

B O O K R E V I E W

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Experimentalist Competition Law and the Regulation of Markets,
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This book provides an account of the recent evolution of competition law enforcement in the European Union (EU) in the face of contemporary challenges. Those challenges include the growth and increasing diversity of the EU itself, novel competition problems presented by dynamic high-tech markets, as well as incipient scepticism about the benefits of competition in the internal market. The book draws on the formal provisions of the legislative frameworks for competition enforcement and market regulation, actual decision-making practice and interviews with enforcement officials at the EU and national levels.

The main argument of the author is that the model of experimentalist governance, based on learning from difference and recursive problem-solving, rationalises a number of emergent developments in the orientation of competition law and enforcement techniques at the EU and national levels. The author shows how different elements of the competition and market regulatory frameworks, which may have been incorporated for a variety of different technocratic or political reasons, have been or can be used in an experimentalist way.

Chapter 1 focuses on the decentralised and networked enforcement regime introduced by the Modernisation Regulation, and the role of the ECN. The author goes beyond the legal provisions that define this governance architecture and draws on available practice to show the reader how the ECN has been used as a tool for experimentalist rule-making and enforcement. He also presents an interesting perspective on the ECN+ Directive. He rightly argues that although it has been passed under the guise of procedural harmonisation, it actually ensures the availability of collaborative and dynamic implementation tools that are more conducive to experimentalist enforcement, by expanding the scope of implementation mechanisms available to NCAs.

The next chapter focuses on the techniques used by authorities at both EU and national levels to implement competition law from an experimentalist governance perspective. The author highlights that the two scope conditions for experimentalist governance – (1) uncertainty about identifying and remedying anti-competitive conduct and (2) the limits of hierarchically imposing a preferred solution – are salient not only for the relationship between authorities in the ECN, but also for the relationship between competition (or regulatory) authorities and their target undertakings. As

a result, in cases in which competition authorities face uncertainty about selecting means to achieve desired objectives, an overall experimentalist architecture would entail that their enforcement orientation shifts from a rule-enforcement (or legalistic) to a problem-oriented approach.

The author analyses the techniques that have been used by the Commission and NCAs in enforcing competition law vis-a-vis target undertakings to understand whether they are legalistic, technocratic or experimentalist. He observes how the formalisation of the tool for negotiated case resolution through commitments in the Modernisation Regulation creates scope for a problem-solving orientation in competition enforcement by sidestepping the retrospective characterisation of conduct and focusing on remedial formulation and adjustment. Both the formal design and the use of this tool in competition enforcement incorporate the experimentalist mechanisms of dynamic adjustment, stakeholder participation and monitoring of implementation.

Later in this chapter, the author shows how competition enforcement in dynamic markets (such as internet search), as well as in cases that involve interaction with non-competition objectives (such as data protection and sustainability), can be rationalised from an experimentalist perspective even when the authorities use coercive violation-based techniques. It is shown how competition law can act as a diagnostic tool that identifies problems in the operation of the competitive market mechanism, as well as deficiencies in specialised regulatory regimes.

Chapter 3 provides an overview of the accountability mechanisms in experimentalist governance and the use of peer review. The author draws on the EU and transnational governance literatures to identify different functionalities of peer review in transnational governance and to highlight the extent to which they are compatible with experimentalist peer review. The author shows that transnational peer review of regulatory action can be used for different purposes, which may or may not be consistent with the experimentalist goals of learning through implementation, as the basis for recursive remedial adjustment and rule-making. At the same time he suggests that evolution towards experimentalism is possible, as actors acknowledge the constraints of uncertainty and the limits of hierarchical enforcement.

Chapter 4 focuses on the role of courts in an experimentalist architecture for competition enforcement and market regulation, both through judicial review and through civil damages litigation. Experimentalism may not sound very appealing when a competition or regulatory authority is facing judicial review, given that it may be seen to provide a *carte blanche* for discretionary problem-solving, which cannot be controlled either through rules or through a probabilistic framework for assessing anti-competitive effects. The author shows that judicial review can support an experimentalist framework if review methodologies stimulate a frank acknowledgement of uncertainty and courts seek to incorporate peer-review mechanisms in creating dialogic disciplines on enforcement discretion. As such, form-based violations by object can be consistent with experimentalism if experience (rather than merely precedent) demonstrates certain conduct to have anti-competitive effects and if the definition of such violations is open to revision in the light of new contextual evidence.

Chapter 5 is the final substantive chapter of this book. It explores the relevance of the experimentalist governance model for the evolution of global competition policy and cooperation. It starts by reminding the reader that throughout the twentieth century, efforts have been directed towards creating an international antitrust cooperation instrument through legally binding common rules. None of those efforts have been rewarded. The failure of the EU's initiative for the creation of an international antitrust instrument under the WTO umbrella was to a large extent attributable to uncertainties about the desirability of competition, as well as the role of competition policy in the promotion of developmental objectives by jurisdictions without much experience of competition enforcement. There was both resistance by developing nations to any one-size-fits-all antitrust rules and a resulting inability by the mature regimes such as the US and the EU to impose their model at the global level. However, at the same time, the creation of a global regulatory network, such as the ICN (International Competition Network), has not provided an experimentalist framework for international antitrust cooperation, because of the ICN's focus on normative convergence and its consequent inability to give a voice to the specific problems and enforcement constraints faced by new adopters.

In the Conclusion, the author revisits the aspects of contemporary market regulation that might suggest that an experimentalist evolution of competition law is normatively desirable, both within the EU and beyond. He distinguishes experimentalist governance from governance models that rely on coordinated controlled experimentation, while also pointing to techniques through which the efficacy of experimentalist governance may be evaluated. He identifies possible limitations and roadblocks to a fuller elaboration of experimentalism in EU market regulation, including through the emergence of Eurosceptic and populist governments, and the incorporation of national particularities in competition and regulatory law that appear contrary to consensus EU templates.

The book successfully demonstrates why experimentalism is a desirable governance architecture that promotes diversification while coping with uncertainty and interdependence, without undermining the unity of EU law or fundamental normative commitments to rule of law or rights protection. It shows that experimentalism is a feasible model, which repurposes existing mechanisms without requiring radical reforms.

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