**LEGITIMACY AND MULTI-LEVEL GOVERNANCE IN EUROPEAN UNION COMPETITION LAW: A DELIBERATIVE DISCURSIVE APPROACH**

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**Abstract:** The question that this article aims to answer is: Union competition law protects ‘consumer welfare’ but what role do consumers play in competition policymaking? In the search for an answer, the article investigates the moral (output) and procedural (input) legitimacy of the recent competition law reforms. Following a discursive approach, the article looks into the roles played by institutions deliberating for citizens (consumer organisations, European Parliament and the Union Courts) in the reform process. This inquiry results in the questioning of the reforms’ legitimacy, and it also leads to broader conclusions regarding the legitimacy of multi-level governance: expert discourses overshadow potential deliberative qualities of networks, which exacerbates networks’ legitimacy problems. Also, the input/output legitimacy dichotomy appears problematic, as expert policymaking in the absence of citizen participation does not guarantee policies resonating with public interest.

**INTRODUCTION**

This article looks at the tension between citizen participation and expertise in multi-level governance in the context of European Union competition law. The choice of competition law for this inquiry is not an accident. Union competition law has been subject to an extensive reform process that transformed the enforcement of rules against anticompetitive mergers (EU Merger Regulation No.139/2004), anticompetitive agreements (Art.101 Treaty on the Functioning of the European Union, hereinafter ‘TFEU’), and abuse of dominance (Art.102 TFEU). The policy objective in this extensive reform process was to protect ‘consumer welfare’. The European Commission, the pioneer of the reform process, relied primarily on soft multi-level governance[[1]](#endnote-1) methods in the reform process, including coalition building with the epistemic community[[2]](#endnote-2) and network governance.

The extensiveness of the reform process and the fundamental changes it brought require a balance between expertise and citizen participation for reforms to enjoy legitimacy. Principal-agent approaches describe the reform process as ‘agency escape’ (Wilks, 2005) arguing that the Commission took advantage of the increasing popularity of neo-liberal norms in Union’s governance reflected in the Lisbon and more recently Europe 2020 Agendas to design a regime in which it enjoys greater powers (see also Riley, 2003; Maher 2009). Similarly, multi-level governance approaches conclude that the increasing reliance on network governance after the reforms render Union competition law vulnerable to legitimacy problems (Cengiz, 2010). Nevertheless, the democratic qualities of the reform process have not been investigated holistically. This is the primary aim of this article. The article does not engage with the European Competition Network (ECN) and its policymaking and implementation methods, as these issues have been investigated elsewhere (e.g. Cengiz 2010 and 2013). Nor does the article analyse the substance of the legal reforms, as an abundant legal literature on the modernisation of competition rules already exists (see Chirita 2014 for a review of this literature). The question that this article aims to answer is: Union competition law prides itself with protecting consumer welfare, but what kind of role (if any) do consumers, or citizens in general, play in the making of competition rules?

The article discusses the reforms’ ‘moral legitimacy’ (‘output legitimacy’, i.e. the reforms’ resonance with public interest) as well as their ‘procedural legitimacy’ (‘input legitimacy’, i.e. citizen participation in the process). Against the background of extensive utilisation of multi-level governance methods and the absence of direct citizen participation, the article looks at the roles played by institutions responsible for deliberating for citizens at the EU level in the reform process, including consumer organisations, European Parliament and the Union Courts. In this, the article follows a discursive approach: it discusses whether the discourses provided by these institutions have been reflected on in the reform process. This discussion is informed by empirical research in the form of semi-structured interviews with two Commission officials and three members of Brussels-based consumer organisations (hereinafter ‘Brussels interviews’[[3]](#endnote-3)) and a discursive analysis of the European Parliament plenary debates.

As a result, it is argued here that the reforms’ moral legitimacy is questionable, as it is unclear whether the reformed rules serve public interest better than the previous status quo. Additionally, institutions deliberating for citizens participated in the process only marginally for reasons including the increasingly technical nature of competition law in the light of the expert economics discourse. This overshadows the reforms’ input legitimacy. Fundamentally, consumer organisations, European Parliament and Union Courts envision a multi-faceted competition regime that pursues multiple policy objectives including, *inter alia* the internal market, in contrast to the emergence of ‘consumer welfare’ as the dominant objective of reforms. It is not suggested here that competition law suffers from greater legitimacy problems than other areas of European economic governance. Nevertheless, competition stands as the only area related to internal market and subject to exclusive Union competence in which the Parliament enjoys limited legislative powers (Arts.3 and 103 TFEU). This renders the input legitimacy problems of competition more acute compared with other pillars of the internal market.

Since competition law constitutes an essential pillar of Union economic governance, the inquiry into the democratic qualities of policymaking in this field contributes to our understanding of legitimacy in Union governance. Firstly and fundamentally, as a result of the empirical analysis of competition and based on the deliberative model, this article questions the procedural (input) legitimacy – moral (output) legitimacy dichotomy, which has become an established analytical framework for understanding legitimacy in Union’s governance. The question posed here is: if citizens are the primary sources of information with regard to policies’ effects on their welfare, yet if non-quantifiable discourses provided by them or institutions that deliberate for them are excluded from the policymaking processes, can policies adopted in the end realistically resonate with public interest? In other words, *can moral (output) legitimacy be achieved in the absence of procedural (input) legitimacy*? Empirical analysis of competition illustrates that expert policymaking in the absence of citizen participation does not necessarily result in policies resonating with public interest. In the light of this finding, the input legitimacy deficit of Union governance appears more acute. This deficit cannot be assumed away with the promise that expert policymaking processes will eventually result in policies resonating with public interest. Thus, in order to improve legitimacy of multi-level governance, one needs to follow a holistic approach that perceives *input and output legitimacy as* *complementary and cumulative conditions*, *rather than alternatives*.

Secondly, in the light of the discursive analysis of competition law, inaccessible expert discourses appear as the most immediate reason for the weaknesses of citizen participation in policy networks which otherwise have promising qualities as deliberative forums. This is not to deny that expertise has a substantial role to play in the design of effective policies. Thus, to improve the democratic qualities of network governance, first and foremost, inaccessible expert discourses should be complemented with accessible citizen friendly ones. This article does not offer a panacea to the legitimacy problems discussed. Ideally, legitimacy problems of multi-level governance should be addressed by establishing multi-level deliberative networks and mini-publics that feed directly into the multi-level policymaking processes. The discussion of the modalities and structure of such deliberative networks is left for future research.

The structure of the article is as follows: next section discusses the moral and procedural legitimacy of Union governance in the light of liberal, republican and deliberative models. Then, the penultimate section discusses respectively the moral and procedural legitimacy of Union competition law reforms and the impact of expert economics discourse on reforms’ legitimacy.

**THE LEGITIMACY OF MULTI-LEVEL NETWORK GOVERNANCE**

**Procedural Legitimacy**

Legitimacy provides citizens with a reference point to judge whether power holders have a rightful claim to their powers and whether they use their powers to society’s best interest. A political regime’s stability fundamentally depends on its legitimacy: if not corrected, a discrepancy between societal beliefs and the way the society is governed (‘legitimacy deficit’) might result in society’s withdrawal of its consent from power holders (‘deligitimation’) (Beetham 1991, p.28).

Traditional liberal/republican legitimacy models take the nation state’s institutional structure as their main template; and they equate powerholders’ legitimacy with their democratic credentials (Habermas, 1996, p.21). Thus, the legitimacy of European Union, as a sui generis multi-level polity, appears problematic in the light of these models. From the liberal perspective that perceives free elections as the key legitimating factor, the absence of directly elected and accessible legislative/executive institutions appear as a fundamental weakness in the legitimacy of Union’s governance (hence, the Union’s ‘democratic deficit’, see Hix, 2008).

The democratic deficit was exacerbated after the 2008 financial crisis. The Union’s supranational institutional structure is built on a principle of ‘multi-level legitimacy intermediation’ that requires decisions to be made as a result of a process in which institutions representing the Union interests (the Commission), Member State interests (the Council) and citizen interests (the Parliament) are included (Art. 13(2) Treaty on European Union). The increased reliance on intergovernmental policy measures[[4]](#endnote-4) post-financial crisis at the expense of European Parliament’s participation and the reliance on a strict conditionality principle in budgetary and fiscal matters[[5]](#endnote-5) that otherwise represent intimate powers of the national parliaments raise significant challenges to the principle of multi-level legitimacy intermediation (De Witte and Dawson, 2013; Scharpf 2012).

In light of the republican model that perceives the democratic process as a means for a *demos* to achieve common good, the diverse Union citizenship appears problematic: it is questionable whether Union citizens constitute a harmonious community built on a common history and cultural bonds that provide them with a political discourse and willingness to partake in a political process with the aim of achieving common good (Nicolaïdis, 2014). The European élites’ management of the financial crisis has exacerbated these issues by adding economic diversity to the mixture and by introducing tensions between the peoples of creditor and debtor states (Habermas, 2011, p.50).

The Union’s extensive multi-level network governance structure further complicates its legitimacy relationship with citizens. Networks can be defined as ‘complex and dialectical relations between multiple and mutually dependent actors which take part in the formulation and enforcement of policies’(Cengiz 2013, p.26). Networks are flexible platforms that bring together national and Union experts and officials who need each others’ cooperation to address a policy issue. Epistemic community members, civil society and interest groups are given temporary access to networks depending on their ability to provide technical information and expertise.

Network governance is not unique to the Union. Twenty-first century economic governance has given body to a plethora of transnational networks, since economic policies in one part of the world translate into externalities in other parts that require constant cooperation (Slaughter, 2005; Peters, 1998). Nevertheless, as a ‘regulatory state’ that aims to achieve an internal market in twenty-eight Member States, the Union is particularly hospitable to network governance, as this provides an efficient alternative to red tape and hierarchy (Majone, 1996). The regulatory landscape of the Union is replete with networks, including comitology committees, the open method of coordination, the European regulatory agencies with links in national capitals, the ECN that brings together the Union and national competition officials, and similar networks between regulators of network industries (Ansell, 2000; Hooghe and Marks, 2001).

Political science struggles with the democratic qualities of networks, as they are novel governance phenomena. Although networks influence policies substantially, they neither share a legitimacy bond with citizens in the form of elections nor do they have a *demos* – all they have is policy clienteles, at times with opposing interests (e.g. consumers v. businesses; workers v. employers) (Peters and Pierre, 2005; Papadopoulos, 2007). These issues appear more serious in the Union. Coupled with the general legitimacy problems identified above, extensive network governance brings with it the danger of producing policies stretched away from expressed citizen choices.

This, nevertheless, is the conclusion of the liberal/republican models that do not reflect the complexities of governance in post-modern polities. In post-modern polities, policymakers frequently face salient questions that need to be legitimated through more frequent feedback mechanisms than political elections (Gutmann and Thompson 1998, p.129). Similarly, in the light of diversities underlying post-modern societies, a thick *demos* envisaged in republican ideals does not always exist (Dryzek 2008, p.264). Against this background, deliberative models argue that open methods of communication to which all affected citizen groups contribute freely constitute a superior legitimating mechanism (Habermas, 2012, p.315; Young, 2000, p.121). Deliberation does not need to lead to consensus. From the normative perspective of participatory democracy, deliberative experience creates ‘better citizens’ by transforming citizens’ ideas and decreasing social prejudices (Andersen and Hansen, 2007). Deliberative models, however, also suffer from weaknesses: they assume different citizen groups’ willingness to talk to each other; and they overlook the possibility of deliberative processes being captured by powerful interest groups (Goodin and Dryzek, 2008).

In loose transnational polities, such as the Union, scale and diversity appear as the key obstacles for the implementation of deliberative methods. Thus, in such polities, as a second-best option, deliberation might be understood as deliberation *for* citizens in different institutional platforms rather than deliberation *by* citizens (Dryzek, 2010, p.24). In the Union’s governance, the Conventions on the Charter of Fundamental Rights and on the Future of the European Union constitute examples of deliberation *for* citizens. Nevertheless, these experiments had limited success, as they induced active participation by but a handful of élite citizens (Karolweski, 2011).

Network governance appears a double-edged sword from the perspective of deliberative legitimacy: on the one hand, if organised in the light of deliberative principles, networks provide excellent participatory platforms, as they lack the procedural straight-jackets of hierarchies (Dryzek, 2010, p.123). On the other hand, networks involved in technical policies tend to produce technical discourses; and they tend to limit participation to those actors who can provide technical expertise. Anecdotal evidence and citizen experiences are not valued as highly, although such experiences constitute the real value of citizen participation, as they are not available through another source (Dryzek 2010, p.133; Young, 2000, p.39).

The deliberative model attributes accountability forums, including courts and parliaments, the tasks of debating policy choices’ resonance with public interest on behalf of citizens and of translating technical policy choices to a language accessible to citizens, in addition to their tasks of protecting procedural legitimacy and the rule of law (Habermas, 2013, p.367). Nevertheless, technical network discourses might be hazardous to accountability forums’ performance of these tasks. Without possessing the necessary technical knowledge, they cannot effectively deliberate if policy choices resonate with public interest; and they cannot perform their task of translating policy choices into an accessible language.

In summary, the three models discussed here perceive different criteria as crucial for input legitimacy: the liberal model perceives policymaking by elected participatory institutions key for input legitimacy, whereas the same role is attributed to the demos and to open deliberation in the republican and deliberative models respectively. As discussed above, the Union faces serious challenges in satisfying any of these criteria.

**Moral legitimacy**

Legitimacy models discussed so far address only the *procedural* conditions of legitimacy (the modalities of citizen participation) without openly discussing its *moral* conditions (the substantive characteristics of policies that make them acceptable for citizens). The Weberian model takes society’s support as the key reference point for substantive legitimacy; and it argues that if citizens believe that those in power are legitimate power-holders, then those in power and their policy choices are considered legitimate (Weber, 1948). In a powerful critique, Beetham argues that this model empties legitimacy of its moral content, and that it unintentionally gives undemocratic power-holders the ability to argue that they enjoy legitimacy on the basis of citizen approval gained through propaganda and other means (Beetham, 1991, p.9). Nevertheless, Beetham does not offer a full account of moral legitimacy other than arguing that, to be morally legitimate, policy choices must serve the general public interest, rather than the power-holders’ or certain classes’ interests (Beetham, 1991, p.59).

Policies produced by European multi-level networks are presumed to enjoy moral legitimacy in light of the input-output legitimacy model (Scharpf, 1997): according to this model, the Union’s multi-level governance undeniably suffers from a procedural legitimacy (input legitimacy) deficit due to insufficient citizen participation. Nevertheless, thanks to the expertise it involves the Union governance has created an internal market and economic policies that maximise citizen welfare. This attributes moral legitimacy(output legitimacy) to Union governance. Thus, in the light of this model improved citizen welfare constitutes the key criteria for output legitimacy. Additionally, proponents of the regulatory state model argue that Union regulatory policies do not result in redistribution of wealth among citizens; thus, they are less in need of legitimation through citizen input (Majone, 1996, p.284).

The input-output legitimacy model builds the legitimacy relationship between citizens and a political regime on policy success that renders the relationship vulnerable to a legitimation crisis in cases of policy failure. This is exemplified in the increasing citizen disaffection towards the Union after the financial crisis (Scharpf, 2012).

Additionally, the model presents input and output legitimacy as alternatives to improve the democratic qualities of Union governance leaving a fundamental question unanswered: if, as argued by proponents of deliberative democracy, citizen experiences constitute the real value of citizen participation, can policies resonating with those experiences and maximising citizen welfare be produced purely on the basis of expertise without making citizens a part of the process? In other words, *can output legitimacy be achieved in the absence of input legitimacy*? Without addressing the input-output dichotomy directly, critical studies argue that it might be unrealistic to expect output legitimacy in the absence of input legitimacy. This is because experts who speak the same technical language might be locked in their cosy network discourse and silence critical voices against the dominant beliefs in the network leading to a potential policy failure (Cengiz, 2010, p.674). Empirical analysis of Union competition reforms, provided in the next part of this article, illustrates that expert policymaking at the expense of input legitimacy does indeed not guarantee output legitimacy.

**THE LEGITIMACY OF UNION COMPETITION LAW REFORMS**

Having discussed the legitimacy of multi-level governance, this article now turns to the legitimacy of Union competition law reforms. This second part of the article first introduces the reform process, then it discusses respectively the reforms’ procedural and moral legitimacy and the expert economics discourse’s effects on legitimacy.

**The reform process of Union competition law**

Union competition rules comprise the Treaty rules against anticompetitive agreements (Art.101 TFEU); abusive behaviour by dominant undertakings (Art.102 TFEU); and the Regulation against anticompetitive mergers (EU Merger Regulation No.139/2004). Competition rules force economic agents to obey the dynamics of liberal markets that are determined by supply and demand. These rules are inextricably linked to the dynamics of economy and are abstract in nature. Thus, they beg for elaboration by the legislature or the institutions enforcing them; and their interpretation reflects the dominant economic ideology of the time.

The Court of Justice, with its duty for protecting the rule of law (Art.19 TEU), and the European Commission, in the light of the autonomy delegated to it with Regulation 1/2003,[[6]](#endnote-6) have been the key institutions enforcing Union competition rules. Since the coming into force of the ECSC Treaty in 1952 until the start of the reform process of competition rules in the late 1990s, ordoliberal ideals and the common market objective heavily influenced the Commission’s and the Court’s approach to competition law (Gerber, 1994, p.100; Gormsen, 2007). Ordoliberalism embraced individual economic freedom against potentially devastating political consequences of the accumulation of economic power (Maier-Rigaud, 2012, p.143). Its influence was most visible in the abuse of dominance doctrine that placed great emphasis on the freedom to choose products and services (Gormsen 2007, p.339). Also, the Treaty declared competition rules as tools to achieve the common market (Arts.2 and 3(g) EC Treaty). The common market objective was most visible in the strict approach against vertical and horizontal agreements that erect economic borders between the Member States (Gerber 1994, p.112).

Since the late 1990s, the Union competition regime has gone through an extensive reform process that transformed the rules against vertical agreements,[[7]](#endnote-7) anticompetitive mergers[[8]](#endnote-8) and abuse of dominance.[[9]](#endnote-9) Similarly, enforcement was decentralised with the sharing of enforcement authority between the Commission and national authorities.[[10]](#endnote-10) Decentralisation measures attributed a managerial position to the Commission within the ECN that brings together the national authorities and the Commission; thus, they strengthened the Commission’s position in the Union competition regime (Cengiz 2010, p.660). The reform process also steered the enforcement regime towards a regulatory paradigm through commitment and settlement procedures that give the Commission the ability to close investigations on the basis of negotiations with parties involved (Cengiz, 2011). Finally, the Commission’s private enforcement agenda has resulted in a Directive[[11]](#endnote-11) increasing citizens’ role in competition law enforcement through damages actions.

As their common characteristic, the reforms steered Union competition rules towards a neoliberal paradigm that employs neo-classical economics as the key enforcement methodology to distinguish between harmful (inefficient) and harmless (efficient) behaviour (Buch-Hansen and Wigger, 2011, p.109). Neoliberalism in this context is understood as ‘the elevation of market-based principles and techniques of evaluation to the level of state-endorsed norms’ (Davies, 2014, p.6). Commissioner Monti, the reform process’s pioneer, branded the reforms as a ‘more economic approach’ (Monti, 2000, p.9). His successor Commissioner Kroes abundantly used the concept of ‘consumer welfare’ in the reforms’ publicity campaign (Kroes, 2009).

The emergence of ‘competition state’ as a global governance phenomenon (Cerny, 2014b) and the Union’s Lisbon (Council 2010) and Europe 2020 Agendas (Commission 2010) that accordingly identify growth and competitiveness as key policy targets provided the political background for the reforms: competition commissioners heavily relied on Lisbon terminology to justify the reform process (Monti 2000; Kroes 2006; Almunia 2014). The increasing prominence of economics in competition law has also had institutional implications. Most notably, a Chief Competition Economist position with a team of economists was created within the Commission to ensure the quality of economic reasoning.

After reforms, the concept of ‘consumer harm’ occupies a central position in the enforcement of rules against anticompetitive agreements and mergers.[[12]](#endnote-12) Similarly, the Commission declared that it will enforce Art.102 TFEU primarily against ‘anticompetitive foreclosure’ resulting in consumer harm in the form of increased prices, reduced output or reduced quality.[[13]](#endnote-13) The Economic Advisory Group (EAGCP), in its report on Art.102 reform argued that enforcement should be informed by economic modelling and industrial organisation theory (EAGCP, 2005, p.18). This signifies a substantial turn from the enforcement agenda only a decade ago that embraced not only economic, but also socio-political objectives, such as economic freedom as a way to achieve democracy in European governance (van Miert 1993; Witt 2010, p.215).

Neoliberal norms and ideas travel across borders thanks to their institutional embeddedness in global networks (Cerny, 2014b). European Commission orchestrated the reform process whilst accommodating the ECN for the dissemination of reformed norms at the national level (Cengiz, 2010, pp.670-71; European Commission, 2009). The reform process was supported by the transatlantic epistemic community of competition law and economics that emerged from the increasingly prominent international networks in this field (Maher, 2002). A part of this epistemic community has been informed by the experiences of Chicago and post-Chicago School American antitrust law embracing economic efficiency as the key policy goal. The European regime was criticised for following a so-called ‘form-based’ (as opposed to ‘effects-based’) approach that protects competitors rather than competition (Davies, 2014, p.95). Although the European and American substantive rules still differ remarkably, actors orchestrating reforms relied on American norms in search of legitimacy: the EAGCP report celebrated the American ‘rule of reason’ doctrine as the ultimate economic approach to competition law (EAGCP 2005, p.3); whereas Commissioner Monti declared his pride for bridging the gap between the American and European regimes (Monti, 2004).

**The procedural legitimacy of reforms**

Legally speaking, reforms have been implemented in the form of soft law measures and delegated Commission regulations, apart from the Directive for damages actions and Regulation 1/2003 that decentralised enforcement. The reform process did not involve deliberation by citizens. Thus, here, the procedural legitimacy of the process will be assessed through a discussion of the roles played by institutions deliberating for citizens: consumer organisations, the European Parliament and the Union Courts.

Civil society organisations representing consumer interests influence Union policymaking through two means: by officially responding to the Commission’s policy initiatives and by lobbying the Commission and other institutions. Compared with businesses, consumers constitute a diffused group with limited financial means. Particularly, European consumers show extreme cultural and linguistic diversity; and they have little, if any, economic incentive to take coordinated action to influence Union policies. A single umbrella organisation, the European Consumers’ Organisation (BEUC), represents consumer interests in competition policymaking in Brussels. BEUC primarily relies on public funding[[14]](#endnote-14); thus, it is selective in its activities.

Commission officials increasingly value technical information in light of the more economic approach to competition law. As one official puts it, they increasingly need information that will ‘get them results’ in cases they work on (Official A). Consumer organisations do not necessarily have access to such information, due to reasons including scarcity of financial and human resources and expertise. This not only affects Commission officials’ incentives for cooperation with consumer organisations, but also renders communication difficult when there is a ‘mismatch’ in the technical knowledge of competition officials and consumer organisation representatives (Official A). Similarly, Commission officials have a strong belief that ‘competition itself protects consumers’; thus, they do not always see additional value in communicating with consumer organisations (Official A). Additionally, business organisations appear ‘more organised’ than consumer organisations; ‘they know things earlier’ and they respond immediately to policy developments (Official B). Thus, although the Commission is willing to listen to different interests (Official B), consumer organisations suffer from disadvantages vis-à-vis business organisations.

Finally, BEUC and other Brussels-based consumer organisations are umbrella organisations that represent national organisations that directly participate in policy debates only occasionally. Thus, the grassroots contribution of consumers to policymaking depends on a two-level feedback mechanism between consumers–national organisations; and between national organisations–BEUC. DG Sanco responsible for health and consumers operates a European Consumers Consultative Group that brings together Commission officials and members of consumer organisations. A competition sub-group was formed within the Group that allowed direct communication between the Commission officials and national organisations. The sub-group has recently been discontinued (Brussels interviews). Similarly, in 2009 Commissioner Kroes established a consumer liaison unit responsible for communication with consumer organisations. Recently the unit’s resources were taken away, and its tasks were reallocated to a single official (Brussels interviews).

Naturally, consumer interests are not only voiced by consumer organisations. SMEs and distributors who suffer from unequal bargaining power against manufacturers lobby at times for issues that benefit consumers. However, the review of all consumer organisation responses and a selection of fifteen business responses to the Commission’s reform initiatives imply that consumer and business groups voiced distinct and at times opposing views in the reform process. Business groups relied on the argument of legal certainty whilst calling for safe harbours and laxer enforcement standards in the context of the abuse of dominance and vertical restraints reforms.[[15]](#endnote-15) They also lobbied against EU action in the field of damages actions arguing that this would bring an undesirable litigation culture to Europe.[[16]](#endnote-16) On the other hand, consumer organisations perceive the internal market as a vital source of welfare that provides consumers a choice between products and services: for instance, they lobbied for a strict approach against distribution regimes that jeopardise cross-border online trade.[[17]](#endnote-17) Similarly, in the context of damages actions, they focused their lobbying efforts on a harmonised Union-wide collective actions regime.[[18]](#endnote-18) They perceive the Commission’s addressing of this issue in a non-binding recommendation (2013/396/EU) without teeth as a significant weakness of the new damages actions regime (Brussels interviews).

European Parliament enjoys significantly limited powers in competition compared with other policies connected to the internal market. Competition is the only exclusive Union competence in which the Parliament’s legislative power is limited to consultation (Arts.3 and 103 TFEU). Parliament participates in competition debates primarily through the Economic and Monetary Affairs Committee that takes the lead in legislative and accountability activities in this field.

Figures 1, 2 and 3 below show the discourses used by members of the Parliament (MEPs) in competition debates. The data is collected from 272 MEP statements made in 22 plenary debates over three parliamentary terms (1999-2005, 2005-09, 2009-14). These are the returns of a search on the plenary website[[19]](#endnote-19) for documents with the word ‘competition’ in the title. The author coded the statements on the basis of discourse(s) used.

The data illustrates that Parliament’s views have not been sufficiently reflected on in the reform process: fundamentally, in contrast to the dominance of consumer welfare in the reform discourse as the ultimate policy objective, MEPs envisage competition law potentially as pursuing multiple policy objectives, including industrial policy and regional development, internal market, consumer welfare, the Lisbon objectives of competitiveness and growth, and SME protection (see Figure 1). Particularly after the financial crisis (2008), competition is increasingly perceived as a social construct with broader societal implications, including those on employment and environment (see Figure 1).

**Figure 1 here.**

Similarly, MEPs perceive the internal market as a significant source generating consumer welfare. In this, MEPs perceive the social and political implications of competition, consumer welfare and internal market as inextricably linked. For instance, rent-seeking by powerful financial institutions is perceived as the key reason for the financial crisis and its socio-economic effects. [[20]](#endnote-20) The weakness of internal market in financial products and insufficient consumer switching to cross-border institutions are perceived as the key reasons for the emergence of such powerful institutions in the first place.[[21]](#endnote-21) The same also goes for network industries, such as telecoms, gas and electricity, which the MEPs perceive not to work to the benefit of citizens due to the weakness of the internal market in these industries.[[22]](#endnote-22)

Finally, MEPs do not necessarily follow a partisan approach in competition debates. All political party groups follow somewhat balanced discourses, with Socialists and the Green Left emphasising socio-economic implications more than others (see Figure 2). Likewise, MEPs do not perceive as contradictory multiple discourses that hint towards different policy objectives. On the contrary, MEPs occasionally refer to multiple discourses, which they view as complementary, in their statements (See Figure 3).

**Figure 2 here.**

**Figure 3 here.**

The lack of outright partisanship and continuous reliance on multiple policy objectives make a stronger case for plenary debates to be reflected on in competition policymaking. Principal-agent approaches argue that partisanship in majoritarian institutions prevent those institutions from committing to long-term policy objectives; and this requires the delegation of policymaking powers in technical economic policies to independent authorities (Thatcher, 2002). However, this is not necessarily the case for the European Parliament’s approach to Union competition law. Thus, increasing Parliament’s powers to contribute towards the legitimacy of the Union competition regime could be considered, without fearing that increased parliamentary powers would result in populism and politicisation. In fact, MEPs have continuously voiced their demand for increased powers in plenary debates and they continuously complained about imperfect transparency in Commission’s policymaking activities towards the Parliament (see Figure 1).

The Union Courts have shown ambivalent responses to the reform process. The Court of Justice was the Commission’s partner in establishing a competition law regime based on the internal market objective (Gerber 1994, p.108). The General Court has engaged with the economics of competition more directly. Its annulment of three merger decisions in one year on the basis of economic reasoning contributed towards the establishment of a Chief Competition Economist position within the Commission (Cases T-342/99 *Airtours v Commission*; T-77/02 *Schneider Electric v Commission*; T-5/02 *Tetra Laval v Commission*). Accordingly, the two Courts have shown different responses to the ‘more economic’ post-reform approach. In *GlaxoSmithKline* (Case T-168/01) the General Court annulled a Commission decision prohibiting the company’s distribution regime that prevented parallel imports between Member States. Whilst doing so, the Court argued that the prevention of parallel imports does not necessarily result in detriments to final consumers; thus, it does not constitute a restriction of competition ‘by object’ in the context of Art.101 TFEU (Case T-168/01, para.119). On appeal, the Court of Justice disagreed: the Court opined that ‘achieving the integration of national markets through the establishment of a single market’ constitutes an objective of Union competition law, and that ‘for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price’ (Cases C-501, 513, 515 & 519/06, paras.61 and 63 respectively).

Since then, the Court of Justice repeated the prominence of the internal market objective in competition in cases involving both Art.101 and 102 TFEU (Cases C-8/08 *T-Mobile* and C-468/06 *Sot. Lelos kai Sia EE*). This loud and clear position of the Court of Justice has resulted in the General Court’s amending of its previous position centring on consumer harm in the widely expected *Intel* decision, the first major decision involving Art.102 after the reforms. The Court stated that the Commission was not required to show ‘direct damage to consumers’ to prove a violation of Art.102 TFEU, and that Art.102 aims ‘not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on effective competitive structure’ (Case T-286/09, *Intel*, para.105).

Litigation before the Union Courts has only limited deliberative quality: individual judges do not write dissenting and concurring opinions, and judicial deliberations are held *in camera* and cannot be published. Nevertheless, as accountability forums with the task of protecting the rule of law (Art.19 TEU), the Courts play a substantial role in the legitimacy of policy choices. The aforementioned analysis shows that the Court of Justice in particular continues to perceive the internal market as a valid policy objective for competition law.

In summary, the European Parliament, the only directly elected institution by citizens, and other deliberative forums played limited roles in the reform process. Whilst consumers and businesses voiced at times opposing concerns in the process, the reform process did not connect with citizens as the demos. Thus, the reform process’s procedural legitimacy is questionable in the light of liberal, republican and deliberative models. European Parliament’s and consumer organisations’ limited role in the process is not surprising. Neither is a veto player in competition policy, as the former does not enjoy strong enough legislative powers and the latter does not enjoy strong enough resources. The same, however, is not true for the Union Courts, which enjoy strong judicial review powers as accountability forums. The exclusion of discourses provided by them from the process does not only result in questionable procedural legitimacy, but it also might render the reformed rules inapplicable if the Courts continue to disagree with them.

**The moral legitimacy of reforms**

Policies’ resonance with the public interest constitutes the main criterion for their moral legitimacy (Beetham 1991, p.59). Thus, the reforms’ moral (il)legitimacy can only be established through an exhaustive discussion of the resonance of efficiency as a policy objective with public interest. Such analysis is beyond the scope of this article. It is argued here that the moral legitimacy of reforms can be questioned for a number of serious reasons both exogenous and endogenous to the reform process.

Firstly, whilst claiming that the competitive process creates efficiency; thus, it resonates with the public interest, competition law and economics scholarship takes a reductionist approach, and it does not investigate how competition affects citizens when they do not act as ‘consumers’. In neo-classical economics market is perceived as an equalising place in which producers and consumers participate and interact freely pursuing their independent economic interests whilst creating wealth for the entire society. Specifically, the competition law and economics literature argues that a competition law regime that prohibits inefficient behaviour; and that refrains from interfering with the dynamics of liberal markets contributes to the creation of wealth that is passed on to consumers benefiting the entire society in the end (Motta, 2005, p.18). Nevertheless, competition is a social construct that takes place in a social and political context. Particularly, competition is likely to affect individuals differently depending on their physical and social location, income and class. For instance, many consumers, who are also workers, might face lower income; thus, lower spending power, as a result of intense competitive pressures facing producers (Buch-Hansen and Wigger, 2011, p.108). Law and economics scholarship limits its analysis to dynamic and productive efficiency leaving questions of allocative efficiency (i.e. distributive effects of economic activities) aside with the argument that redistributive tax and income policies are better placed to address those questions (see Friedman, 2000, p.24).

Secondly, it is argued that the removal of economic borders for businesses, but not for diffuse citizen groups results in oligopolistic markets that are subject to *pseudocompetition* and rent-seeking (Cerny, 2014a, p.357). Empirical evidence shows that oligopolies pose a significant yet covert threat to citizen welfare in liberal markets (See e.g. Griffith et. al. 2015). Yet, competition rules cannot offer a credible solution to oligopolies, because oligopolists, who relax competition whilst adapting ‘themselves intelligently to the existing and anticipated conduct of their competitors’,[[23]](#endnote-23) do not break the competition rules (see also Motta, 2005, p.551). In the face of competition law’s oligopoly problem, its contribution to the production of consumer welfare might be an overestimation.

There are also endogenous reasons to the reform process that overshadow its moral legitimacy: the concept of ‘consumer welfare’ is not clearly defined in the reform discourse. One might expect consumer welfare to refer to the ‘consumer surplus’ standard; thus, suggesting that competition law will prevent practices that reduce the surplus enjoyed by consumers irrespective of the profits enjoyed by producers (Motta, 2005, p.18). Nevertheless, this is not altogether clear: American Chicago School relies on the same concept whilst advocating a ‘total surplus’ standard that permits practices reducing consumer surplus when such practices increase producer surplus more than they reduce consumer surplus (Bork, 1978).

Additionally, the identification of ‘consumer welfare’ as the ultimate objective at the outset prevented the emergence of a holistic reform discourse, in which alternative objectives serving the interests of European citizens are opened to consideration. Policy objectives that were considered equally prominent in the past, including the internal market, industrial policy and SME protection were not given sufficient weight in the reform discourse (Parret, 2012). Yet, as shown in the previous section, institutions deliberating for citizens still perceive those objectives valid.

Finally, the minimalistic approach to objectives was a missed opportunity to use competition rules creatively to address specific citizen needs and weaknesses of markets in the shadow of the financial crisis. Competition law has played a reactive role in crisis management, primarily through the utilisation of state aid rules in the rescue of financial institutions and settlements with cartels operating in the derivatives market (Lowe, 2009). Nevertheless, there is a potential proactive role for competition rules in the deterrence of activities that contributed to the crisis: for instance, Art.102 TFEU – unlike its American equivalent, Sherman Act section II – prohibits the so-called ‘exploitative abuses’ of dominance. Whether this provision could be relied on, in conjunction with consumer protection rules, against such exploitative practices of financial institutions as subprime lending, deserves investigation. Ironically, exploitative abuses are the only aspect of competition that has not been discussed in the reform discourse, although they cause the greatest consumer harm (Lyons, 2007).

**The economics discourse and the legitimacy of reforms**

As argued above, neoliberal norms and neo-classical economic methodology played dominant roles in the reform process. Arguably, this has exacerbated the reform process’s legitimacy problems.

As argued by Foucault, all expert discourses, particularly that of economics, tends to be exclusionary. This is because economics discourse is made of not only the ‘sayable’ but also the ‘seeable’: economy is not only thought or perceived but it can be seen in models, equations and statistics (Walter, 2008, p.542). Also, one’s understanding of the economy is very much determined by the assumptions of the dominant economics discourse of the time: one ‘sees’ economy in the light of what economics ‘says’. Non-experts have limited capacity to be an active part of the debate, as one cannot challenge what economics ‘says’ without being fluent in its language and methodology. Thus, economics tends to be dominant vis-à-vis other expert discourses, including that of law. For instance, a prominent competition law scholar argues that experts who rely on alternative legal discourses are marginalised in the epistemic community (Wils, 2014).

Similarly, when faced with a choice between ‘reason’ and ‘equality’ economics sides with reason: it dismisses ‘irrational’ discourses that cannot be measured and represented in models (Amariglio, 1988, p.604). For instance, in the context of competition law, emotional and personal experiences of citizens as victims of competition law violations, who need to sacrifice a higher proportion of their disposable income in return for inferior quality products, cannot be made a part of the debate involving the so-called more economic approach. Neither is the symbolic yet fundamental value of the internal market for European citizenship and identity made a part of the equation whilst criticising Union competition law for being ‘form-based’.

As a result, alternative non-quantifiable discourses offered by citizens and institutions deliberating for them lose out against the economics discourse. This exclusion cannot be justified with a promise of moral (output) legitimacy, since the reforms’ output legitimacy is also questionable. The reforms’ weaknesses on both legitimacy fronts imply that the input/output legitimacy dichotomy might not be altogether plausible. Policymaking processes that are dominated by expertise and that do not benefit from deliberation by and for citizens do not necessarily produce policies resonating with public interest. As a result, at least in this particular case, input legitimacy deficit appears much more acute, and it cannot be assumed away with the promise of output legitimacy. In the light of this finding, improving democratic qualities of network governance requires *a holistic approach in which input and output are considered equally vital complementary elements, rather than alternatives*.

**CONCLUSIONS**

European Union’s sui generis institutional design coupled with its extensive multi-level network structure tends to produce policy outcomes that are at times stretched away from expressed citizen choices. This remote relationship with citizens results in the Union’s democratic deficit that is exacerbated in the shadow of post-financial crisis experiences. Although the Union claims to increase citizen welfare through various policies, including the internal market and competition policy, citizens are unlikely to recognise and appreciate this, if they do not play any (in)direct role in policymaking. From this perspective, the reform process of Union competition rules appears as a missed opportunity to anchor citizens to a policy that claims to produce benefits for them. The reform process did not involve deliberation by citizens in which they voice their real life experiences in the market. The contribution of institutions that deliberate for citizens to the reform process was also limited for reasons including the expert economics discourse that became dominant in the process. Thus, reforms’ procedural (input) legitimacy is questionable at best. Also, it is unclear whether the reformed rules serve public interest better than the previous internal market-centric approach, which overshadows the reforms’ moral (output) legitimacy.

Thus, the empirical analysis of competition law illustrates that the input-output divide in the understanding of legitimacy in Union governance is not always plausible. Expert policymaking through multi-level networks at the expense of citizen participation does not always guarantee policies resonating with public interest. A more holistic approach to legitimacy, in which input and output are perceived as equally vital and complementary elements rather than alternatives, is necessary. Finally, the empirical analysis of Union competition law also illustrates that expert discourses tend to overshadow potential democratic qualities of networks as deliberative forums. Thus, first and foremost, expert inaccessible discourses need to be complemented with accessible citizen friendly ones to improve the democratic qualities of network governance.

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1. Multi-level governance in the context of this article is understood as ‘an arrangement for making binding decisions that engages a multiplicity of politically independent but otherwise interdependent actors at different levels of territorial aggregation in more-or-less continuous negotiation/deliberation/implementation and that does not assign exclusive policy competence or assert a stable hierarchy of political authority to any of these levels’ (Schmitter, 2004, p.49). [↑](#endnote-ref-1)
2. Epistemic communities are ‘networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area’ (Haas, 1992, p.3). [↑](#endnote-ref-2)
3. The interviewed Commission officials represented the Commission position in the legislative process of a reform legislation and were responsible for liaising with consumer organisations. Interviewed consumer organisation members are directly involved in lobbying. Names are kept confidential. Questionnaires are available upon request. [↑](#endnote-ref-3)
4. Most notably the Treaty on Stability, Coordination and Governance, <http://european-council.europa.eu/media/639235/st00tscg26\_en12.pdf>. [↑](#endnote-ref-4)
5. See the so-called ‘six pack’, <http://ec.europa.eu/economy\_finance/economic\_governance/sgp/legal\_texts/index\_en.htm>. [↑](#endnote-ref-5)
6. Council Regulation (EC) No 1/2003 on the implementation of the rules on competition, [2003] OJ L1/1. [↑](#endnote-ref-6)
7. Commission Regulation 330/2010 on the application of Article 101(3) to vertical agreements, [2010] OJ L 102. [↑](#endnote-ref-7)
8. Council Regulation (EC) No 139/2004 on the control of concentrations, [2004] OJ L 24/1. [↑](#endnote-ref-8)
9. Guidance on the Commission's enforcement priorities in applying Article 82 EC, [2009] OJ C45/7. [↑](#endnote-ref-9)
10. Council Regulation (EC) No 1/2003 on the implementation of the rules on competition, [2003] OJ L1/1. [↑](#endnote-ref-10)
11. Directive on certain rules governing actions for damages, not yet published, <http://ec.europa.eu/competition/antitrust/actionsdamages/damages\_directive\_final\_en.pdf>. [↑](#endnote-ref-11)
12. Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97; Guidelines on Vertical Restraints [2000] OJ C291/1, para.7; Guidelines on the assessment of horizontal mergers [20004] OJ C31/5, para.8. [↑](#endnote-ref-12)
13. Commission Guidance, note 9 above, paras.19, 22. [↑](#endnote-ref-13)
14. 54% of BEUC’s budget comes from its member organisations and 41% of it comes from EU grants, see <http://www.beuc.org/about-beuc/financial-information>. [↑](#endnote-ref-14)
15. See e.g. the responses of Bayer, Confederation of Finnish Industries, European Federation of Pharmaceutical Industries all available at <http://ec.europa.eu/competition/antitrust/art82/contributions.html>; responses of EUROPIA, Business Europe, Federation of Chemical Distributors and Federation of Small Businesses all available at <http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html>. [↑](#endnote-ref-15)
16. See e.g. responses of CBI, BusinessEurope and American Chamber of Commerce to the EU, all available at <http://ec.europa.eu/competition/antitrust/actionsdamages/green_paper_comments.html>. [↑](#endnote-ref-16)
17. See responses of Which?, Consumentenbond and Consumer Focus, all available at <http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html>. [↑](#endnote-ref-17)
18. See responses of Which? and BEUC, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/green_paper_comments.html>. [↑](#endnote-ref-18)
19. <http://www.europarl.europa.eu/plenary/en/debates-video.html>. [↑](#endnote-ref-19)
20. Plenary Debate on Sector Inquiry in Retail Banking, 4 June 2008, CRE 04/06/2008-24. [↑](#endnote-ref-20)
21. Ibid. [↑](#endnote-ref-21)
22. Plenary Debate on 2009 Competition Policy Report, 20 January 2011, CRE 20/01/2011-3. [↑](#endnote-ref-22)
23. Case C-199/92P, Hüls v. Commission, [1999] ECR I-4287, para. 160. [↑](#endnote-ref-23)