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Competition Policy in Action: Regulating Tech Markets with Hierarchy and Experimentalism

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Abstract

Although experimentalist governance – presented as a novel alternative to conventional hierarchical governance – has attracted attention over the past 15 years, we still know little about its real spread and scope conditions. Examining the application of competition policy to the digital sector, the article reveals that the European Competition Network and the procedures modernized in the early 2000s actually host a variety of governance processes, ranging from hierarchical development and enforcement of stable solutions at one extreme to experimentalist discretion of local actors, review of their implementation experiences, and central revisions in their light at the other. Further, shifts from hierarchy to experimentalism might reverse. As for explanations, variation in governance processes cannot be explained by formal distributions of power, which were the same. Instead, the greater the uncertainty about solutions and the weaker the readily available coalitions in their support, the more actors favored experimentalist governance, and vice versa. The broader implications thus caution against general claims, challenge the influence of legal factors, and suggest that far from being necessarily antithetical, functional and political factors may bear together on the spread of distinct forms of governance.

Keywords: competition policy; digital markets; experimentalist governance; structure; behaviour

Introduction

Pressing concerns that ‘tech giants’ such as Google, Microsoft, Amazon, Apple, and Facebook may have become too powerful are fuelling proposals for their structural break up, further empowerment of the European Union (EU) to curb ‘digital empires’, and a re-assessment of EU competition policy altogether (Financial Times, 2020a). Recently, the European Commission has conducted enquiries into e-commerce and competition policy for the digital era, extended the Competition Commissioner’s portfolio to digital policy, proposed an *ex ante* regulatory framework to remedy the perceived failures of the *ex post* competition regime in digital markets, and taken controversial decisions imposing unprecedented fines on tech giants.

But underneath this stream of proposals and initiatives, today, there is not even consensus on how EU competition policy really operates, which is the logical prior step to any successful reform. An early and still influential view is that, through the 2003 revolutionary ‘modernization’ of competition procedures (EU Council, 2003) and the associated creation of the European Competition Network (ECN), the European Commission has been able to consolidate its traditional hierarchical dominance over National Competition Authorities (NCAs) (Riley, 2003; Wilks, 2005, 2014, p. 141; Tarrant and Kelemen, 2017, p. 218). An alternative interpretation is that the modernization reforms have instead created a multi-level ‘experimentalist’ architecture, whereby NCAs (and/or firms) are

afforded discretion, and review of their implementation experiences regularly feeds into EU-level revisions (Sabel and Zeitlin, 2008, p. 298, 2010, pp. 298–300; Svetiev, 2010, 2020, pp. 26–53). But however polar these two general views are, both have mainly focused on the institutional arrangements as modernised ‘on paper’ (Riley, 2003; Sabel and Zeitlin, 2008, p. 298, 2010, pp. 298–300; Svetiev, 2010; Wilks, 2005), with less attention to how these have worked in practice (Svetiev, 2014, 2020, pp. 41–6, 71–84). As a result, it remains largely unclear how the modernized EU competition structures have really been working over the past 15 years.

The problem is broader than the specific though important case of competition policy. All too often conflated with ‘soft law’ and characterized as a departure from binding law-making (Eberlein and Kerwer, 2004; Bickerton *et al.*, 2015, p.707; Ferrero Ferrero and Ackrill, 2016, p.881), experimentalist governance’s distinctiveness lies in the discretion granted to local actors to propose solutions, the pooling of information on their implementation experiences, and the revision of solutions in the light of such reviews (Sabel, 2004; Sabel and Simon, 2011; Sabel and Zeitlin, 2008, 2012; Eberlein and Kerwer, 2004, pp. 131–3). This literature’s key argument is that, through a variety of institutional configurations well-beyond the Open Method of Coordination (OMC), the combination of a secular rise in cognitive uncertainty and firm polyarchic constraints have been, especially in the EU, overwhelming the capacities of conventional hierarchical governance while instead favouring novel experimentalist governance across an impressive array of policy domains and issue areas (de Búrca *et al.*, 2013, 2014; Sabel, 2004; Sabel and Simon, 2011, 2012; Sabel and Zeitlin, 2008, 2010, 2012).¹ Not surprisingly, such sweeping claims have attracted attention in both academic and policy circles.

Yet also this broader literature has thus far paid more attention to documenting the widespread emergence of experimentalist architecture than to studying its functioning in practice (de Búrca *et al.*, 2013, 2014; Sabel, 2004; Sabel and Simon, 2011, 2012; Sabel and Zeitlin, 2008, 2010), despite findings highlighting variation in the implementation of the OMC (Harcourt, 2013; Heidenreich and Zeitlin, 2009; Lodge, 2007) as well as of other experimentalist arrangements such as forums, networks, and agencies (de Búrca, 2010, pp. 226–32; Rangoni, 2019; Weimer, 2019, pp. 115–42).

The article thus contributes to important questions about the real spread of experimentalist governance and its scope conditions. It does so by examining the application of the modernized competition arrangements to digital markets, which offers an excellent opportunity to study which processes operate under a given architecture and why. The article finds that under the same distribution of formal powers, when actors are under pressure from greater uncertainty and weaker coalitions, they engage in more experimentalist processes. But when they are more confident to know the best solution and can rely on a stronger coalition supporting that solution, they favour more hierarchical processes instead. Further, initial engagement in experimentalism may revert back to hierarchy. The findings therefore caution against general claims, underlining that far from being necessarily antithetical, functional factors (cognitive uncertainty) and political rather than legal factors (*de facto* – rather than *de jure* – multipolar distributions of power) may jointly shape the use of different forms of governance, which may vary even within the same policy domain and sector.

¹To be clear, ‘polyarchy’ is not used in the Dahlian sense, as an equivalent of (real world) democracy.

I. The Existing Competition and Experimentalist Literatures

There is broad agreement that the 2003 modernization reform of competition was a ‘revolution in the fundamental reorganization of the existing responsibilities between the Commission [and] national anti-trust authorities’ (Ehlermann, 2000, p. 537) and ‘the single most important reform in the history of European competition policy’ (Wilks, 2005, p. 432). For decades, the Commission enjoyed exclusive powers on EU competition. Yet the 2003 reforms broke with such tradition by ending the obligation of notification of agreements by firms to the Commission and by empowering NCAs to apply EU competition concurrently with the Commission (EU Council, 2003).

One early and still commonly held interpretation is that ‘while they appear to promise decentralization to national competition authorities, the modernization reforms actually reinforce the dominance of European law and the Commission’ (Wilks, 2005, pp. 431–2, 437, 2014, p. 141; Tarrant and Kelemen, 2017, p. 218). The view here is that

the Commission has orchestrated a political masterstroke. It has given the impression of radical reform to the Member States [...] while in no way undermining its central role in the development of EC competition policy or the enforcement of EC competition law. DG Competition has in fact managed to centralize European competition law even more (Riley, 2003, p. 657).

An alternative interpretation is that the reforms have not only provided space for local discretion, but ‘created an important mechanism for disseminating learning about regulatory interventions by national authorities and the Commission, reviewing such interventions, and using the information gathered to regularly revise policies’ (Svetiev, 2010, p. 84). The modernization reforms have ‘created the scope for all participants to contribute towards the development of the new European competition law’ (Svetiev, 2010, p. 97, 2014, 2020, pp. 26–53), and are therefore best understood as novel experimentalist architecture (Sabel and Zeitlin, 2008, p. 298, 2010, pp. 298–300; Svetiev, 2010).

It is worth noting that both views put forward general claims. Indeed, the hierarchical view does not discuss any scope condition, implicitly suggesting no limit to its claim (Riley, 2003; Wilks, 2005; Tarrant and Kelemen, 2017, p. 218). The experimentalist view, instead, does identify scope conditions, which empirically, however, are said to be pervasive: the first is uncertainty, which is argued to be commonly rising; another is polyarchy, which similarly, is claimed to be widespread (Sabel and Zeitlin, 2008, pp. 280, 298, 2010, pp. 9–10, 2012, pp. 174–5; Svetiev, 2010, esp. pp. 90–5, 2020, esp. pp. 18–25; see further below).

Furthermore, both views have primarily focused on the revised institutional arrangements as they *could* operate in theory, as opposed to how they have really functioned in practice. Hence the hierarchical view drew particular attention to the provision requiring NCAs to apply EU law, which increased the direct scope of application of EU rather than national law, and to the provision empowering the Commission to take over cases from NCAs whenever it wishes to do so (Riley, 2003, pp. 657, 663–5; Wilks, 2005, pp. 438–40). By contrast, the experimentalist view focused attention on the obligation for the Commission to provide justifications before an advisory committee composed of NCAs if one NCA disagrees with the Commission’s decision to take over its case, the provisions on information exchanges among NCAs and between these and the

Commission on specific cases, and the ‘forum for discussion and cooperation of European competition authorities’ offered by the ECN more generally (Sabel and Zeitlin, 2008, p. 299; Svetiev, 2010, pp. 95–114).

The primary focus on institutional structure is problematic because unintended consequences are common, and policy actors can and often do use institutional arrangements in many different ways. The literature itself acknowledges that ‘much will depend on the vital role of the novel and potentially powerful European Competition Network’ (Wilks, 2005, p. 432), that ‘the situation created by Regulation 1 is fundamentally unstable’ (Riley, 2003, p. 657), and that ‘the new network has features that *can* make it an important experimentalist mechanism’ (Svetiev, 2010, p. 84, 2020, pp. 26–53; see also Sabel and Zeitlin, 2008, p. 298). But it is only recently that research has begun looking at how the modernized arrangements have really been working in practice (Svetiev, 2014, 2020, pp. 41–6, 71–84), acknowledging that actors might not openly recognise the uncertainty on which experimentalism is said to depend (Svetiev, 2020, pp. 20, 184–5).

Far from being confined to the competition literature, the problem affects the wider experimentalist literature. Experimentalism is presented as an alternative to conventional hierarchical governance (Sabel and Zeitlin, 2012). Although it shares with ‘new modes of governance’ the departure from ‘old modes of governance’ that tend to be less inclusive, more rigid, more prescriptive, more committed to uniformity and overall more hierarchical (De Búrca and Scott, 2006), experimentalism is neither necessarily confined to informal, non-binding tools (Sabel and Zeitlin, 2008, p. 274), nor can it be reduced to public vs. private actors divides, nor is it necessarily at odds with synchronic uniformity (Sabel, 2004; Sabel and Simon, 2011; Zeitlin, 2016, p. 1075; but compare with Sabel and Zeitlin, 2008, 2010, 2012).

While experimentalism shares Elinor Ostrom’s intuition that successful solutions tend to come from decentralized polycentric experiences (Ostrom, 1990), it differs from polycentrism in emphasizing the role of ‘central’ actors in pooling information on the most successful local experiences and their generalization (de Búrca *et al.*, 2014, p. 478). Conversely, reflexive revision by central actors alone is not experimentalism either, as this is multi-level and requires also local actors.

And whilst sanctions, fines and other negative instruments may *prima facie* be associated with hierarchical governance, the literature clarifies that the ‘penalty defaults’ on which experimentalist governance often relies to induce otherwise reluctant actors to overcome their distributive conflicts and cooperate in the joint exploration of solutions should not be confused with the ‘shadow of hierarchy’ (Héritier and Lehmkuhl, 2008). This is because the latter emphasizes authorities’ capacity of retaking control and imposing positive (albeit suboptimal) solutions, a capacity which, in a world of uncertainty, experimentalists reject (Sabel and Zeitlin, 2008, pp. 305–9, 2010, pp. 13–16; Zeitlin, 2016, pp. 3–4).

Indeed, the alleged decline of hierarchical governance and rise of experimentalist governance is understood first and foremost as a widespread response to strategic uncertainty, defined as when actors are uncertain about the definition of the relevant problems and/or their precise solutions. In conditions of low strategic uncertainty, actors are convinced that they know how to pursue their goals, making joint exploration of solutions unnecessary. Another major scope condition identified is a polyarchic or multipolar distribution of power, in which no single actor can unilaterally impose her preferred

solution without considering the views of others. If it could, it would not bother engaging in more inclusive, experimentalist processes (de Búrca *et al.*, 2013, pp. 725–6, 743, 2014, pp. 479, 483; Rangoni and Zeitlin, 2020, pp. 2–3; Sabel and Simon, 2011, pp. 56, 78, 82; Sabel and Zeitlin, 2008, pp. 175–6, 2012, pp. 174–6; Zeitlin, 2016, pp. 18–19).

Building on recent clarifications (Rangoni, 2019, p. 69), this article takes the view that polyarchy can be understood in both *de jure* and *de facto* terms. In the former, what constrains any single actor from unilaterally imposing its own view on others are distributions of formal power. In the latter, these constraints come from constellations of interests and specifically lack of coalitions between major actors available in advance, thus shifting the focus from legal procedures to political alliances. With this analytic move, the article begins addressing conventional criticisms that experimentalist governance and learning theories more broadly do not tend to pay enough attention to political considerations. Moreover, it also allows examination of how such considerations might play out vis-à-vis others, notably given that functional and political factors are often directly opposed (for an example of many, see Tarrant and Kelemen, 2017).

Stimulated by generally growing uncertainty due to globalization and the accelerating pace of technological innovation on the one hand and firm polyarchic constraints on the other, experimentalist governance is said to have spread to the United States (US), other developed democracies and transnational regimes alike (de Búrca *et al.*, 2013, 2014; Sabel and Simon, 2011, 2012). But it is in the EU where, through a variety of institutional configurations, experimentalist governance is claimed to have appeared in no fewer policy domains than telecommunications, energy, drugs, occupational health and safety, employment promotion, social inclusion, pensions, health care, environmental protection, food safety, maritime safety, financial services, competition, anti-discrimination, and fundamental rights (Sabel and Zeitlin, 2008, 2010).

Yet, thus far most systematic attention has been dedicated to widespread identification of institutional arrangements reflecting the distinctive elements of experimentalism. Indeed, the literature ‘shares the widespread conviction that the institutional framework heavily influences deliberation’ (Eberlein and Kerwer, 2004, p. 131). Early works thus focused on ‘a new class of networked, experimentalist organizations that institutionalize learning by routinely questioning the suitability of their current ends and means, and periodically revising their structures in light of answers’ (Sabel, 2004, p. 175). These were followed by comparative articles and edited volumes documenting the emergence, across several policy domains, of ‘a new architecture of experimentalist governance in the EU’ (Sabel and Zeitlin, 2008, 2010), experimentalist architecture and structures in the US (Sabel and Simon, 2011, 2012), and an experimentalist ‘institutionalized transnational process’ at the global level (de Búrca *et al.*, 2013, 2014). To be sure, this is neither to deny that the literature had anticipated possible mismatches between architecture and operation or welcomed their exploration (Sabel and Zeitlin, 2008, pp. 280–1), nor to fully neglect the existence of such explorations.

Now that a ‘striking and consistent design innovation’ across several contexts (Sabel and Zeitlin, 2008, pp. 280–1) has been systematically documented, however, it is appropriate to extend such systematic analysis to practical operation. This is the natural implication of findings that OMC implementation has often led to surprising variations (Harcourt, 2013; Heidenreich and Zeitlin, 2009; Lodge, 2007), and of claims that experimentalist architecture is not confined to the OMC. It is especially timely since

Table 1: Distinguishing More Hierarchical and Experimentalist Processes (in EU Competition Policy)

<i>Hierarchical processes</i>	<i>Experimentalist processes</i>
1a. Solutions imposed by ‘central actors’ (European Commission)	1b. Solutions proposed by ‘local actors’ (national authorities and/or regulated firms)
2a. Compliance monitoring	2b. Performance review of local implementation experiences
3a. Solutions stable	3b. Solutions revised based on performance reviews

cutting-edge research focusing precisely on implementation of EU experimentalist arrangements beyond the OMC has recently shown that, while actors may ‘stumble’ and ‘stumble back’ into experimentalist governance (de Búrca, 2010; Rangoni and Zeitlin, 2020, pp. 3–4), they may also be ‘uncertainty-intolerant’ and use experimentalist arrangements hierarchically (Rangoni, 2019; Weimer, 2019, pp. 115–42). The article thus builds on and contributes to these cutting-edge efforts. But before moving to the empirical analysis, it develops indicators for distinguishing more hierarchical and experimentalist processes, justifies its case selection, and outlines sources of evidence and methods used to analyse it.

II. Research Design, Methods, and Data

In line with the literature, the article contrasts experimentalist with hierarchical governance. It treats these as Weberian ideal types that empirical developments may only partially approximate, as opposed to ‘either, or’ dichotomies. Indeed, it will show that some of the arguably most interesting findings, such as actors ‘stumbling back into hierarchy’, simply cannot be understood with reference to rigid either, or dichotomies.

Another key analytic move is shifting attention to processes in practice, as opposed to institutional arrangements as designed. The article draws on the literature (Eberlein and Kerwer, 2004, pp. 131–3; Sabel, 2004; Sabel and Simon, 2011; Sabel and Zeitlin, 2008, 2010) to develop indicators for distinguishing between more and less hierarchical or experimentalist processes. Table 1 displays the indicators, both tailored to the case study, where the key ‘central’ actor is the Commission and ‘local actors’ are NCAs and firms,² and in a generic, widely applicable form.

A first indicator is the extent to which ‘local actors’ enjoy discretion to propose and experiment with possible solutions. Local actors can be public, such as NCAs, or private, such as firms. The focus here is on how far solutions (no matter how uniform) are developed ‘from the bottom’, in contrast to unilateral development and top-down imposition of solutions by ‘central actors’, namely the Commission. A second indicator is the extent to which the performance of the solutions proposed by local actors is reviewed, especially in the light of their implementation. In hierarchical processes, by contrast, the focus is typically on monitoring compliance with the solutions previously imposed from the top. A third indicator is how far solutions are conceived as revisable and are indeed revised considering the performance reviews. This contrasts with

²To be sure, the identification of these – and not others – as key actors did not derive from assumptions, but from empirical analysis.

hierarchical governance, whereby solutions are supposed to be stable. In sum, while experimentalist processes emphasize the contribution of local actors to the development of solutions and their revision based on feedback from local implementation experiences, hierarchical processes stress top-down imposition of fixed solutions and monitoring of compliance with them.

In the explanatory analysis, the article focuses on relative (rather than absolute) degrees of strategic uncertainty and (*de jure* and *de facto*) polyarchy, which is justified by the identification of these as the essential scope conditions for experimentalist governance. To be sure, the article does not imply that these are the only factors that may affect actors' choices. But by breaking down polyarchy into *de jure* and *de facto*, the article already goes beyond the current literature. More generally, by focusing on strategic uncertainty and *de jure* and *de facto* polyarchy the article examines whether and how functional, legal, and/or political factors influence actors' choices.

The choice of EU competition policy in digital markets as case study is appropriate for several reasons. First, the EU is the polity where experimentalist governance is said to have spread most (Sabel and Zeitlin, 2008, 2010). Second, competition and particularly antitrust (see below) was modernized through a single institutional reform in the early 2000s, thus allowing to study, over a significant period, how and why actors may have favoured more experimentalist or hierarchical processes under a common architecture. Third, while competition has historically been one of the most centralized EU policies, the digital is one of the most dynamic sectors, making the case study a plausible candidate for both hierarchical and experimentalist governance.

The case study is broken into sub-cases, allowing comparisons across the whole spectrum of antitrust (that is, 'horizontal' agreements between firms at the same level of the value chain, commonly known as cartels; 'vertical' agreements between firms at different levels of the value chain; and abuse by dominant firms), as well as process-tracing within each sub-case. To mitigate problems of selection bias when selecting among a virtually unlimited universe of sub-cases, the article focuses on especially prominent examples. Although this selection risks focusing on examples that are atypical, for instance because actors might act unusually in conditions of high salience, it is hard to see why this should vary across the sub-cases.

As for the evidence, the article largely relies on primary sources. These include public documents such as decisions by NCAs or the Commission, ECN monitoring reports, NCAs responses to Commission's consultations, Commission memos and press releases, and speeches by Competition Commissioners. They also include 13 elite interviews, with interviewees selected for their expertise and experience with the examples and period analysed and seeking a balance especially between EU and national authorities. Interviews were particularly useful to cross-check and integrate findings emerging from public documents, such as possible mismatches in the descriptive analysis between what is accessible publicly and what might have happened 'behind the scenes', as well as gaps in the explanatory analysis especially regarding the uncertainty and *de facto* polyarchy perceived by relevant actors. Although all interviewees were offered anonymity, only around half of them chose that option. Details on the procedures followed and a full list of interviews by name, function, affiliation, date, and place can be found in the Online Appendix. Having outlined the research design, methods and data, the article now proceeds to the empirical analysis.

III. Hierarchy and Experimentalism: Competition Policy in Digital Markets

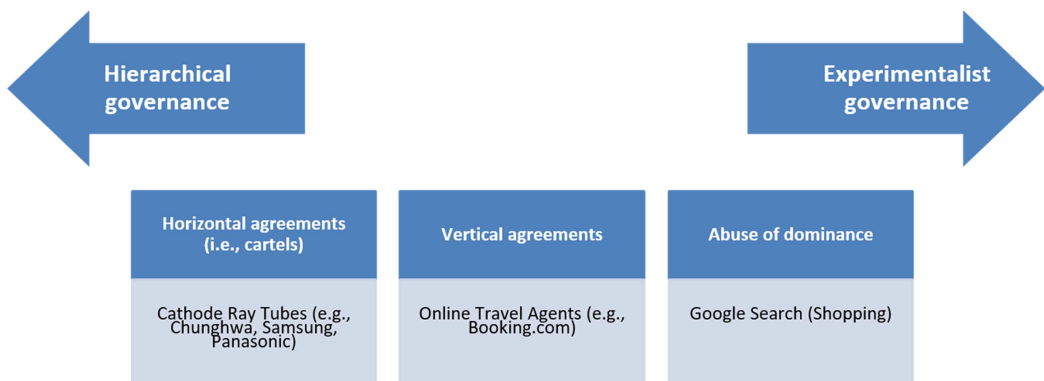
The article findings that, under the same modernized institutional architecture, key actors and in particular the Commission have engaged in different processes, ranging from more hierarchical governance to tackle cartels, through stumbling back into hierarchy after an initial engagement with experimentalist governance to regulate vertical agreements, to more experimentalist governance to address abuse of dominance (Figure 1). It argues that rather than by the formal distributions of power, the Commission's choices were influenced by coalitional considerations as well as the extent of perceived strategic uncertainty.

Hierarchy: Fighting Cartels

In the cartel involving the largest total fine in the EU history (€1.5 billion), the Commission found in 2012 that several firms including Samsung, Panasonic and Toshiba had for almost a decade fixed prices, shared markets, allocated customers and restricted their output of 'Cathode Ray Tubes' (CRT), key inputs for computer monitors and colour televisions that were gradually being replaced by alternatives such as LCD and plasma displays. Precisely as foreseen by the (non-sector-specific) Model Leniency Programme (MLP), 'Chunghwa received full immunity from fines under the Commission's 2006 Leniency Notice for cartels, as it was the first to reveal its existence to the Commission. Other companies received reductions of their fines for their cooperation in the investigation' (European Commission, 2012b; COM5a). The question then becomes, how was the leniency policy developed in the aftermath of modernization?

Although the MLP was officially the first important output of the ECN and could thus appear as an instance of experimentalist governance (Svetiev, 2010, pp. 99–105, 2020, pp. 39–40), in fact, it was largely based on the leniency policy the Commission has had since 1996 (European Commission, 1996). From the late 1990s up to the latest EU legislation, the key policy question has been how best to ensure that leniency policy

Figure 1: Hierarchy and Experimentalist to Regulate Competition in Digital Markets [Colour figure can be viewed at wileyonlinelibrary.com]



works to discover cartels. Throughout, actors' explicit answer has been by reducing fragmentation across national leniency programmes and harmonizing them in the image of the MLP, a solution that came more from the Commission's previous policy than by NCAs' proposals (European Commission, 1996, 2009; ECN, 2012, p. 10; European Parliament and Council, 2019, rec. 11, arts. 17–23; COM5a; COM5b).

Monitoring focused more on ensuring compliance with such hierarchically developed solution than on reviewing performance of solutions proposed by local actors. An ECN review, titled 'Report on the Assessment of the State of Convergence', focused on gaps in NCAs' leniency policies as compared to the MLP and on the absence of leniency policies in certain member states, recalling that NCAs had 'made a political commitment to use their best efforts to align their leniency programmes with the Model Programme' (ECN, 2009, p. 2).

And while the MLP was originally intended to be revised 'on the basis of the experience gathered by the ECN members' (ECN, 2006, pp. 1, 7), in practice, such experimentalist revisions were limited. Beforehand only the first applicant was able to submit a 'summary application' avoiding multiple parallel applications, but noting the experience of some NCAs, this was then extended to all leniency applicants (ECN, 2012, pp. 16–18). But this was no more than a refinement: 'the basic elements of the MLP remain unchanged' (European Commission, 2012a).

In sum, although the process for regulating cartels such as CRT does not fully match the hierarchical governance ideal type, the fact that the MLP solution was based on a previous Commission template and then followed by compliance monitoring and by only limited revisions stemming from local implementation experiences shows that, on balance, the process was largely hierarchical.

Stumbling into Experimentalism and Then Back into Hierarchy: Tackling Verticals

When dealing with agreements between hotels and leading Online Travel Agents (OTAs) like Booking.com, the Commission could have decided to take control of the case as the relevant market is clearly European (COM2b). But instead, the Commission let three NCAs (the Italian, French and Swedish) work on this case together. These NCAs concluded that while on the one hand 'wide price parity' clauses (imposing that hotel room prices should be the same both across all OTAs and on the hotel's own website) cannot be tolerated, on the other hand 'narrow price parity' clauses (enabling hotels to offer different room prices to different OTAs and thus allowing price competition among OTAs) are acceptable (ECN, 2015a). Although this distinction was then followed by other NCAs, the German NCA took a different view, namely that all price parity clauses – no matter if wide or narrow – should be prohibited, because this maximizes the possibility for competition (ECN, 2015b).

Far from being repressed, the performance of implementation experiences with local discretion was actively reviewed. In 2015, the ECN heads (that is, the Commission and the NCAs) commissioned a study to assess the outcome of the different actions taken by NCAs about OTAs such as Booking.com and Expedia. A working group composed of the Commission and ten NCAs conducted an assessment throughout 2016, whose explicit purpose was to 'measure the effects of recent changes to the parity clauses used by online travel agents ('OTAs') in their contracts with hotels' (ECN, 2017a, p. 4).

Yet, the performance reviews of local implementation experiences have thus far not stimulated revisions of the substantive solutions initially adopted. After the diverging local approaches and the benchmarking study gave a glimpse into experimentalist governance, a consistent follow-through would have been the agreement to a general solution, namely feeding into the Block Exemption Regulation and Guidelines on vertical agreements currently under review. But while the fact that these will be revised only in mid-2022 necessarily invites caution, what the currently available evidence shows is that, in their responses to the Commission's public consultation, both the German and the other NCAs remain stuck in their initial, diverging positions (European Commission, 2019, p. 11; Bundeskartellamt, 2019, p. 3). What is more, most NCAs are calling on the Commission to avoid cross-national divergence by providing more guidance on the legal qualification and assessment of price parity clauses (European Commission, 2019, p. 11). And while an institutional revision has taken place in the aftermath of this experience (Svetiev, 2020, p. 45), the creation of an ECN early warning system is, too, aimed at ensuring earlier and better consistency and coordination (ECN, 2017b, p. 1; COM2b).

In sum, the process for regulating OTAs' vertical agreements was initially experimentalist, as evidenced by solutions proposed by local actors and by performance reviews of their implementation. But after having 'stumbled into experimentalist governance' (de Búrca, 2010), actors reverted to solutions developed from the top and with less local discretion, thus 'stumbling back into hierarchy'.

Experimentalism: Addressing Abuse of Dominance

In the first European case against Google, the Commission refrained from directly imposing specific solutions, which were instead proposed by local actors, in this sub-case not NCAs but rather the regulated firm. After receiving complaints – both directly and via re-allocation of cases pending before NCAs – that Google could have abused its dominant position in the market for general web search by displaying its own specialised search engines (for example Google News, Google Flights) more prominently than those of its competitors (European Commission, 2017, art. 3), the Commission began negotiations with the US tech giant. Following the 'commitments procedure' formally introduced by the modernization reforms (EU Council, 2003, art. 9), during 2010–14, Google presented three rounds of proposals (COM2a).

The (anticipated) performance of solutions proposed by local actors was reviewed. As foreseen by the modernization Regulation, the likely capacity of Google's proposed solutions of resolving the identified competition problems was 'market tested' by the complainants, which included firms such as Microsoft, Expedia, and TripAdvisor.

The third and last set of proposed solutions was designed as revisable. As put it by then Competition Commissioner Joaquín Almunia: 'if Google improves the presentation of its services, so must the presentation of rival links. [...] This means that any new vertical search services developed by Google must also be subject to the commitments. [...] These commitments are forward-looking' (European Commission, 2014, pp. 2–3).

Although the Commission had initially welcomed Google's last set of proposals, this did not meet the tests of 'some US firms that had a very strong network to test the results of the possible implementation of the commitments and [that] on that basis put forward some strong arguments' against accepting Google's proposed solutions (COM2a). At that

point, the Commission reverted to the more conventional ‘prohibition decision procedure’ (EU Council, 2003, art. 7), imposing on Google a then record fine (€2.42 billion).

But in practice, the Commission continued to refrain from imposing itself any specific positive solution. Indeed, it is striking that the Commission dedicated only two of over 700 paragraphs of its Prohibition Decision to how the abuse should be remedied, explicitly foreseeing that: ‘It is for Google, and not the Commission, to make a choice [...] thereby bringing the infringement to an end’ (European Commission, 2017, art. 4.5, p. 144).

Furthermore, the Commission set out provisions for reviewing the performance of such solutions, obliging Google to send every four months over the next five years reports on the measures taken, with technical experts and complainants contributing to monitor how Google is implementing the Decision (European Commission, 2017, art. 12.2, pp. 704–5; COM2a).

And although the Commission has not yet requested Google to revise the solutions currently implemented, growing concerns of complainants and their consultants that these solutions have failed to address the identified problems (Financial Times, 2020b) suggest that experimentalist revisions based on review of implementation experiences may well be on the horizon.

In sum, processes to regulate the first Google case were consistently experimentalist (Svetiev, 2020, pp. 74–80), notwithstanding the apparently hierarchical prohibition decision and penalty default.

Explaining Variation in Governance Processes

Why have actors and particularly the Commission engaged in such different processes under the same institutional architecture? *De jure* distributions of power cannot explain the variation found. Regardless of whether one emphasizes the Commission’s power of taking over cases from NCAs or else the requirement of providing justifications when doing so, the fundamental distribution of formal powers is the same across all the sub-areas of antitrust (EU Council, 2003).

By contrast, a condition affecting actors’ choices has been the different degrees of perceived strategic uncertainty. At one extreme, actors consider cartels a sub-area of low strategic uncertainty. If cartels are unambiguously considered harmful by every competition policy regime in the world, in the EU, their prohibition is considered a Commission ‘success story’ (Wilks, 2014, pp. 146–8). Indeed, this is the EU antitrust sub-area that is least controversial, where case law is most consolidated, and where the number of cases is greater (BUS1). By the late 1990s the Commission had already worked out a leniency policy (European Commission, 1996). Equally, in the substantive cartel discussed, Commissioner Almunia showed confidence, assessing that ‘These cartels for cathode ray tubes are “textbook cartels”’ (European Commission, 2012b, p. 1). In short, ‘this is not very complex’ (COM2b).

While on cartels there is consensus not only that they should be prohibited but also that leniency is the most appropriate solution to identify them, actors are less confident when dealing with abuse of dominance. This is the ‘frontier’ of EU antitrust, characterized by greater complexity and sophistication, less jurisprudence, and a lower number of cases (COM2a; BUS1). According to former Commission’s Chief Competition Economist,

Professor Massimo Motta, modern economic theory does not yet constitute an alternative paradigm to the still influential ‘Chicago School’, marked by faith in markets and scepticism about regulation. While in the US the trust that markets are always contestable and that courts’ lives cannot be too complicated has resulted into simple rules favouring *laissez-faire*, in Europe, less faith in markets and concerns that large firms may be too powerful have instead led to an ‘ordoliberal’ approach whereby otherwise lawful activities become unlawful when undertaken by dominant firms (COM3a). In effect, despite attempts in the late 2000s, the Commission has not been able to reach a consensus on abuse of dominance comparable to the Block Exemption Regulation and Guidelines on vertical agreements, let alone that observed on cartels.

In the Google case, then Competition Commissioner Almunia explains, the Commission considered that

a commitment procedure would have been more efficient, because markets were moving very fast and because it was the first time that DG COMP was investigating these kinds of infringements, of a big platform, with a strong capacity to innovate, develop new services to explore new markets ... was very very complex ... we are talking of 2010–11, ten years ago (COM2a; COM2b).

Indeed, the recognition of the sectoral volatility was explicitly linked to the revisability of the last set of proposed commitments (European Commission, 2014, pp. 2–3), just as the acknowledgment of complexity was explicitly connected, even after the shift to a prohibition procedure, to the decision of leaving the task of developing a solution to Google and of obliging it to submit periodic reports to be evaluated with the support of technical experts (European Commission, 2017, arts. 4.5, p. 144; 12.2, pp. 704–5). In sum, the Commission’s choices were affected by the recognition of the ‘level of complexity, fast-moving markets that require forward looking approach (i.e., not only analysing the past but also what will happen next), new areas under investigation, new players, maybe the need of new definitions of the relevant market, very intelligent and innovative players, and changes in technologies and consumer preferences’ (COM2a).

If cartels and abuse of dominance sit at opposite extremes in terms of perceived strategic uncertainty, vertical agreements stand in between. This is the EU antitrust sub-area where the ‘essential coordinates’ are agreed, but there are a few specific issues, currently concerning e-commerce and online platforms (BUS1). In the example of OTAs such as Booking.com, an anonymous senior Commission official reveals that the Commission decided not to take the lead because ‘even within the Commission, there was a lot of dialogue and different approaches across different people and different units.’ The consideration was that ‘we want to understand better before being able to give guidance. The idea is first we wanted to have a few cases and to understand well how we should behave, to know better what the issues are, and then we are going to write Guidelines. If we say that we want to take up the case, [then] we have to take a decision immediately. Since we do not know what we are going to do then it is not the right thing to do to get the decision for ourselves and then take many months to study the issue’ (COM4).

Actors’ engagement with experimentalist processes, however, broke down after the ECN performance review of implementation experiences with the two different types of clauses led to inconclusive findings (ECN, 2017a). The subsequent call by most NCAs on the Commission to hierarchically provide the ‘right’ solution was explicitly linked to

the perception that local discretion could ‘limit legal certainty for stakeholders, notably platforms and their business partners’ (European Commission, 2019, p. 11). Indeed, the currently dominant view seems to be that ‘this is very much about legal certainty’ (COM1), with NCAs doing their best to have a harmonized approach (NCA1; NCA2; NCA3) because ‘when applying EU law, we are European, and our duty is to be loyal’ (NCA2).

But however enlightening cognitive explanations are, extending attention to political considerations allows a fuller understanding. In the Google case, as seen, the Commission has been considering complainants’ views on the solutions first proposed and then implemented by Google. While under the commitments procedure the Commission was unable to accept Google’s commitments when these did not pass the market test, by adopting a prohibition decision the Commission does no longer have to wait for or accept complainants’ comments on the effectiveness of the solutions implemented by Google. But besides being helpful because of their expertise, ‘the problem is that the complainants have always the possibility to go before the European Court of Justice’ (ECJ), then Commissioner Almunia explains (COM2b). Against a background characterized by the absence of ECJ jurisprudence (COM2a; COM2b; BUS1), part of the explanation of why the Commission has favoured experimentalist processes is thus the permanent risk of a rival coalition between complainant firms and the ECJ.

This contrasts with cartels, a sub-area where the Commission could count not only on the leniency solutions it had developed in the late 1990s (European Commission, 1996), but also on a vast ECJ jurisprudence (BUS1), and thus a more plausible alliance between the Commission and the ECJ against NCAs, should the need arise.

In the case of Booking.com, finally, the anonymous senior Commission official who revealed the uncertainty faced by the Commission also suggests that ‘before the Commission realised that there was a problem, the NCAs had already started dealing with these issues and so at that point it would have been extremely costly for the Commission to tell the NCAs “don’t do anything, we are going to do it”’ (COM4). Almunia goes further, claiming that letting NCAs continue to enjoy discretion ‘was more a pragmatic decision than a decision based on cognitive advantages’:

I remember one meeting of the ECN when this issue was on the agenda, what do to, we need to transform these national investigations into an EU wide investigation stopping the next steps at the national level or, given that some investigations were advanced, let us allow the NCAs to conclude, but let us try to coordinate [...] not to have very different decisions in a case that probably should have been since the beginning an EU case. We decided to let NCAs go until the end and after the end of my mandate the ECN set up some common criteria [i.e., the early warning system] to deal with this. But it was not a voluntary decentralization of investigations. It was a factual [one] and in this case [...] a political decision. We can discuss the case and at the end the decision [...] belongs to the Commissioner, and the Commissioner is a political figure (COM2b).

Conclusion

By going beyond the study of institutional design prevalent in the competition literature (Riley, 2003; Sabel and Zeitlin, 2008, p. 298; Svetiev, 2010; Wilks, 2005), the article reveals that the ECN and the procedures modernized in 2003 in fact host a variety of

governance processes, ranging from more hierarchical governance to deal with cartels (for example, CRT) to more experimentalist governance to tackle abuse of dominance (for example, Google Search Shopping). It also shows that while this variation in governance processes cannot be explained by the distribution of formal powers (which was identical), it is consistent with different degrees to which the Commission was confident to know the right solution and could rely on the support of other key actors, such as the ECJ. The article thus partially challenges influential views that either implicitly or explicitly have put forward general claims: that the modernization reforms have strengthened the traditional Commission's hierarchical dominance over NCAs (Riley, 2003; Wilks, 2005, 2014, p. 141; Tarrant and Kelemen, 2017, p. 218), or that on the contrary, they have stimulated the emergence of experimentalist governance, marked by solutions proposed by local actors, review of their implementation experiences, and common revisions in their light (Sabel and Zeitlin, 2008, p. 298, 2010, pp. 298–300; Svetiev, 2010, 2014, 2020).

Analogously and more broadly, by moving beyond the now well-documented emergence of experimentalist architecture (de Búrca *et al.*, 2013, 2014; Sabel, 2004; Sabel and Simon, 2011, 2012; Sabel and Zeitlin, 2008, 2010), the article shows that the actual use of such architecture may vary, even within the same domain and sector. Furthermore, it finds that besides stumbling into experimentalist governance (de Búrca, 2010), actors may, conversely, stumble back into hierarchical governance. By looking at experimentalist governance in action, therefore, the article qualifies general claims about its actual spread.

The article contributes to understanding of the factors shaping the actual spread of experimentalist governance. It clarifies that polyarchy may be understood in both *de jure* and *de facto* terms, and finds that regardless of the former, it is the latter that, when combined with greater uncertainty, makes it more likely for actors to engage in experimentalist processes. Whilst confirming the explanatory value of strategic uncertainty, the article thus suggests that polyarchic distributions of power are less influential when understood legally rather than politically (de Búrca *et al.*, 2013, pp. 725–6, 743, 2014, pp. 479, 483; Rangoni, 2019, p. 69; Rangoni and Zeitlin, 2020, pp. 2–3; Sabel and Simon, 2011, pp. 56, 78, 82; Sabel and Zeitlin, 2008, pp. 175–6, 2012, pp. 174–6; Zeitlin, 2016, pp. 18–19). The article's findings also imply that, in contrast to common analyses portraying them as at odds with one another (e.g., Tarrant and Kelemen, 2017), functional and political factors are not necessarily antithetical. An important upshot is that experimentalist governance, then, might not only be a 'machine for learning' (Sabel and Zeitlin 2008, 2010, 2012), but also for creating consensus.

The article's argument that, rather than by legal factors, actors' choices between more hierarchical or experimentalist governance are driven by functional *as well as* political considerations should now be tested against other evidence, which could include for example algorithmic collusion, evolutions in the regulation of vertical agreements or in the Google saga, or decision-making processes *within* rather than by the Commission. Whatever the evidence used, furthermore, indexes to gradate with finer resolution the key components of experimentalist governance would be welcome.

The article's widest implications, for both academia and policy, are that extending attention from structures to processes and engaging with granular within-case comparisons may reveal a world of variation within even within the same policy domains and sectors, and even when these are governed by a common institutional architecture. Shifting from

binary dichotomies to nuanced views of distinct modes of governance, furthermore, may illuminate otherwise obscured processes that may be incomplete or have even reversed.

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Supporting Information

Additional supporting information may be found online in the Supporting Information section at the end of the article.

Data S1. Supporting Information.