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Towards Regulatory and yet Democratic Governance? Consumer Involvement and the Legitimacy of EU Competition Policy

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Abstract

In the study of European governance, the relationship between the legitimacy of the European Union and the involvement of civil society in governance has been one of the central concerns. This research contributes to the literature by examining the case of European Union competition policy. In the last decade, the European Commission has conducted institutional reforms and multiplied channels to competition policy for consumers. Those changes include the initiation of European Commission public consultations, a proposal of collective consumer redress system, and the creation of the Consumer Liaison Unit in Directorate-General Competition as well as the Consumer Sub-unit in the European Consumer Consultative Group. This article maintains that those reforms aim to enhance both input and output sides of the legitimacy of competition policy, whereas the issue of capacity building of consumer organizations remains essential. This finding casts doubt on an argument that regulatory policies such as competition policy are and should be technocratic rather than democratic. The research employs a qualitative analysis to pursue a better understanding in the objectives of the Commission-led reforms.

Keywords

Competition policy, legitimacy, consumer, regulation, collective redress

Introduction

This paper investigates a current shift in EU competition policy towards greater consumer involvement, and in addition discusses its potential contributions to the legitimacy of this policy. Interestingly, consumers have played a marginal role in the development of EU competition policy in spite of the fact that they are the ultimate beneficiaries of this policy (Doern and Wilks 1996, 336). The collective action problem is one key factor which hinders the interest representation of diffuse interests such as consumers in European governance, although institutional remedies provided by supranational institutions tend to alleviate this underrepresentation problem (Young 1997; Pollack 1997). Specifically in the context of competition regulation, the separation of consumer affairs from the Directorate-General for Competition (DG COMP) of the European Commission in 1967 weakened the connection between competition policy makers and consumers (Cini and McGowan 2009, 23-24). Yet, consumers have been increasingly incorporated into the policy-making process particularly in the last decade through recent Commission-led institutional reforms. A close examination of this novel and largely overlooked trend helps to understand the way in which the Commission legitimizes the current reforms, especially in the context of the controversial White Paper and draft Directive on consumers redress. Since there has so far been little research on the legitimacy of EU competition policy, it is worth investigating this issue with particular focus on the key stakeholder, consumers, while demonstrating the interface between input and output legitimacy in the context of concrete institutional designs.

The examination of legitimacy of EU competition policy has the potential to provide new theoretical insights for the study of regulatory policies. In the study of EU politics,

the incorporation of civil society into governance has been increasingly recognized as one of the main tools to reduce the perceived democratic deficit, despite the possible legitimacy problem of civil society organizations as intermediate actors between citizens and policy makers (Smismans 2006). Yet, as far as regulatory policies are concerned, the dominant view is that input legitimacy is unimportant and could even deteriorate policy effectiveness (Majone 1996a; Eberlein and Grande 2005; but see also Borrás, Koutalakis and Wendler 2007), although the narrow understanding of the input legitimacy in this argument as the involvement of parliaments at the policy making stage is problematic. There is insufficient research on this important controversy between the two competing views. Therefore, the paper aims to make contributions to this theoretical debate through the case study of EU competition policy. This policy makes an interesting case study here because it is one of the core policies of the EU underpinning the functioning of the single market, while exemplifying a regulatory policy focusing on the rule-based collection of market failure. As indicated above, the particular focus of the research is consumers because they are crucial in terms of policy inclusiveness as well as effective litigation (Dayagi-Epstein 2007), and indeed one of the most important stakeholders in this policy in spite of their marginal role so far.

The promotion of consumer interests has become a key issue in EU competition policy since the 2000s. One early sign of this is the inclusion of the consumer activities section in the annual reports of DG COMP since 2008. Another indication of the current consumer ethos of the EU is a conference organized by DG COMP, entitled 'Competition and Consumers in the 21st Century', on 21 October 2009. On the same day, the DG launched a website dedicated to consumer affairs and competition

regulation[1]. In addition, the EU takes the institutional approach for consumers' greater participation. Several institutional changes for better inclusiveness have already taken place: the setup of the Consumer Liaison Office within DG COMP; the establishment of the Competition Sub-unit in the European Consumer Consultation Group (ECCG); the launch of periodic public consultations organized by the European Commission across various areas including competition. Besides, a draft Directive concerning consumers redress for the victims of EU competition law infringements was proposed by the European Commission on 11th June 2013, although this is less ambitious than the Commission's Green Paper of 2005 and the White Paper of 2008 regarding this issue.

A question which arises from these observations is why the EU, particularly the European Commission, promotes consumer interest representation in competition policy. Based on the detailed analysis of the publications of the EU, especially those of the Commission, the paper maintains that the series of current consumer-related reforms and especially the proposed redress system are designed to enhance both input and output legitimacy. Notwithstanding this proposition, the paper also points out that the capacities of consumer organizations as intermediate actors bridging policy makers and consumers remain questionable primarily because of the shortage of resources.

It is Scharpf (1999, 6) who provides the useful distinction between the input and output legitimacy: input legitimacy refers to the legitimacy based on governance by the people, or to put it in another way, the participation of the governed in policy without presupposing representative demcracy. By contrast, the concept of output legitimacy is predicated on the principle of governance for the people. This type of legitimacy can be

[1] The Consumer corner of DG Competition, available at http://ec.europa.eu/competition/consumers/index _en.html, accessed 12 June 2013.

measured by the degree to which policy output is in line with the interest of the public. In other words, it is the effectiveness of public policies in terms of problem solving. This set of concepts is relevant to the paper because it clarifies the fundamental difference between the two strands of theories concerning the legitimacy of regulatory policies, and also helps to analyse the potential trade-off between policy effectiveness and inclusiveness in specific institutional designs such as the consumers redress.

The paper is structured as follows. The next section critically overviews two relevant bodies of literature, namely organized civil society and European governance, and regulatory policies and legitimate governance. The second part provides a brief historical overview of EU competition policy and consumer relations, and then generates a hypothesis based on the preceding theoretical debate. The third section analyses the three established channels and one proposed one in EU competition policy for the representation of consumer interests. The concluding remarks discuss the implications of the empirical findings for the study of EU competition policy, link this to the theoretical debate over the legitimacy of regulatory policies, and briefly identify potential areas for further research.

1 Regulatory policies, legitimacy, and the wider context of European governance

Organized civil society and European governance

The so-called democratic deficit is one of the most publicized issues concerning the EU. The debate among practitioners and academics has been accelerated since the near failure of the ratification of the Maastricht Treaty, while the turnout of European Parliament elections is consistently decreasing despite its incremental empowerment

(for an overview of this issue, see Follesdal and Hix 2006). The rejection of the Constitutional Treaty by the French and Dutch referenda made the issue even more salient. As the effort to parliamentalize EU governance has gradually proved insufficient to relieve the democratic deficit primarily because of the largely second-order nature of European Parliament elections, the potential contributions of civil society to the EU's legitimacy have attracted much attention. In fact, there has been a series of attempts of the EU to enhance the participation of civil society, understood as a distinctive social sphere distinct from both the state and the market (Smismans 2006, 3)[2]. The landmark White Paper on European Governance of 2001 prepared by the European Commission (2001, 11-12) emphasizes the importance of communication between the EU institutions and the member states on one side, and citizens on the other side. The Commission expects that better involvement would encourage transnational public debate, generate 'a sense of belonging to Europe' among citizens, and help the policy makers to provide better policies which can mobilize public support. This 'rediscovery' of civil society has been echoed in EU discourse in the Laeken Declaration of the European Council in 2001 and other various EU documents (Smismans 2006), while the Lisbon Treaty aims to consolidate this momentum, for example by establishing the system of the European Citizens' Initiative.

What is particularly interesting in this context is the growing debate over the 'intermediary function' of civil society organizations (CSOs)[3] in European and global governance. As the terms such as the intermediary function and the role of 'mediators' in the literature (Nantz and Steffek 2005, 381) indicate, CSOs are widely believed to

[2] It should be noted the autonomy of civil society from the state is not assumed here unlike the Hegelian understanding of this concept.
[3] Nanz and Steffek (2005: 382) define the civil society organization as 'a non-governmental, non-profit organization that has a clearly stated purpose, legal personality and pursues its goals in non-violent ways'.

have the potential for stimulating informed public debate and citizens' political participation on the one hand, and enhancing policy effectiveness on the other hand (Saurugger 2008: 1276). As Nanz and Steffek (2004, 329-331; 327-329) maintain, on the one hand, CSOs aggregate and represent public interests, opinions and values ('inclusion of stakeholders'), especially which would not be heard in exclusively intergovernmental organizations. Many of these organizations make decisions on a one-state one-vote basis, a system which underrepresents alternative and / or minority voices ('empowerment of marginalized groups of stakeholders). On the other hand, CSOs monitor global governance regimes and makes them more transparent and accountable to interested groups and citizens ('transparency of the rule-making process'). The legitimacy of CSOs themselves, for example in terms of their resources and representativeness, is also critically debated in the literature (Warleigh 2001: Saurugger 2008). Nevertheless, overall this strand of theoretical debate underlines the potential contributions of organized civil society's participation in European governance regarding both input and output legitimacy, while describing the absence of full-fledged representative democracy in the EU polity.

The regulatory legitimacy argument and its limitations

In contrast to the civil society and European governance literature, a dominant claim in the study of regulatory policies is that they are and should be technocratic rather than democratic (Majone 1996a, 294-295; Eberlein and Grande 2005, 103-104). According to this line, redistributive policies are by definition the zero-sum game in which a consensual decision-making system does not work effectively, whereas regulatory

policies are the non-zero-sum game where non-majoritarian institutions such as independent regulatory agencies and courts play a central role. It follows that these institutional actors are more immune from party politics and short-sighted political considerations than elected bodies, and should be responsible for public regulation so as to avoid politicization and distributive conflicts. This argument implies that the output legitimacy or the logic of policy effectiveness is and should be prioritized in regulatory policies, while minimizing the risk of regulatory capture[4]. A classic example of the delegation of power to non-majoritarian body in the study of EU politics is the European Commission (Laudati 1996; Majone 1996b).

One limitation of the literature is the narrow understanding of interactions between regulators and societal actors from a rent-seeking perspective, which hinders a comprehensive analysis of the potential of CSOs' contributions to governance. Another criticism is that it focuses too much on the stage of power delegation to regulatory agencies. In fact, recent research shows that regulatory agenices in the EU such as the European Food Safety Authority, the European Medicines Agency, and the European Patent Office are deeply embedded in transnational networks, indicating the importance of input legitimacy in the post delegation phase (Borrás, S., C. Koutalakis and F. Wendler 2007).

2 Theoretical Framework

Background: a short history of EU competition policy and consumer relations

[4] Hague and Harrop (2010, 377) provide a clear definition of this concept: 'regulatory capture occurs when public agencies created to oversee particular industries come to serve the interests of those they supervise'.

First this chapter provides background information about institutional settings in EU competition policy because how much diffuse interest can be represented depends on which EU institutions are powerful in a certain policy. It also overviews the history of consumer involvement in this policy. The second part generates a hypothesis drawing on the theoretical and empirical debate in the previous chapter.

In EU competition policy, a non-parliamentary institution, the European Commission is the most powerful institutional actor (Cini and McGowan 2009). It possesses exclusive competence in legislation initiation. The Commission and DG COMP also have considerable discretion in the treatment of individual competition cases. Despite their relative shortage of staff, these institutions hold plenty of expertise on economic and legal analyses. EU courts also have played major roles in the development of EU competition policy. By contrast, the Council and the European Parliament are marginal (Cini and McGowan 2009, 42-44). The former is not involved in decisions on cases except in the area of state aid. The latter has only consultation competence in legislation. While national representatives are entitled to participate in advisory committees concerning competition control and express their opinions, in practice they mostly accept the decisions of DG COMP and the Commission. Such institutional setting is typical in EU regulatory policies, although the marginal role of the Council in it is distinctive.

The understanding of this power balance between the major EU institutions is relevant to the argument because each of them has its own preference in the relationship with civil society (Bouwen 2002) and therefore the balance affects interest representation in a given policy domain. On the one hand, the European Parliament, which is generally open to diffuse interests (Kohler-Koch 1997) is has little power in

competition policy. On the other, other promoters of the interests, it is important to notice the considerable competence of the European Commission in this policy. Young and Wallace (2000) argue that the Commission strongly supports diffuse interests for two main reasons. Firstly, to fulfil its role as agenda setter, the Commission willingly consults with a wide range of actors intensively. Secondly, the Commission is in charge of monitoring EU law compliance. Thus, it is ready to take on the private sector, which is often the 'clients' of Member States, for the protection of the single market[5]. Therefore, one may assume that diffuse interests are not necessarily underrepresented in the area of competition.

Literature on the collective action problem in EU politics supports this argument. While the institutional setting of the EU advantages business interests in general, the former do not systematically exclude diffuse interests such as consumers, environmentalists and women's rights groups (Greenwood 2003; Young 1997; Pollack 1997). The key reason why the theory of collective action does not explain the reality of European interest representation very well is institutional pull by supranational actors[6]. In fact, the EU institutions have promoted the formation of European consumer groups proactively. Thus, this institutional setting may ease the difficulty in group formation.

It should be noted that consumer involvement in the policy is not an entirely new story. On the contrary, a consultation mechanism for consumers was launched as early as the 1960s, although it was not dedicated to the issue of competition and consumer

[5] Young and Wallace (2000) gives another reason, although it does not apply to core EU policies such as competition policy:in new policy areas the Commission ventures, there are few established private actors having a strong connection to the EU institutions. Thus, in such a 'level playing field', public interests can compete with other interests.

[6] Young (1997) also suggests that the free-rider problem tends to be less serious at the EU level because the members of European association organizations are likely to be already politically active at the national level.

affairs. Young (1997, 157-59) points out that the Commission's incentive to collective action at the European level largely affected European consumer groups. In 1961, the European Commission organized a seminar for consumer groups. At the meeting, then Commission Vice President and Commissioner for Agriculture Sicco Mansholt noted that European consumers need to unite because producers would become stronger once the Common Agricultural Policy of the European Economic Community was established (European Commission 1991, 13). In response to this Commission's call, national consumer groups which attended the meeting signed a protocol and formed the aforementioned BEUC in the same year. Another direct consequence of the 1961 meeting was the establishment of the Consumers' Contact Committee in April 1962. The Commission utilized the Committee in which the Commission staff may consult consumer groups on any matter relating to European-level consumer interest. In the 1960s five European consumer associations were given two seats for each and were consulted on consumer-related matters. The invited associations are the BEUC, COFACE (Confederation of Family Organizations in the European Community), EURO COOP (European Community of Consumer Cooperatives), EO/ICFTU (European Organization of Free Trade Union) and EO/IFCTU (European Organization of the International Federation of Christian Trade Unions). The Commission's initiative also directly affected the consumer organizations' activities (Young 1998: 158). For example, EUROCOOP created a secretariat in Brussels and COFACE launched a working group on competition policy.

The consultation mechanism was restructured four times in the past. Since 2003, the European Consumers Consultative Group (ECCG) has been the main formal channel for dialogue between consumer groups and the European Commission. It is normally held

four times a year and its meeting minutes are published online. The Commission not only funds the ECCG but also provides staff. In short, the EU has been incorporating consumer interest through an institutionalized channel for a long time, while the novelty of current institutional reforms for consumer involvement should not be underestimated, as will be discussed in the third section.

Hypothesis

The critical reveiw of the literature and the brief overview of consumer affairs in EU competition policy lead to one hypothesis corresponding to the research question: in cooperation with other EU institutions, the European Commission conducts institutional reforms regarding consumer involvement in EU competition policy aiming for the improvement of both input and output legitimacy.

There are three reasons for this hypothesis. Firstly, taking the overall situation of EU governance into consideration, one may assume that EU institutions, particularly the European Commission, promote both input and output legitimacy even in competition policy. In order to cope with the perceived democratic deficit, the EU increasingly incorporates civil society actors into the policy-making process for better governance. If the EU makes exceptions in the area of competition, the credibility of the series of EU administrative reforms aiming for good governance since the Commission's White Paper in 2001 would be easily undermined. Since competition policy is one of the core policies of the EU which is designed to assure the functioning the common market, it would be hard for the Commission to break its own principle in this area. Consumers are one of the biggest categories in number among stakeholders. Therefore, the

promotion of consumer involvement in EU competition policy would substantially contribute to policy inclusiveness. In addition, because of the limited resources and increasing tasks of DG COMP, the EU has strong incentive to incorporate consumer input for better policy effectiveness.

Secondly, input and output legitimacy do not necessarily conflict with each other. Democratic governance may prevent effective governance due to politicization and conflicts between national interests (Sharpf 1999; Majone 1996a), but they also reinforce each other at times. The issue of transparency is a good example. It helps citizens to have adequate information for their decision-making, while underpinning effective governance by preventing corruption and enhancing the government's accountability (Naurin 2004, 139). It should be also noted that, as it has been argued, CSOs have the potential to enhance better public participation on the one hand, and effective problem solving on the other hand.

Thirdly, as noted above, the Commission has an incentive to enhance inclusiveness because it is crucial for the Commission's role as a guardian of EU law. Indeed, the Commission has long promoted consumer involvement in decision-making processes since the early 1960s. Though consumer interest is a typical diffuse interest, institutional remedies could ease the collective action problem.

In order to test the hypothesis, the following empirical analysis uses the case study method. This method is most appropriate for the research since the goal is to understand the intention of the European Commission, which is often reflected in its action implicitly. The purpose of the Commission is observed drawing on two types of text in their official documents, namely the institutional arrangement and justifications for it.

Specifically, in order to test the hypothesis, it is useful to investigate the current institutional reforms and the proposed redress system as illustrative cases. The empirical analysis employs primary sources, mainly the publications of the European Commission, while interviews to DG COMP officials supplement the official documents.

3 Institutional Reforms and Consumer Involvement

The Consumer Liaison Office

One institutionalized channel for consumers assuring access to EU competition policy is the Consumer Liaison Office established in 2003 within DG COMP. The European Commission (2004, 12) assigns the Consumer Liaison Officer four functions: to serve as a primary contact point for consumers and consumer organizations; to provide regular and comprehensive consultation with consumer organizations in the ECCG; to alert consumer associations when their contributions are beneficial in handling a case, and to help the former to express their opinions; to maintain contacts with national competition authorities concerning consumer issues. There was a further organizational change in 2008, namely the creation of a dedicated Consumer Liaison Unit in DG COMP (then Unit A6), but the Unit was desolved and replaced by a position of Consumer Liaison Adviser by early 2013. The Advisor takes a pivot role facilitating communication between indivisual consumers, consumer organizations, DG COMP and the Directorate-General for Health and Consumers[7].

[7] Interview with the Consumer Liaison Officer of DG COMP, Advisor Consumer Liaison, Directorate A (Policy and Strategy) (26 February 2013, Brussels).

As a result of the outbreak of the new contact point, DG COMP received approximately 2,500 comments on competition issues from citizens that year (European Commission 2008b, 27), showing improved accessibility to the Commission. Nonetheless, of greater importance is the fact that the Commission regards consumer involvement as a key for the enhancement of inclusiveness, and expects consumers and consumer groups to provide information and expertise for better policy effectiveness (European Commission 2009). Especially, the Commission expects information concerning the distortion of market competition so that the policy reflects their interests. Putting aside the responsiveness of the Commission, its intention to improve openness and inclusiveness of the decision-making process is evident.

The Competition Sub-unit of the ECCG

The creation of the ECCG Sub-group on Competition in 2009 marked another tie between consumers and EU regulators in a more organized way. The Sub-group is an advisory body to the ECCG and consists of two European consumer organizations, BEUC and ANEC (European Association for the Co-ordination of Consumer Representation in Standardization); consumer organization representatives from every Member State; as well as two observers (i.e. Norway and Iceland, which are in the European Economic Area). They discuss competition matters twice a year in Brussels. National competition authorities also attend one meeting a year (European Commission no date a).

As for the Consumer Liaison Unit, the competition subunit in the ECCG functions as a bridge between decision makers and civil society. While the ECCG opinions are not

legally binding and could be disregarded by the Commission, the new subunit at least guarantees regular consultation between the European Commission, national competition authorities, and national and European consumer groups. It is still too early to judge the achievement of the subunit. Nevertheless, since its establishment, it has been operating actively. For example, it has already issued its first opinion on actions for damages in 2010 (European Commission 2010).

On the input side of legitimacy, the major achievement of the ECCG is the establishment of regular participation by consumer associations in consultations. Though the suggestions of the ECCG are non-binding, the importance of this permanent dialogue should not be underestimated. National and European consumer groups can directly contact policy makers regarding any consumer affair. On the output side, the European Commission not only gains policy expertise, but also receives information from a stakeholder, consumer interest, about potential problems in implementation. The creation of the competition subunit provides a specialized arena for a dialogue between the EU and consumer organizations. As a by-product of the participation, ECCG members benefit from information exchange among themselves. The pooling of experience in different countries and the sharing of best practices would be of great use for them. If the ECCG functions as a spokesperson of the Commission, as is stated in the 2009 Commission decision, the public would be better informed, and in the long run, it would lead to greater and better consumer input to the policy-making process.

Proposed consumer redress system

The overall structure and objectives

The two institutional reforms discussed above cover all stages of the policy cycle, particularly policy initiation and formation, while the proposed redress system concerns the policy implementation stage. A short summary of the background and main contents of the Commission's Green Paper (2005) and White Paper (2008) on consumer collective redress is followed by the analysis of specific proposals in the latter Paper, in which the Commission extensively illustrates its favorite options. In addition, the section very briefly points out the differences between the White Paper and the subsequent draft Directive of June 2013.

The European Commission's Green Paper Damages Actions for the Breach of EC Antitrust Rules in 2005 illustrated a preliminary idea of an EU-wide collective redress mechanism for consumers. After a public consultation on this issue and a generally favorable response from the European Parliament (2007), the Commission published the White Paper of 2008 with a more concrete description of the proposed judicial system. Back in 2001 the Court of Justice judgement on the *Courage and Crehan* case underlined the right of all victims of EU competition law infringements to compensation and reaffirmed in the 2006 *Manfredi* judgement[8]. In practice, however, an effective European legal system for consumer redress is absent up to the present. Given the lack of EU legislation on the issue, it is the national courts of member states have been responsible for collective redress actions if available. This has been a source of legal uncertainty because busness activities increasingly take place transnationally. The thing which increased this uncertainty even further was the modernization reform of EU competition regulation in 2004 which transferred some competences from supranational institutions to national authorities and courts concerning the implementation of Articles

[8] Case C-453/99, *Courage and Crehan*, 2001, ECR I-6297, and Joined cases C-295-298/04, *Manfredi*, 2006 ECR I-6619, cited in Commission (2008, 2).

101 (restrictive practices) and 102 (abuse of dominance) of the Treaty[9]. In this light, BEUC (2005, 1) even claims that the increasing demand for compensation mechanisms is a 'logical consequence of "modernization" of competition rules'.

The European Commission's justification for the creation of the collective damages action system illustrates how it seeks input and output legitimacy at the same time. The Commission's Green Paper (European Commission 2005, 4) maintains that an effective system for consumer redress is desirable for two reasons. First, individuals and firms have rights to get compensation for the antitrust practice. Secondly, the presence of the system will deter such illegal conducts by producers. The White Paper makes a similar argument by listing three guiding principles of the proposed redress mechanism: full compensation regardless of category of victim, type of breach and sector of the economy; to be based on European legal culture and traditions; to strengthen private enforcement of antitrust laws without replacing or jeopardizing public enforcement (European Commission 2008, 3). Judging from these pieces of material, the Commission perceives that the redress system would contribute to both better consumer involvement and more effective deterrence to anticompetitive conduct. A further question which arises is whether specific proposals of the White Paper confirm this general assessment.

The form of standing in damages action

The White Paper lists nine obstacles to the effective enforcement of consumers redress. The proposals corresponding to each of the nine barriers provide evidence of the

[9] Before coming into force of the Treaty of the Functioning of the European Union, they were Articles 81 and 82 respectively.

Commissions' dual purpose. Of great significance are three of them dealing with, respectively, the form of standing in a consumer compensation case, the information disclosure by firms, and the interaction between the redress system and the lenience programme[10]. The proposal of the new standing mechanism is arguably the most important and provocative point in the proposed collective redress system, and therefore worth discussing in depth. There is no single European legislation concerning the right to stand in consumer redress cases before national courts, and standing by consumer organizations in the pursuit of compensation is so far impossible in Belgium, Estonia, Finland, France, Germany, Greece, Hungary, Luxembourg, Malta, Netherlands, Slovakia, Slovenia and Sweden (European Commission 2010, 2).

The White Paper suggested the adoption of two forms of collective redress action, namely representative actions and opt-in collective action (European Commission 2008: 4). According to this idea, those who can bring representative actions are 'qualified entities, such as consumer associations, state bodies or trade associations'. Unless consumers opt out from representative claims in order to sue on a collective-action basis, consumer association(s) can represent victims in judicial appeals. More precisely, qualified bodies can take action 'on behalf of identified or, in rather restricted cases, identifiable victims'. Regarding qualification, the groups must be 'either (i) officially designated in advance or (ii) certified on an ad hoc basis by a member state for a particular antitrust infringement to bring an action on behalf of some or all of their members'. By opting-in collective actions, victims of competition law infringement declare that they combine their individual claims and put them into a single action.

[10] In essence, the other six proposals regarding the redress system are attempts to reduce costs and legal uncertainties. These plans concern judicial cost reduction, the binding effects of national court decisions, period limitation, fault requirement, passing-on charges, damage calculation, burden of proof, and fault requirement.

A fundamental issue concerning the collective action is the collective action problem: damages of the infringement of EU competition law per consumer is usually very small, whereas the cost of litigation is considerable. This is the reason why damage claims are not practical for individual consumers, and group actions or representation by consumer organizations are more realistic.

Information disclosure and the leniency programme

As for the standing system, an information access issue highlights the interface between consumer involvement and policy effectiveness. In general, it is difficult for claimants to prove the infringement of competition rules because defendants (i.e. companies) often refuse to disclose essential information. Since competition-related appeals require the various kinds of evidence and intensive economic analyses, the such hesitance of the defendants is a major barrier to judicial appeals. As Dayagi-Epstein (2007: 240) points out, the importance of information disclosure was highlighted in the *Lombard Club* case. In this case, the European Commission rejected a request for relevant information by an Austrian consumer association, Verein Fur Konsumenteninformation, which was crucial for proving an infringement[11]. To remove this difficulty in proving law infringements, the white paper suggests national courts should have power to order companies to disclose relevant and necessary corporate documents (Proposal 2.9.).

To repeat a principle of the collective redress system, public and private enforcement should be complementary. The Green Paper undoubtedly shows that the Commission

[11] Commission Decision 2004/138/EC of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty (in Case COMP/36.571/D-1: Austrian Banks – 'Lombard Club'), Official Journal (2004) L56/1.

itself recognizes the potential contradiction between public and private enforcement from the very beginning (European Commission 2005: 9-10). In their responses to the green paper, private sectors expressed their fear that private and public enforcement may contradict. Specifically, they complain that the proposed collective action system may deter application to leniency by firms.

Leniency programmes are programmes for effective anticartel regulation. First, whistle blowers gain fee reduction though the number of beneficiaries per case is limited. Second, in general the sooner you confess, the more reduction you get. This mechanism originates in the US and is now common in EU Member States.

If the information disclosure rule applies to leniency applicants' information submitted to the competition authority, they would be disadvantaged than coinfringers who do not cooperate with case investigation by the authority. To establish an effective consumer compensation mechanism without hindering the leniency programmes, the white paper specifies situations in which information disclosure is exempted. All corporate documents submitted by leniency applicants shall be confidential regardless of whether their applications were accepted by the competition authority or not. This institutional design indicates that where a conflict exists between input and output legitimacy, the Commission attempts to reconcile them instead of abandoning either of them.

To sum up, the proposed collective redress system builds in mechanisms which can alleviate obstacles to consumre redress and promote input legitimacy in the sense that they aim to enhance the participation of consumers and consumers organizations. Most proposals concern the reduction of the cost in a broad sense, which is often

unnecessarily high. On the output side, the Commission attempts to establish an effective redress system to deter competition law infringements, while respecting the compensation principle. As for the overall architecture, the sections of standing, information disclosure, and the private-public enforcement coordination aim to push both input and output legitimacy forward.

Controvery over the collective redress

On 11 June 2013 the European Commission proposed a draft Directive on damages action (European Commission 2013), and it drops several elements of the White Paper, most notably the collective action mechanism. Although the policial process in which this change has happened is not a focus of this paper, a very brief overview of the controvery over this issue is worth here. Two particularly controversial elements seem to be called into question both by the European Parliament and contributors to the public consultations. Firstly, there is a danger of double compensation because of the unclear definition of the 'identifiable victim' to be represented by qualified bodies. It has led to a suspect that representative actions include the opt-out standing, class actions (White & Case LLP 2008: 4). Secondly, there have been concerns that the proposed collective redress system may cause overuse by consumers, while overloading the courts could be overloaded and therefore delay cases seriously. This concern derives from the experience in the US, as the European Parliament's resolution concerning the White Paper on damages actions points out (The European Parliament 2009: Point I)[12].

[12] In the American case, class actions are pervasive and that have had enormous impacts on companies who infringed the competition law.

Public consultations

In the *White Paper on European Governance* in 2001, the European Commission suggested an initiation of public consultations. The consultation is a cross-policy system and covers competition policy. Since its initiation in 2004, the number of the public consultations on competition policy has increased, although it varies according to year.

Stakeholder Report – Consumer Associations (TNS Qual+ 2010, p. 13) reports that all the consumer group representatives interviewed positively evaluated their involvement in the European Commission's consultation on new rules. 'In fact, one of the consumer associations feels that they are so involved in consultations that they may need to employ someone dedicated to these activities.' These positive views of consumer groups on the public consultations highlight its novelty and usefulness. In particular, such assessment is in sharp contrast to the interviewees' general dissatisfaction with the Commission's openness and responsiveness (TNS Qual+ 2010, 12-13): 'Most expressed the view that DG Competition does not give them sufficient notice about the information it requires and so asks for information 'at the last minute', which means there is compromise in the quality of information the consumer associations can provide'.

Contribution to public consultations by consumer groups is still limited, most obviously in terms of number. Take the public consultation on the Green Paper and White Paper on collective action damages as examples, major contributors were business, professionals and national governmental bodies. Trade unions and individuals follow, and public interest (in this case, consumer groups) comes last. In fact, only two out of 149 contributors to the Green Paper were consumer organizations: BEUC and

Which? Similarly, in the case of the White Paper, the two organizations were the only contributors representing consumers out of 173[13].

With regard to the content of contributions, the two consumer groups gave overarching comments which cover most of the questions listed in the White Paper. In addition, Which? (Which? 2008, pp. 8-13) provided detailed comments on potential issues unspecified in the Paper. One can say that BEUC and Which? made substantial contributions to the discussion, though their opinions were not distinctive. Nevertheless, the number of contributions from consumer groups was remarkably small in both consultations.

All in all, the pieces of evidence presented in this chapter confirm the hypothesis that institutional reforms are for the improvement of both input and output legitimacy. In total, the four channels cover various forms of participation in both policy formation and policy implementation stages (for a brief summary, see Table 1 below). Considering all of the four channels into consideration, it is fair to say that the openness of EU competition policy has become high. However, as the case of the public consultations suggests, only a few consumer organizations have the capacity to fully engage in the policy formation process. In the ECCG, public consultation and collective redress system, de facto participants are consumer organizations rather than consumers. Thus, it is important to discuss not only the role of consumer organizations as a watchdog, but also the legitimacy of those groups themselves. The next section therefore focuses on this issue.

[13] Author's own count based on the lists of contributors at (Commission no date, b; no date, c).

Table 1: Access points to EU competition policy for consumer interest

	Covered policy-making stages	Entitled participants from civil society
Consumer Liaison Unit	All stages	Every consumer and consumer organizations
ECCG	All stages	Qualified consumer organizations
Public consultation	Policy formation	Every individual and group
Consumer redress	Policy implementation	Groups of victims of competition law infringement and qualified entities (in member states with collective redress systems)

Source: European Commission (2008a; 2008b; no date).

4 The Question of Consumer Organizations' Capacities

At the present, only a very small number of giant consumer organizations such as BEUC, Which?, OCU (Organization for Consumers and Users) in Spain and DECO (Portuguese Association for Consumer Protection) in Portugal have the ability to regularly monitor EU competition policy, contribute to the public consultations, and stand for competition damages redress at national courts on behalf of consumers[14]. As noted above, the number of contributions of consumer groups to the Commission public consultations is quite small. Most national consumer organizations play a relatively passive role in the area of competition most likely because they prioritize other consumer issues such as the security of foods, health and child, leaving only limited resources for the competition affairs[15]. This is why BEUC makes efforts to build the capacities of national competition organizations and their associations. It also plays a leadership role in the ECCG. To publish its very first opinion, according to the minute of the ECCG (European Commission 2010, 1), the competition Sub-group appointed

[14] Both the Advisor Consumer Liaison mentined above and a policy officer of the Private Enforcement Unit (A6) of DG COMP agree with this point (interview 26 February 2013, Brussels). The author would like to thank them for adding OCU and DECO to the list.
[15] Interview with the Advisor Consumer Liaison of DG COMP mentioned above.

BEUC as a rapporteur. Indeed, it runs training programmes for consumer organization officers.

Institutional sponsorship for European consumer associations has a long history (Young 1997, 165-166). A recent initiative for capacity building of consumer groups is the Training for Consumer Empowerment (TRACE) Programme. This programme is wholly funded by the Commission and offers training courses. It is open to all consumer organizations. BEUC runs the courses under the supervision of DG Health and Consumers (TRACE no date). For example, on DG Competition's initiative, a three-day course on competition policy took place between the 18 and 20 October 2010 in the framework of the TRACE (European Commission 2010, 115-116). The first programme from 2002 to 2007 provided introductory courses on Management, Public Relations and Lobbying, and Consumer Law. The second programme from 2008 to the present includes specialized courses as well as introductory ones (TRACE no date).

5 Conclusions

The empirical analysis of the current institutional reforms has revealed that the European Commission regards consumer involvement as a key to the better inclusiveness of its competition policy. The reforms multiplied consumers' and consumer organizations' access points to the policy. Consumers have the Consumer Liaison Office in DG COMP as a one-stop contact point and in addiction may express their opinions on selected policy plans through the public consultation mechanism. Qualified consumer organizations can attend the competition Sub-unit of ECCG with full membership. Furthermore, the consumer redress plan implies the possibility of

increased consumer involvement in the policy implementation stage as well as the policy formation stage, although the draft Directive is clearly a watered-down version of the White Paper.

There is evidence that the Commission acknowledges the close link between input and output sides. The White Paper's design of the consumer collective redress system remains an imoprtant illustration of this paper's argument that the Commission aims to enhance both sides of legitimacy, though the draft Directive has dropped this issue due to oppositions from business and other interests. The proposed collective redress system aimed to kill two birds with one stone: the Commission expected it to increase consumers participation at the ex post stage, while deterring the infringements of EU competition law. Recognizing the complexity of the mixed standing system and the danger of double compensation, the Commission proposed the redress system without excluding the opt-in collective system. The Commission also attempted to strike balance between information disclosure and leniency programmes.

The paper has argued that at each stage of the policy consumer organizations play essential roles in representing the interests of individual consumers and ensuring policy effectiveness. At the same time, it is important to remember that as the importance of CSOs increases in EU governance, their legitimacy has become a salient issue. Capacity building is the particularly relevant issue concerning the consumer organizations intermediary role in EU competition policy.

It is also important to point out that improved consumer involvement would ease many problems concerning the legitimacy of EU competition policy, but not all problems. For example, as for consumers, small and medium enterprises are politically

less powerful than large firms. Consumers are the largest and the most important stakeholder in terms of inclusiveness, and this research has therefore focused on their incorporation into competition policy. Yet, there is still room for future research on the other interests.

All in all, the European Commission regards input legitimacy at least as important as output legitimacy, even in the typical areas of regulation such as competition. In fact, the current institutional reforms are clearly designed to increase input from consumers and consumer groups. Therefore, one may conclude that the common belief that regulatory policies are and should be technocratic rather than democratic is called into question.

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Bibliography

Bexell, M., Tallberg, J. and Uhlin, A. (2010). 'Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors', *Global Governance*, 16, pp. 81-101.

BEUC (2009). 'Damages Actions for Breach of EC Antitrust Rules BEUC Response to the White Paper', available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/beuc_en.pdf, accessed 14 June 2013.

BEUC (2006). 'Damages Actions for breach of EC anti-trust rules: BEUC position on the Commission`s Green Paper', available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/beuc.pdf, accessed 14 June 2013.

Bouwen, P. (2002). 'Corporate lobbying in the European Union: the logic of access', *Journal of European Public Policy*, 9 (3), pp. 365-390.

Bouwen, P. and McCowan, M. (2007). 'Lobbying versus Litigation: Political and Legal Strategies of Interest Representation in the European Union', *Journal of European Public Policy*, 14 (3), pp. 422-443.

Borrás, S., C. Koutalakis and F. Wendler (2007) 'European Agencies and Input Legitimacy: EFSA, EMeA and EPO in the Post-Delegation Phase', *Journal of European Integration*, 29 (5), pp. 583-600.

Cini, M. and McGowan, L. (2009). *Competition Policy in the European Union*, 2nd edition. Basingstoke: Palgrave Macmillan.

Dayagi-Epstein, O. (2007). 'Representation of Consumer Interest by Consumer Associations: Salvation for the Masses?', *The Competition Law Review*, 3 (2), pp. 209-249.

Doern, G. B. and S. Wilks (1996) 'Conclusions', in G. B. Doern and S. Wilks (eds.) *Comparative Competition Policy: National Institutions in a Global Market*, New York: Oxford University Press, pp. 327-359.

Eberlein, B. and E. Grande (2005) 'Beyond delegatin: transnational regulatory regimes and the EU regulatory state', *Journal of European Public Policy*, 12 (1), pp. 89-112.

European Commission (2013) Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 11 June 2013, COM (2013) 404 final.

European Commission (2011). *Commission Staff Working Paper Accompanying the Report from the Commission*. Brussels, 10 June 2011, COM (2011) 328 final.

European Commission (2010). 'European Consumer Consultative Group - Opinion for actions for damages', available at http://ec.europa.eu/consumers/empowerment/docs/ECCG_opinion_on_actions_for_damages_18112010.pdf, accessed 15 April 2013.

European Commission (2009). *Report on Competition Policy 2008*. Brussels, 23 July 2009, COM (2009) 374 final.

European Commission (2008 a). *White Paper on Damages Actions for Breach of the EC antitrust rules*. COM (2008) 165, 2 April 2008.

European Commission (2008 b). *Commission Staff Working Document*. SEC (2008) 2038, Annex to the Report on Competition Policy 2007.

European Commission (2007). *Communication from the Commission to the Council, the European Parliament and the European and Social Committee: EU Consumer Policy Strategy 2007-2013: Empowering consumers, enhancing their welfare, effectively protecting them*. SEC (2007) 321-3, Brussels, 13 March 2007, 99 Final.

European Commission (2005). *Green Paper: Damages Actions for the Breach of EC Antitrust Rules*. COM (2005) 672 final, Brussels, 19 December 2005.

European Commission (2004). *XXXIIIrd Report on Competition Policy2003*. Luxemburg: Office for the Official Publications of the European Communities.

European Commission (1991). *Consumer Policy in the Single Market*. Luxemburg: Office for the Official Publications of the European Communities.

European Commission (no date a). 'European Consumer Consultative Group', available at http://ec.europa.eu/consumers/empowerment/eccg_en.htm, accessed 15 April 2013.

European Commission (no date b). 'Comments on the White Paper on Damages actions for breach of the EC antitrust rules', available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html, accessed 15 April 2013.

European Commission (no date c). 'Comments on the Green Paper on Damages actions for breach of the EC antitrust rules', available at http://ec.europa.eu/competition/antitrust/actionsdamages/green_paper_comments.html, accessed 15 April 2013.

European Parliament (2009). *Resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules*. 2006/2007 INI, A6-0123/2009.

European Parliament (2007). *Resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules*. 2006/2207 INI, T6-0152/2007.

Eising, R. (2007). 'The Access of Business Interests to EU Institutions: Towards elite Pluralism?', *Journal of European Public Policy*, 14 (3), pp. 384-403.

Follesdal, A. and Hix, S. (2006). 'Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', *Journal of Common Market Studies*, 44 (3), pp. 151-173.

Greenwood, J. (2003). *Interest Representation in the European Union*. New York: Palgrave Macmillan.

Hague, R. and Harrop, M. (2010). *Comparative Government and Politics: An Introduction*, 8th edition. Basingstoke: Palgrave Macmillan.

Kohler-Kock, B. (2010). 'How to Put Matters Right? Assessing the Role of Civil Society in EU Accountability', *West European Politics*, 33 (5), pp. 1117-1141.

Kohler-Koch, B. (1997). 'Organized interests in the EC and the European Parliament', *European Integration online Papers*, 1 (9), available at http://eiop.or.at/eiop/pdf/1997-009.pdf, accessed 15 April 2013.

Laudati, L. (1996). 'The European Commission as regulator: the uncertain pursuit of the competitive market', in Majone, G. (ed), *Regulating Europe*. London; New York: Routledge.

Majone, G. (1996b). 'The European Commission as regulator', in Majone, G. (ed), *Regulating Europe*. London; New York: Routledge.

Majone, G. (1996a). 'Regulatory legitimacy', in Majone, G. (ed), *Regulating Europe*. London; New York: Routledge.

Nanz, P. and Steffek, J. (2005). 'Assessing the Democratic Quality of Deliberation in International Governance: Criteria and Research Strategies', *Acta Politica*, 40, pp. 368-383.

Nanz, P. and Steffek, J. (2004). 'Global Governance, Participation and the Public Sphere', *Government and Opposition*, 39 (2), pp. 314-335.

Naurin, D. (2004). 'Transparency and legitimacy', in Dobson, L. and Follesdall, A. (eds), *Political Theory and the European Constitution*. London: Routledge.

Pollack, M. A. (1997). 'Representing diffuse interests in EC policy-making', *Journal of European Public Policy*, 4 (4), pp. 572-590.

Saurugger, S. (2008). 'Interest Groups and Democracy in the European Union', *West European Politics*, 31 (6), pp. 1274-1291.

Scharpf, F. W. (1999). *Governing in Europe: Effective and Democratic?*. Oxford: Oxford University Press.

Smismans, S. (2006). 'Civil society and European governance: from concepts to research agenda', in Smismans, S. (ed), *Civil Society and Legitimate European Governance*. Cheltenham: Edward Elgar.

TRACE (no date). 'History of the TRACE programme', available at http://www.trace-beuc.org/history/, accessed 15 April 2013.

Warleigh, A. (2001) 'Europeanizing civil society: NGOs as agents of political socialisation', *Journal of Common Market Studies*, 39 (4), pp. 619-639.

White & Case LLP (2008). 'Consultation response', available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/whitecase_en.pdf, accessed 15 April 2013.

Which? (2008). 'Consultation response', available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/which_en.pdf, accessed 15 April 2013.

Young, A. R. (1997). 'European consumer groups: multiple levels of governance and multiple logics of collective action', in J. Greenwood and M. Aspinwall (eds.), *Collective Action in the European Union: Interests and the new politics of accociability*. London; New York: Routledge.

Interviews

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