches, has accepted that the theory “cannot satisfactorily explain the treaty-based independence of the Commission” so that in these cases “it is necessary to go beyond agency theory” (Majone, 2001, 104-05). Majone similarly draws parallels with central bank independence and, on the basis of a property rights analysis, he argues that the Commission might best be seen as a ‘trustee’. This trustee role has allowed the Commission to pursue its own agenda which has been clear since the early 1990s. In 1992 Leon Brittan articulated the

goal of “the achievement of the Community’s objectives through a coordinated partnership involving regulation at the Community and national level” (Laudati, 1996, 248). With the patience and persistence for which it is famous the Commission has worked to secure that goal.

It can be argued, however, that the Commission has been too successful. Riley (2003,671) maintains that “it is the Commission who is the principal if not the sole beneficiary of the new regulation”. The reaction of the NCAs and the majoritarian governments of the Member States will depend on the goals pursued by the Commission. A ‘trustee’ reading would identify goals defined by the Commission and embedded in the legal system which it enforces and has ‘imposed’ upon the European Competition Network. This is the equivalent of the monetary stability elevated by Central Bank independence to the dominant goal. The goals of the Commission have always centred on market integration. This will remain but is also associated with the competitiveness of European industry. This, in turn, is based on the Porter-style commitment to competitive markets which are felt to create the environment in which domestic companies are ‘trained’ to compete in global markets (Porter, 1990). This implies an Anglo-Saxon-style competitive, deregulated free market of the type espoused by Gordon Brown. On this reading the modernisation of European competition policy will lead to the reinforcement, within the economy of every Member State, of a free market imperative which could overwhelm other social and industrial goals. This modernisation is not therefore simply about the efficient application of agreed law. It is about compelling national competition authorities to apply a free market logic embedded in European competition law, precedent and supervised procedure. It is a reassertion of the embedded liberalism which fuelled the single market programme and which underpins global capitalist competition for world market share.

Alternative futures: collapse or dominance?

As noted in the opening sections, this paper has offered two contrasting analyses of the modernisation of the application of European competition law. One sees modernisation as a relatively revolutionary shift towards decentralising a major European competence. The alternative, more conspiratorial, reading, presents modernisation as an imperialist move by the Commission to centralise competition enforcement and to consolidate its control over an increasingly assertive group of NCAs. We can go on to analyse the possible effects of modernisation on the governance of the European market

Whichever analysis and conclusion is more correct, they both point to substantial risk. Initially there are six risks associated with authentic decentralisation. First, there are technical risks, in the sense of legal defects in the drafting of the regulation and the effectiveness of the notice dealing with case handling. The procedural uncertainties over the

operation of the Network are especially acute. The supervisory burden on the Commission may begin to rival the alleged burden created by notifications. This might arise from erratic implementation by the NCAs, from disagreement over case handling, or over the sheer complexity of implementing competition law in the former centrally planned economies. Second, there are nationalistic risks, in the sense that individual Member States may deliberately move to give preference to their own economic or social priorities either by the NCAs becoming nationalistic, or by elected governments intervening to influence the NCAs. Third, there will be an increased vulnerability to lobbying. The level of independence of the NCAs may be prejudiced when they take on more direct control of major national enterprises. The pressure may be direct from business, aimed at more lenient treatment or lower fines; or it might be mediated through national politicians, parties and so on. Fourth, it is virtually certain that some national authorities will sufficiently lack competence to jeopardise their own implementation and the integrity of the network. This may emerge from low status, poor leadership or poor understanding. A problem especially likely in non-specialist courts. It is also likely to reflect unduly modest funding from national governments. A fifth area of risk arises from the likelihood that decentralisation will allow cultural differences to become more influential. These differences may reflect differing administrative cultures, legal cultures, or economic cultures. In some countries there is a less robust commitment to the free market and to competition. The former centrally planned economies do not have the same history of free markets but neither do some of the countries of Southern Europe. Sixth, a key variable will be the reaction of business. Large firms may find opportunities to exploit the system and the market, they may be more uncooperative and critical with weaker national authorities, they may seek opportunities for 'forum shopping'. A combination of some or all of these problems could spell systemic problems with the new implementation regime. They may become so serious that the regime will collapse under pressures of conflict, of criticism, or of inadequate decisions leading to successful legal challenges.

The alternative analysis poses more subtle risks which are not so widely debated. Two risks emerge from the 'Commission dominance' thesis. The first is the risk identified by Riley of Commission dominance creating a backlash from the larger and more competent NCAs. This could lead to systemic failure due to outright conflict within the system. Riley's prediction is that the Commission will be obliged to concede real decentralisation. This risk should therefore be manageable through negotiation and adjustment within the Network. Adjustment will be greatly facilitated by the common legal norms that animate all NCAs and by a shared view of the virtues of competition expressed in the Commission's phrase of a 'common competition culture'. But this legal-economic common ground carries its own dangers, particularly that of excessive dominance embedded through juridification.

The second Commission dominance risk lies in a subtle and pervasive danger which is integral to the very nature and power of DG Comp. It is that a juridified form of competition policy could become a destructive force in the regulation of the European economy. This argument of juridification helps to explain the puzzle of why the Member states agreed to the modernisation regulation, despite its centralising bias. The arguments for modernisation were advanced by legal specialists, in a legal discourse, and mobilised coherently and collectively by an ‘epistemic community’. As argued elsewhere (Wilks, 2001; van Waarden and Drahos, 2002) in the field of competition policy there is a well developed network of legal specialists drawn from the Commission, NCAs, the Courts and private practice. Collectively the epistemic community possesses formidable legal expertise and authority and shares common causal beliefs and common policy goals to do with the role of competition in regulating European industry. It can be argued that the officials and ministers of the Member States were persuaded by the weight and consistency of the legal arguments presented by the Commission and its associates. If the power of legal arguments, in a legally-orientated regulatory policy area, were indeed so persuasive in extending the level of delegation from the Member States then this can only reinforce the resort to legal argumentation. The danger, in other words, is that in the hands of the Commission European competition policy could become too powerful and too juridified.

If modernisation under the guidance of the Commission is successful then the law will be applied with greatly increased rigour, a competition culture will begin to dominate, the courts will reinforce and expand the application of the law, and private parties seeking damages will begin to succeed. We may, in other words, find a future of coherence in the refinement, application and effectiveness of the law. This might lead to a European future where competition law became a dominant mode of regulating the greater European economy which would represent a victory for DG Comp. There may be dangers in a policy that is too successful. From the point of view of non-majoritarian institutions there is the danger that excessive power will accentuate the problems of accountability but here we focus more particularly on a secular shift across Europe to greater reliance on a technocratic legal discourse which can be analysed as ‘juridification’. This refers to the excessive influence of law and legal process. In a recent thesis Morris (2003, 22) explores the growth of juridification in the UK and points out that:

juridification, as legalisation, necessarily means something different than simply more laws or more complex law. Instead it implies a change in the nature of political relationships from one governed by *non-legal* considerations to one governed by *legal* considerations. At its most extreme, a wholly juridified relationship ... would be one in which politics was replaced, with law supplanting power structures,

decisions about competing resources, public opinion, pressure group lobbying and so on in determining the nature and content of that relationship.

Morris identifies the abrupt juridification of the OFT and aspects of British competition law as a result of the Competition Act 1998 and the introduction of European legal principles. UK domestic competition policy has moved from a regime that was primarily 'administrative' to one that is fully legalised. In the administrative model decisions were made judgementally on the balance of 'the public interest', investigatory powers were minimal, legal arguments were restricted to judicial review of processes, precedent was relatively unimportant, there were no financial penalties and no appeal on the substance to the courts. All this has changed and there will be unanticipated effects on the rigour of policy, the dynamics of implementation and the distribution of benefits.

The abrupt Europe-inspired legalisation of the UK regime indicates what is happening across Europe and underlines the problems associated with juridification. The issue is not merely of more law and more lawyers, but is to do with a profound change in social and economic relationships. The German social theorists who have developed a critique of juridification analyse the ways in which regulatory law is moving to juridify the modern economy, the world of industry and labour. They argue that "juridification in the social state means the "constitutionalization" of the economic system" (Teubner, 1987, 11) so that economic behaviour comes under the control of sets of legal rules. This may or may not be harmful but it does present a changed dynamic in the control of the economy. Certain priorities and privileges may be embedded in law; the operation of legal principles may contradict the guidance of economic theory; the incorporation of particular economic theories in law may de-legitimise the legal system by virtue of threatening its key characteristic, its normative objectivity (Teubner, 1987, 26). The interplay of law and economics is complex and has been widely studied. The reluctance of the British judiciary to engage with economic principles and the conflicting dogmas of rival economists and economic theories was one reason for the long retention of the British administrative system. Is 'economics' justiciable? is an important question to which many British judges traditionally answered 'no'.

The Commission has been criticised for the paucity of its economic analysis and has recently stressed an increased role for economists in competition policy. Indeed, Mario Monti has described this as one of the main goals of his period of office and DG-Comp has for the first time appointed a Chief Economist (Monti, 2004, 7). But the incorporation of economic principles into legal tests is exceedingly problematic and illustrated both the problem of juridification and the danger that legal enforcement pursues a certain type of economic intervention, in this case prioritising a particular view of neo-classical economics essentially based on the conventional analysis of perfect competition. This is not the place to pursue an exercise in economic historiography but the prospect is for a European record of enforcement

that begins to duplicate the American experience. In the US authors such as Eisner and Kovacic (1995; 2003) have charted the way in which shifts in economic theories (such as the impact of the Chicago School) had fundamental effects on antitrust activism. Here we see yet another dimension of economic governance. Competition policy is not simply orientated to safeguarding a zone of free competition, it is pursuing a particular sort of competition and not only allows scope for political intervention but in fact requires it.

The argument then, is that the reform of competition law implementation across Europe is likely to lead to an increased juridification of the policy area. The cement of the ECN will be law and legal principles. This is entirely consistent with the status of the Network and its constituent elements as non-majoritarian institutions. One of the rationales for administration through non-majoritarian institutions is the ability to concentrate specialist expertise. Here we see the logical effects of relying on legal expertise.

Teubner identified three possible areas of dysfunctionality arising from juridification, they are social disintegration through law, legal disintegration through society and mutual indifference. The question of social disintegration revolves around the danger that law will impede processes of self-regulation to create rigid, perverse and possibly counter-productive outcomes. The issue of legal disintegration raises questions of whether the law can cope with the rapidity of regulatory change, whether it can cope with internal contradictions between, for example, public law and private law (see Maher, 2004), and above all whether the norms of objectivity underpinning formal law can survive a more instrumental and materialised law which actually implements policy preferences. But let's end with the question of mutual indifference. This is the risk that law and politics will begin to ignore one another. Politicians will make regulations and pass legislation with such frequency and of such complexity that lawyers will tend to ignore their intention. Instead law will become increasingly self-referential and will develop doctrine and legal norms which are workable and which they will be reluctant to abandon. Law becomes autocratic, goals are displaced and the competition authorities begin to apply competition law in ways that damage industry, industrial confidence and national prosperity. In the 1980s Martin Bangeman famously complained about the self-righteous domination of the 'competition ayatollahs' in DG-Comp. It is this potential domination of opaque law which is to be feared.

Conclusion

This article has compared two regulations of the European Council, forty years apart, Regulations 17/1962 and 1/2003. They symbolise a seismic transformation in the governance of the markets of the European Union. They have empowered the European Commission to lead or consolidate a shift from segmented national markets, all governed through politicised selective intervention; to an integrated Pan-European market governed by economic law.

The passage of Regulation 1 is a landmark in the history of European competition law. In particular the creation of a transnational policy network is a major innovation which welds together up to 26 NMIs into a form of ‘supra-NMI’ whose accountability is doubly unclear. This article stresses the risks generated by the Regulation. One set of risks is defined by the orthodox interpretation of the Regulation as an exercise in decentralisation. These are risks of fragmentation and incoherence in the application of the law and cooperation through the Competition Network. But the article also offers a second, more radical, interpretation which argues that the Commission has executed a strategic coup in reinforcing the power of DG Comp, marginalizing national laws and centralising control of the application of European law. The risks generated include the risk of tension and conflict between Member States and the Commission, and the risk of European Competition Law becoming at the same time excessively powerful and excessively juridified.

The discussion ends on a more normative tone. It points to the rapid juridification of UK competition law as a portent of a secular trend towards juridification across Europe which will steadily permeate national regimes through Regulation 1. This juridification involves the increased subjection of economic activities to European law. This has both desirable and undesirable features but the detailed implementation of competition policy in a legal form represents a huge shift away from the origins of antitrust in programmes of reassuring and largely symbolic legislation. The dangers stressed here rest on the nature of economic principles embodied in law and the sheer intrusive weight and complexity of law embodied in the operation of European jurisprudence. The law may require competition authorities to act in ways incompatible with national interests in employment, social welfare, technological development or the location of industrial activity. Moreover, it may do so in contradiction of reasonable economic analysis. This interpretation of an extension of European law, implemented by a strengthened Commission, carries the prospect of a backlash from NCAs, from Member States, and perhaps from European industry.

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