

**The consequence of modernisation reform: does DG COMP have
more bureaucratic autonomy since the modernisation reform?**

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The thesis is submitted for the degree of Doctor of Philosophy.

I, Ta-ching Shih, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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Abstract

The modernisation reform is the most important policy development in the European competition history. Council Regulation 1/2003 has replaced long-lived Council Regulation 17/62 with three main changes in the competition enforcement. First, the reform decentralises the enforcement by introducing national competition authorities (NCAs), alongside Directorate-General for Competition (DG COMP), to apply Article 81 and 82 (now 101 and 102). Second, a quasi-binding European Competition Network (ECN) is established for the purpose of better allocation of cases and the consistent enforcement. Third, competition authorities are further equipped with the substantial power of enquiry and punishment to tackle the most serious infringements. These changes draw the attention to the possibility of paradigm shift and the relationships between DG COMP and NCAs.

As the reform in many ways changes the enforcement of competition rules, the role of DG COMP would be very important to the studies of modernisation reform and to resolve the puzzles regarding the impact of reform and the actual enforcement of Council Regulation 1/2003. Therefore, the aim of the thesis is to assess the autonomy change of DG COMP and to reconfigure the role of DG COMP in the modernised European competition regime. In this regard, this research has to draw on a large body of literature, in particular, the principal-agent theory and the bureaucratic autonomy approach, to assess the bureaucratic autonomy of DG COMP in six aspects: political differentiation, organisational capacity, personal capacity, multiple networks, financial capacity and changes in legal status.

Overall, this research has three main findings. First, DG COMP has increased its bureaucratic autonomy, with some reservations. Second, DG COMP holds a new 'supervisory' role, along with its administrative and 'jury-judge-prosecutor' role. Third, two levels of principal-agent relationship have emerged and the leading role of DG COMP in the ECN is confirmed. As this research adapts the U.S. bureaucratic autonomy model to the EU context, the assessment may further be applicable to other public policy studies about institutional changes or competence reforms.

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Chapter 1 – Introduction

The development of the European Union (EU) has been a dynamic and incremental process. The arrival of the single market was for many observers a landmark of integration. The policy-making and enforcement of various EU policies caught public as well as academic attention as the salience of EU policies was acknowledged. Among the policy sectors, the competition policy is one of the most independent and advanced policies in the EU. It is persistent in upholding the Community's interests as a whole. The subject of competition is vital to the success of economic integration and the study of modernisation reform is important to understand the development of competition policy.¹ As the modernisation reform in many ways changes the enforcement of competition rules, the role of Directorate-General for Competition (DG COMP) would be very important to the studies of modernisation reform. Therefore, the aim of the thesis is to assess the autonomy change of DG COMP and to reconsider the role of DG COMP in the modernised European competition regime. In this regard, this research has to draw on a large body of literature, in particular, the principal-agent theory (Majone, 2001; Huber and Shipan, 2002; Pollack, 2003) and the bureaucratic autonomy approach (Carpenter, 2001; Peters, 2001; Yesilkagit, 2004), to assess the bureaucratic autonomy of DG COMP after the modernisation reform.

The distinctiveness of EU competition policy is seen from its very beginnings in the Treaty² of Rome, in which the principles of the European competition

¹ The subject of competition often takes up considerable space in the comprehensive EU textbooks and leading journals of EU studies, e.g. *Journal of European Public Policy*, *Journal of Common Market Studies*, etc. There are also several competition-specific journals which discuss the details of competition enforcement, the prospect of competition policy development, and other competition-related issues, expanding the scope of competition studies. Therefore, the development of European competition policy is a necessary field for the pupils of EU studies to explore.

² The term "Treaty" refers to the EU Treaties in the trajectory of its regulatory development. The competition rules appeared first in the Treaty of Rome and were retained in the Single European Act (SEA), Treaty on European Union (TEU), and the following amendments: Treaty of Amsterdam, Treaty of Nice and Treaty of Lisbon.

regime are consolidated by Article 85 and 86 (Article 81 and 82 since the Treaty of Amsterdam; and now Article 101 and 102 since the Treaty of Lisbon) to prohibit the anti-competitive behaviour and the abuse of dominant position by undertakings.³ ‘The strong treaty basis of competition policy is an indication of the importance which the architects of the treaty attached to it.’ (Støle, 2006: 88) Not long after, the first enforcement rule – Council Regulation 17/62 – was launched to denote the uniqueness and importance of European competition regime in the development of the EU. Council Regulation 17/62 adopts the prior notification system to minimise the possibility of legal uncertainty and forum-shopping. It requires that all liable cases should notify DG COMP to get negative clearance⁴ of their cases which are otherwise *per se* illegal.⁵ The operational guidelines are further regulated by several Commission Directives.⁶ Therefore, the Treaty, the Council Regulation, and the Commission Directives construct three levels of competition rules in the enforcement.

The construction of competition law allows the European competition regime to be very independent and powerful compared to other EU policies. (Cini and McGowan, 1998; Mavroidis and Neven, 2001a; Komninos, 2008) Unlike other EU policies, the enforcement of competition policy remains unaffected

³ ‘Dominance has been defined under EU law as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained in the relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Dominance means that the firm in question is only to a limited extent constrained by effective competitive forces and therefore enjoys substantial and durable market power.’ (Kroes, 2008: 5)

⁴ ‘When the Commission, on the basis of the facts presented to it, comes to the conclusion that there are no grounds under Article 81(1) or 82 of the EC Treaty to take action in respect of an agreement or practice, the Commission issues a negative clearance either as a formal decision or informally by way of a comfort letter.’ (Directorate-General for Competition, 2002: 33)

⁵ Article 4 and 5 of Council Regulation 17/62 regulate that agreements, decision and practices of the kind described in Article 85 (1) of the Treaty shall be notified to the Commission.

⁶ For example, Commission Regulation (EC) No 773/2004 directs the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. There are also Commission Notices to stipulate the enforcement aspect, e.g. Guidelines on the application of Article 81(3) of the Treaty, Commission Notice on cooperation within the Network of Competition Authorities, Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty which arise in individual cases, etc.

by the Member States' preferences and is exempt from the involvement of the European Parliament (EP) and the Council of the European Union (often referred to as the Council). The traditional EU actors of the Council and the EP hardly have a say in the implementation of competition law. Such salience provides ample scope for DG COMP, the Commission's competition authority, to exercise its discretionary power in the enforcement. 'The Commission was given almost complete autonomy and vested with final decision-making authority, unchecked by the Council or the European Parliament, and subject only to the jurisprudence of the European Court of Justice.' (Kassim and Wright, 2009: 741) As the Commission's competition authority, DG COMP has enjoyed the virtual monopoly of decision-making power⁷ in the enforcement from the beginning of European competition regime in 1962. (Cini and McGowan, 1998) In the view of public policy studies, DG COMP is one of the most independent and autonomous institutions in the pan-Commission organisation. It draws further attention to the likelihood of bureaucratic autonomy for DG COMP and the principal-agent relationship between DG COMP and other competition actors.

In a dynamic and enlarging Union, the enforcement of competition policy requires effective updates. The system of prior notification is unable to deal with the massive volume of notified cases and results in heavy backlogs and administrative delays. Interim measures have been installed with limited effect, such as the introduction of block exemption regulations (BERs)⁸, the use of comfort letter⁹, etc. (Cini and McGowan, 1998) The efficiency and

⁷ 'Subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty.' (Article 9(1), Council Regulation 17/62)

⁸ "Block Exemption Regulation" is a specific regulation to exempt certain types of business activities from the general competition rules. It is often accompanied by a white list to clarify the details of exemptions.

⁹ Instead of adopting a decision granting formal exemption or negative clearance, DG COMP issues the non-binding administrative 'comfort letter' to close the majority of notified cases. Based on the information provided, the quick-delivered comfort letter provides the views of DG COMP on the compatibility of the notified case. However, according to the ECJ rulings (Case 253/78 and Case 1-3/79), the comfort letter does not have the legal status of Commission Decision. it does not preclude the possibility of further legal actions and investigations.

accountability of European competition regime is thus in danger, leaving the pledge for a fundamental change of enforcement system a mainstream and only option.

In light of the demand for a fundamental reform of competition enforcement and the still unlikely¹⁰ prospect of treaty modification on competition issues, the modernisation reform is by now the most important policy development and the largest ever reform in the history of European competition regime. Council Regulation 1/2003 replaced the long-lasting Council Regulation 17/62 and denoted the arrival of a new enforcement regime. Prior notification was abolished and replaced by the directly applicable exception system. National competition authorities (NCAs) were invited to enforce Article 81 and 82 alongside DG COMP. Cases were *per se* legal; whilst undertakings were liable for any anti-competitive behaviour. To ensure the uniform application of competition law, DG COMP and 27 NCAs became binding members of the European Competition Network (ECN), which was created for the purpose of information exchange and case allocation. Competition authorities were further equipped with the substantial power of enquiry and punishment to tackle the most serious infringements.

In short, the most important changes in the modernisation reform are the decentralisation of enforcement, the creation of ECN, and the enhanced power of enquiry for the competition authorities, in particular DG COMP. The changes draw the attention of the competition epistemic community on the possibility of paradigm shift (McNutt, 2000; Abbott, 2005; Monti, 2007; Decker, 2009) and the relationships among enforcement actors, in particular DG COMP and national competition authorities (NCAs) (Lomas and Long, 2004; Egeberg and Trondal, 2009b; Dekeyser and Polverino, 2010). The reform may also reshape the well-developed European competition regime and jeopardise the independence of enforcement and the continuity and integrity of the competition principle.

¹⁰ 'Despite several modifications of the Treaty over the past decades, the competition provisions have remained untouched.' (Kroes, 2008: 4) A fundamental change of competition rules in the Treaty is still unlikely to ensue.

In many public policy reforms, the bureaucratic autonomy approach is adopted to study the changing role of executive agencies and the concomitant policy development.¹¹ The modernisation reform of European competition regime has a similar appearance to those reforms and provides an opportunity for the bureaucratic autonomy approach to explain the role of DG COMP in the new competition regime as the main research objective. For instance, the modernisation reform ends the exclusive competence of DG COMP to enforce Article 81(3). The establishment of ECN serves as a forum for exchanging information and allocating cases, whilst DG COMP is the leading actor in charge of cross-border cases involving three Member States or more. DG COMP is still responsible for the consistent enforcement of new competition rules; the power of the Commission, at the same time, is further enhanced by Council Regulation 1/2003, in particular, in the investigation and punishment of cartels. These changes are critical to DG COMP as the most important actor in the decentralised European competition regime. In this regard, the bureaucratic autonomy approach is the main theoretical basis on which to describe the role of DG COMP and the changes brought about by modernisation reform.

1.1 The Puzzles of Modernisation Reform

In the eyes of public policy studies, two puzzles stem from the modernisation reform: what is the impact of the reform? How is the actual enforcement of Council Regulation 1/2003? These two puzzles are the key to access the details of modernisation reform. Resolving the puzzles would be very important in confirming the value of modernisation reform and the applicability of bureaucratic autonomy approach in the competition studies.

First, the reform has a close relevance to key issues of competition studies, such as the possible paradigm shift of competition principles, the consistency

¹¹ For example, Carpenter (2001) studies the bureaucratic autonomy of the U.S. postal services and other agencies; Crowe (2007) also applies the bureaucratic autonomy approach to the study of the U.S. judicial independence.

and coherence of enforcement, the independence of judgement, the relationship among multiple enforcers and so on. The impact of reform basically reconstructs the European competition regime. For example, the introduction of the Chief Competition Economist (CCE) may suggest the growing momentum of the economic approach in the assessment of anti-competitive cases. 'Economic evidence can provide valuable additional support for (or help to refute) theoretical arguments regarding market definition, competitive effects, entry, and efficiencies.' (Gotts and Hemli, 2006: 24) The reform also pays attention to the issue of consistent and coherent enforcement. In light of the multiple enforcement by NCAs, the reform provides clear guidance on case allocation to ensure that the application of competition rules is uniform. DG COMP is entrusted with the power to intervene and correct any inappropriate proceedings. The creation of ECN is another institutional change to safeguard the consistent enforcement of competition law. Moreover, the new appearance of the decentralised competition regime should be explained, in particular the relationships among competition authorities, and the possibility of direct involvement by national governments and other EU actors, such as the Council and the EP. Based on the bureaucratic autonomy approach, this research aims to resolve the first puzzle and clarify the impact of modernisation.

Second, the modernisation reform also draws the attention to the actual enforcement of Council Regulation 1/2003. The actual enforcement is capable of answering whether the problem of backlogs has been resolved and the effectiveness of European competition regime has been restored. It can further reveal the substantive and procedural change of modernisation reform. However, since the implementation of Council Regulation 1/2003 in 2004, only a handful of analyses have assessed the actual performance of new rules.¹² We are still uncertain whether the new rules are properly enforced, not least since some young NCAs are now the enforcement authorities. Therefore, this research studies three aspects of enforcement to

¹² Section 2.3 discusses the existing public policy literature on the modernisation reform. Most of the existing literature seeks to interpret the modernisation reform rather than explaining the outcome of enforcement.

identify the actual enforcement of new Council Regulation 1/2003: the pivotal competition cases by DG COMP, the operation of ECN, and the relationship between DG COMP and NCAs. They are the crucial factors in addressing the second puzzle of modernisation reform.

1.2 Approach to the Modernisation Reform: the Role of DG COMP

The competition system is composed not only of competition laws, but also enforcement institutions. (Gavil, 2007) Having addressed the massive impact of change and the concern of actual enforcement as the puzzles of modernisation reform, this research adopts the bureaucratic autonomy approach in order to study the most important actor in the competition regime – DG COMP. In fact, both puzzles have the role of DG COMP in the enforcement as their common ground. Therefore, the bureaucratic autonomy approach helps to understand the role of DG COMP in the post-modernised competition system and to resolve the puzzles on the impact of reform and the actual enforcement of Council Regulation 1/2003.

As this research focuses on the impact of modernisation reform and the autonomy change of DG COMP, it is necessary to define three different periods of time for the modernisation reform, as shown in Table 1.1. First, the pre-modernisation period refers to the time before the introduction of White Paper¹³ in May 1999. This period is mainly under the enforcement of Council Regulation 17/62. Second, the time between May 1999 ~ May 2004 is often known as the modernisation process, which is a transitional time towards the arrival of Council Regulation 1/2003. Third, the successful enforcement of Council Regulation 1/2003 in May 2004 denotes the beginning of post-modernisation period. These periods are consistently referred in this research and other competition studies.

Table 1.1 Three Periods of Time for the Modernisation Reform

¹³ European Commission (1999b) 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty', available at: http://ec.europa.eu/comm/competition/antitrust/wp_modern_en.pdf, (accessed 12 May 2009)

Reference	Time frame
The Pre-modernisation Period	Feb 1962 ~ May 1999
The Process Period	May 1999 ~ May 2004
The Post-modernisation Period	May 2004 ~

Through a series of changes in the enforcement procedure, Council Regulation 1/2003 has changed the role of DG COMP, the Commission's competition authority. In the new enforcement regime, the power of the Commission is enhanced in the areas of sectoral inquiry, the cartel investigation, and the punishment. The abolition of prior notification ends the exclusive competence of DG COMP to enforce Article 81(3). Relieved of the overload of notifications, DG COMP has more room to deploy its limited resources and resumes its active and autonomous role in the regime, in the *ex officio* cases above all. Following the establishment of ECN, DG COMP acts as the forerunner in the network for setting up the initial enforcement procedures and for maintaining the uniform application of new competition rules.

The changes of reform and the adaptation of DG COMP provide plenty of room for the bureaucratic autonomy approach to examine the substantive and procedural changes of the modernisation reform. Therefore, this research studies the modernisation reform by focusing on the role of DG COMP as a way of resolving the puzzles identified above and attempts to provide a sound justification for the modernised European competition regime.

1.3 The Theoretical Basis of the Research: the Bureaucratic Autonomy Approach

As noted above, before the modernisation reform, DG COMP enjoyed a *de facto* monopoly in the enforcement of competition rules. Consequently, the change of enforcement law resulted in the institutional and competence

change for DG COMP, the primary enforcer in the European competition regime. Council Regulation 1/2003 replaced Council Regulation 17/62 and introduced three main changes in the competition enforcement: the replacement of the prior notification system by the decentralised *ex post* directly applicable exception system with multiple enforcement authorities, the establishment of ECN, and the enhanced power of enquiry and punishment for DG COMP. Embedded in the public policy studies, this research requires the compatible theoretical basis on which to examine the role of DG COMP in the modernised competition regime.

Derived from the principal-agent theory, the bureaucratic autonomy approach is widely applied to many public policy studies on the institutional capacity and the competence change. In particular, it serves as a theoretical tool for examining the role of executive agencies and the development of related policies. The approach is capable of explaining why the agencies develop their distinctive institutional culture, escape from political designated assignments and evolve as policy entrepreneurs¹⁴ (Majone, 2001; Crowe, 2007). By definition, 'bureaucratic autonomy occurs when bureaucrats take actions consistent with their own wishes, actions to which politicians and organised interests defer even though they would prefer that other actions (or no action at all) be taken' (Carpenter, 2001: 4). Therefore, bureaucratic autonomy gives executive agencies ample scope to exert their preferences and to set up formal or informal administrative standards in the enforcement. As a result, the actual enforcement follows more closely the patterns of executive agencies than the design of legislative principals.

The modernisation reform involved both the institutional and competence change for the executive agencies, notably DG COMP, and the development of competition policy. It is as suitable as other policy reforms for the adoption of the bureaucratic autonomy approach. In fact, the bureaucratic autonomy

¹⁴ Political entrepreneurship refers to actions taken by 'creative, resourceful, and opportunistic leaders whose skillful manipulation of politics some how results in the creation of a new policy or bureaucratic agency, creates a new institution, or transforms an existing one' (Sheingate, quoted in Crowe, 2007: 76).

approach helps us to make sense of the modernisation reform by assessing the political and institutional changes in DG COMP.

Consequently, the bureaucratic autonomy of DG COMP is the theoretical focus of this research. By examining the autonomy change of DG COMP, the research is able to describe the role of DG COMP in the decentralised competition regime and the multi-level relationship between DG COMP and NCAs in the ECN. The activities of DG COMP in the modernisation process also reflect whether the reform alleviates the problems of administrative delays and raises the quality of decisions. The bureaucratic autonomy analysis is able to resolve the puzzles of the impact of reform and the actual enforcement of Council Regulation 1/2003.

1.4 The Research Question and The Operation

Having discussed the salience and the regulatory structure of European competition regime, the main changes and puzzles of modernisation reform, and the research focus on the role of DG COMP in the modernised system, this study should now consider the bureaucratic autonomy of DG COMP following the modernisation reform. The answer is clarified by a series of questions regarding the autonomy change of DG COMP: in the decentralised enforcement system, is DG COMP still highly independent and autonomous? How may we describe the role of DG COMP in the modernised competition regime and its relationship with NCAs in the ECN? How does the modernisation design minimise the possible forum-shopping and ensure the legal certainty? Does DG COMP have more capacity to tackle complex antitrust cases since the enforcement of Council Regulation 1/2003? These questions are to be studied in the present research through an analysis of the institutional and competence change of DG COMP and an examination of the enforcement of Council Regulation 1/2003. They also point to the fundamental question of this research on the role of DG COMP: **the consequence of modernisation reform – does DG COMP have more bureaucratic autonomy since the modernisation reform?** This is the main

research question derived from a series of questions regarding the role of DG COMP in the modernised competition regime. Finding the answer to the main research question of DG COMP's bureaucratic autonomy will resolve the puzzles of the impact of reform and the actual enforcement of Council Regulation 1/2003.

Based on the theoretical review of bureaucratic autonomy approach in Section 3.3.1, this research develops six main hypotheses to study the main research question: the bureaucratic autonomy of DG COMP. The first hypothesis concerns the substantive change in the modernisation reform. It argues that the increase of DG COMP's political differentiation is based on the institutionalisation of economists, the increase of economic assessment, and the paradigm shift from the Structure Conduct Performance (SCP) paradigm to the Chicago School paradigm. The second and third hypotheses discuss the procedural change of modernisation reform. They investigate the organisational and personnel capacity of DG COMP through a study of organisational change, organisational development, the role of the bureaucratic chief and staff, and the availability of independent recruitment. The fourth hypothesis deals with the multiple networks of DG COMP, concentrating on DG COMP's bilateral and multilateral participation with other competition regimes and the role of DG COMP in the ECN in the regulatory and enforcement aspects. The financial autonomy of DG COMP is the subject of the fifth hypothesis, which investigates the discretionary use of a regular budget and the availability of own resources. The legal autonomy of DG COMP, the last and very important hypothesis, is studied to identify the legal boundaries of bureaucratic autonomy and the regulatory development in the modernisation reform. It is assessed through a comparative study of European competition rules, the legislative process of Council Regulation 1/2003 and an analysis of pivotal enforcement cases. Therefore, six categories of bureaucratic autonomy are embodied in the main hypotheses to answer the question of whether DG COMP has more bureaucratic autonomy after the modernisation reform.

Moreover, as a meta-policy in the history of EU market integration¹⁵, the modernisation reform gives a concrete example of policy development in the EU. 'European competition policy is one element determining the evolution of European capitalism, an element with a potential to take pre-eminence over other areas of Community Law.' (Wilks and McGowan, 1996: 226) In this regard, this research serves as a pivotal exploration and the beginning of a series of public policy studies about DG COMP, the Commission's competition authority.

1.5 The Aims of the Thesis and the Research Contributions

This research aims to provide a comprehensive redefinition of the role of DG COMP in the modernised European competition regime. By reconfiguring the role of DG COMP, the research is able to discuss the interaction among the enforcement authorities and to illustrate the operation of modernised European competition regime. Taking a further step, this research seeks to identify and describe the bureaucratic autonomy of DG COMP, the most important characteristic of its role in the competition regime. By exploring its autonomy change, we would gain an in-depth and comprehensive understanding of the changes in the competition regime and the exercise of autonomy by DG COMP. For example, the research will examine how the paradigm shift is conducted by DG COMP and to what extent DG COMP exerts its organisational capacity. It will also explore the possibility of establishing financial autonomy and independent recruitment for DG COMP in the modernisation reform, the details of DG COMP's network activities and the enforcement of ECN. In doing so, the analysis would be able to justify the role of DG COMP in the modernised competition regime and to resolve the puzzles of the impact of reform and the actual performance of Council Regulation 1/2003. This is the first objective of this research.

Apart from this primary objective, the literature review in Section 2.3 also discovers that the public policy studies on the EU competition policy are

¹⁵ 'The main objectives of competition policy as enforced by the EC are most probably economic efficiency and European market integration.' (Motta, 2007a: 15)

relatively few, compared with the volume contributed by the economic and law studies. 'From a political science perspective, EU competition policy *per se* has largely been neglected as an area of academic scrutiny albeit with a few notable exceptions.' (McGowan, 2005: 987) The arrival of modernisation reform provides a good opportunity to re-examine the enforcement regime with the public policy studies. Only a handful of studies have described the implementation of modernised EU competition system as they can hardly provide a convincing picture of the modernised regime.¹⁶ Furthermore, there are even fewer in-depth studies assessing the role of specific authorities or explaining the relationships among these actors to reflect the development of European competition regime.¹⁷ Therefore, the second objective of this research is to fill the gap between the macro and micro studies of competition, and to overcome some of the deficiencies of public policy studies in the field of competition.

The assessment of DG COMP's bureaucratic autonomy is a twofold contribution. First, it substantially identifies the autonomy change of DG COMP in the modernisation process, which is a vital finding of this research. The existence of bureaucratic autonomy for DG COMP helps to maintain an independent competition regime from unnecessary involvement of national governments and private actors. DG COMP is able to forge the paradigm shift and increase the use of economic assessment in many antitrust cases. The consistent and coherent enforcement of competition law is preserved and guided by an autonomous DG COMP. Second, the assessment of bureaucratic autonomy could serve as an applicable example to apply to other public policy studies. This is the theoretical contribution of the research. The use of bureaucratic autonomy approach is common in the studies of U.S. governmental agencies. (Carpenter, 2001; Crowe, 2007) This research on the

¹⁶ For example, a study conducted by three scholars in the Amsterdam Center for Law & Economics analyses the Commission decisions on antitrust between 1957 and 2004. (Carree, Günster and Schinkel, 2009) It is one of the complete analyses of the administrative performance of DG COMP.

¹⁷ For example, a recent study focuses on the performance of competition authorities of 13 OECD countries between 1995-2005 with the use of Competition Policy Indexes (CPIs). The study aims to identify the deterrence effect of competition enforcement. (Buccirossi, Ciari, Duso, Spagnolo and Vitale, 2011)

EU competition policy would be pivotal in confirming the universality of bureaucratic autonomy approach.

1.6 The Definitions in the Research

In previous pages, we have discussed our approach to the role of DG COMP in the modernised competition regime: that is to analyse its autonomy change. In this regard, the present research should first clarify the essential terms to be used in this research, in particular, the definitions of bureaucracy, bureaucratic autonomy and principal-agent theory. Details are further elaborated in Chapter 3.

1.6.1 The Definition of Bureaucracy

Bureaucracy is the governmental organisation consisting of non-elected officials and experts, bounded by operational instructions, and focused on the impersonal delivery of policy objectives and the implementation of law. Often, these officials are selected through a centralised recruitment and granted long-term tenure under the concept of performance-based merit system. The operational instructions are drafted by certain internal sectors in the bureaucracy and approved by the cabinet or legislative actors in the government. In general, the instructions include 'formal constraints (rules, laws, constitutions), informal constraints (norms of behaviour, conventions, and self-imposed codes of conduct), and their enforcement characteristics' (North, 1996: 344). The effective delivery of policy goals and the proper implementation of laws are the main purpose and function of bureaucracy.

The proper operation of bureaucracy can establish a system of administrative efficiency. (Lawton and Rose, 1994) It is expected that the highly skilled policy experts in the bureaucracy will be able to help less knowledgeable politicians to achieve their policy goals. (Huber and McCarty, 2004) With the successful implementation of laws and regulations, well-

developed bureaucracies go beyond their original principle of neutrality to bargain with the elected politicians for the dominance and control of enforcement. This phenomenon has resulted in the extensive study of bureaucratic behaviour and development, which leads to the following analysis of bureaucratic autonomy.

1.6.2 The Definition of Bureaucratic Autonomy

The bargaining and manoeuvring of bureaucracy in the enforcement results in the possibility of bureaucratic autonomy. By definition, bureaucratic autonomy is the phenomenon to describe bureaucracies which have politically differentiated preferences and implementing policies consistent with their interpretations and objectives. The enforcement is not 'checked or reversed by elected authorities, organised interests, or courts' (Carpenter, 2001: 14).

The existence of bureaucratic autonomy gives the bureaucracy 'the capacity to change the agenda and preferences of politicians and the organised public' (Yesilkagit, 2004: 531). Bureaucratic officials are able to maximise their administrative role with their expertise and monopoly of enforcement, and ultimately act as the 'policy entrepreneur'. (Majone, 2001; Crowe, 2007) The bureaucracy enjoys an unconventional privilege to manoeuvre its preferences from the policy enforcement as far as even the policy-making process. Therefore, securing bureaucratic autonomy is a vital interest for the long-term existence of bureaucracy. In practice, the bureaucracy often increases its autonomy by extending its political differentiation, exercising its organisational and personnel capacity, pursuing financial independence, establishing multiple network relationships with other actors in the regime, and consolidating its competence in the regulatory aspect. This is the key area to study the role of DG COMP in the modernisation reform. Further discussion of this point may be found in Section 3.3.1.

1.6.3 The Definition of Principal-Agent Theory

The bureaucratic autonomy approach is very closely relevant to the principal-agent theory. The characteristics of principal-agent relationship are the basis for bureaucracies to seek further autonomy in the policy implementation. Derived from the economic incentive theory, the principal-agent theory is the rationalist approach describing the causal relationship of actors and the effect of delegation in the contemporary government system. (Kiewiet and McCubbins, 1991) 'Institutions (principals) delegate or confer authority upon other institutions (agents) so they can make decisions and take actions independent of the explicit approval of the principal.' (Egan, 1998: 487) Since the principal is often bounded by various policy proposals, constituent pressure, interest group lobbying, and so on, the agent is made capable of implementing the policy objectives and satisfying the long-term interests of the principal.

Therefore, the salience of principal-agent theory is marked. First, actors are interest-maximising and opportunistic. (Braun and Gilardi, 2006a) In particular, the agent seeks to increase the irreplaceable value in the policy enforcement. Second, the principal is willing to delegate a certain competence to the agent to execute the policy objectives and deliver the desirable outcomes for the principal. The principal is often the elected politician and the agent, consisting of permanent officials, is the administrative organisation outside the cabinet or ministry. (Egeberg and Trondal, 2009b) An effective delegation means that the agent delivers better policy outcomes, the advantages of which outweigh the transactional cost of direct enforcement by the principal itself. Third, there may be multiple delegations existed in certain parts of specific policy sectors. The main benchmark is that the collective action of multiple agents should accomplish the policy objectives for the principal. Consequently, the principal-agent relationship has become a frequent phenomenon in modern governmental systems.

1.7 The Salience of Modernisation Reform: the Main Changes

As mentioned in the opening paragraphs, the European competition policy is one of the most independent and advanced policies in the EU. Its achievement is based on the regulatory stability and the diligent application of DG COMP. The modernisation reform is the most important policy development so far. The method of enforcement has changed; the concept of competition has evolved; the relationship between DG COMP and NCAs has strengthened with the creation of ECN. The phenomenon requires this research to take a further look at the salience of modernisation reform to figure out the causal factors in the changing role of DG COMP in the regime. Thus, to resolve the puzzles regarding the impact of reform and the actual enforcement of Council Regulation 1/2003, three main changes of modernisation reform ought to be carefully examined and addressed here: the decentralisation of enforcement, the creation of ECN, and the enhanced power of inquiry.

First, in applying Article 81 and 82 EC (now Article 101 and 102), the reform has decentralised the enforcement of competition rules by introducing multiple authorities. National competition authorities (NCAs) are given the decision-making competence and the responsibility for most of the cases involving competition laws.¹⁸ The division of labour is clearly explained in a follow-up Commission Notice¹⁹. DG COMP, the Commission's competition authority, is no longer the only enforcement authority to implement the EC competition rules. The decentralised enforcement substantially relieves the administrative workload of DG COMP. It also excites concern over the autonomous and independent role of DG COMP.

¹⁸ 'The most dramatic change following the harmonisation and decentralisation of enforcing Articles 81 and 82 of the EC Treaty, is that the Commission prerogative of granting exemptions to the prohibition principle in 81(1) and 81(2) is abandoned, giving national authorities the right to enforce all of Article 81, including 81(3). A main motivation for this is surely to come to terms with the ever-increasing load of notifications or applications for exemptions directed at the Commission.' (Støle, 2006: 91)

¹⁹ European Commission (2004e) 'Commission Notice on cooperation within the Network of Competition Authorities (Text with EEA relevance)', Official Journal of the European Union, C 101(27.4.2004): 43-53.

In this regard, the European competition regime has evolved from a prior notification system to an *ex post* directly applicable exception system on restrictive practices and the abuse of dominant position. 'Modernisation will shift some costs to national authorities and courts, and it will impose start-up costs on national judicial systems.' (Fox, 2001: 125) Similarly, the undertakings themselves are liable for evaluating the compatibility of their cases with the competition rules, either through an in-house mechanism or with external assistance. Therefore, the assessment cost is transferred from DG COMP to other actors in the regime. This transfer is the spirit of *ex post* 'directly applicable exception' system and a wise strategy for giving DG COMP more discretionary use of its scarce resources.

Second, for the consistent application of competition rules, a quasi-binding network has created 'to encourage coordination and information-sharing among the competition authorities in the EU' (Ginsburg, 2005: 427). It is reasonable to have such organisational development, since the move from prior notification to *ex post* control requires a high quality of consistency and legal certainty, in particular, when the previous centralised notification system operated properly in the past. Several procedural alterations have been adopted in this regard. The most important arrangement is the establishment of a quasi-binding organisation: the European Competition Network (ECN). NCAs have become the necessary members to facilitate the collaboration and the exchange of information. DG COMP is able to share its expertise and influence through the channel of ECN. In the meantime, DG COMP may also exert its preferences and consolidate its leading role in the operation of ECN and the enforcement of new rules. Therefore, the development and performance of ECN would be decisive for the effective enforcement of modernised rules and the success of Council Regulation 1/2003.

Third, regarding the competence aspect, the power of enquiry has been strengthened. Sectoral inquiries have become a frequent market surveillance tool to detect possible violations. The power of investigation is largely increased as well. DG COMP has been empowered to conduct the so-called

“dawn raid” to inspect private premises and to take statements from any staff of their undertakings. Deterrent fines and periodic penalty payments have been implemented by DG COMP in several pivotal cases. The competence of DG COMP has thus been substantially changed.

In sum, three prominent changes have brought to the competition regime: the decentralised enforcement of EC competition rules, the establishment of ECN, and the enhanced power of enquiry. The changes have fundamentally transformed the enforcement regime into an unprecedented system of parallel enforcement in a single market. The operation and function of ECN also give rise to uncertainties about the relationships among the enforcement authorities. The empowered authorities, DG COMP in particular, are required to properly implement the new rules with whatever institutional changes are necessary. The changes are closely correlated with the autonomy change of DG COMP. Therefore, the modernisation reform is perceived as a response to the criticism of previous Council Regulation 17/62 as well as a fundamental change in the enforcement of competition rules. The role of DG COMP is still the most important factor in the competition regime.

1.8 The Chapters of the Thesis

The following chapter, Chapter 2, reviews the previous studies about the competition policy and the modernisation reform. The literature review aims to reveal the achievements and deficiencies of existing studies and to set out the existing knowledge of modernisation reform, not only in the public policy studies but also in the economic literature of paradigm shift and the legal literature on the regulatory change.

The first section of Chapter 2 reviews the literature before the modernisation. It confirms the existence of bureaucratic autonomy, the growing problems of the centralised system, and the development leading to the modernisation reform. The second section focuses on the modernisation reform itself. Three perspectives are studied: decentralisation, Commission

dominance, and regulatory explanation. The decentralisation perspective traces the context of the official documents, namely, the 1999 White Paper, which assumes that the modernisation reform decentralises the administrative competence to NCAs and changes the system from one of prior notification to one of *ex post* directly applicable exception system. The Commission dominance perspective argues that, instead of decentralising the enforcement, the new system actually gives DG COMP the prestigious function of leading NCAs and harmonising national competition rules. The third perspective of regulatory change takes the eclectic view that the realm of modernised competition regime lies between the total decentralisation and the total control by DG COMP. However, all of these different statements neither allow a deeper investigation of the actual relationship between the enforcement authorities nor enable a comprehensive study on the role of DG COMP in the regime. Their deficiencies give this research a critical opportunity to bridge the gap and to address the two puzzles of modernisation reform.

In addition to the public policy literature, the economic literature mainly contributes to the discussion of the paradigm shift in the modernisation process from the SCP paradigm to the Chicago School paradigm. Based on the experience of the U.S., the economic literature points out the characteristic of the SCP paradigm and that of the Chicago School, the reasons for the paradigm shift in the U.S., and why the Chicago School is the mainstream economic theory for competition policy. Moreover, the review of legal studies shows the strong support for decentralisation. The fervent discussions on the issues and settlements resulting from the modernisation and the recognition of the Commission's dominance in the decentralised competition regime are referred to here. The economic and legal literature would be helpful to the overall understanding of competition policy.

Chapter 3 discusses the theoretical basis of this research. The theoretical review aims to provide the relevant context for the principal-agent theory and the bureaucratic autonomy approach.

The review of principal-agent theory helps to explain the relationships among multiple actors and the reasons for agency escape, the problems of delegation, etc. The bureaucratic autonomy approach is based mainly on Daniel Carpenter's interpretation (2001), which articulates the degree of autonomy of a specific executive institution. The main factors of bureaucratic autonomy are described in some details and connected with the modernisation reform. Six areas of bureaucratic autonomy are discussed and adopted as the main categories of assessment in this research. The political differentiation is first discussed to reflect the substantive change entailed in the paradigm shift. The organisational capacity resulting from the organisational changes and development is examined as the most obvious and accessible field of autonomy assessment. The personnel capacity is discussed with a focus on the role of the bureaucratic chief in the pursuit of bureaucratic autonomy. The multiple network relationship is very important in supporting the long-term autonomy of bureaucracy. Financial and legal autonomy are the necessary areas for justifying the bureaucratic autonomy of any bureaucratic institution. Through these indicative areas, the research seeks to apply the theoretical context of the bureaucratic autonomy approach to the study of DG COMP and to construct six main hypotheses, with their collateral sub-hypotheses, of the main research question.

Moreover, the last part of Chapter 3 describes the operational methodology for testing the hypotheses and sub-hypotheses and the possible results: the bureaucratic autonomy has increased, decreased, or retains *status quo*. A mixed method of research is adopted with most weight given to qualitative analysis. The empirical data are based on a detailed analysis of secondary materials and supported by a number of elite interviews.

Chapters 4 to 7 are the main chapters of empirical research; they assess the bureaucratic autonomy of DG COMP.

Chapter 4 aims to provide a thorough analysis of the substantive change in the modernisation reform. Based on the literature and the theoretical review of the paradigm shift, the study first focuses on the increase of in-house economists and the institutionalisation of Chief Competition Economist (CCE) and Competition Economist Team (CET). The chapter then discusses the increased use of economic methodology in many anti-competitive cases and debates the embeddedness of economic thinking in the modernisation documents, with positive feedback from the Community courts. Moreover, this research identifies the convergence of EU & U.S. competition regimes towards the efficiency-based method of Chicago School. The paradigm shift from the Structure Conduct Performance (SCP) paradigm to the Chicago School paradigm is further seen in the substantive test and the context of new Merger Regulation 139/2004, the Guidelines for horizontal agreements, and the block exemption regulation (BER) for vertical agreements. With more than 40 years of enforcement, the European competition regime is capable of endorsing the Chicago School paradigm in its examination of anti-competitive cases. The paradigm shift from the SCP paradigm to the Chicago School paradigm is verified.

Chapter 5 works on the procedural change in the modernisation reform. The first half investigates the organisational capacity of DG COMP through the organisational change and organisational development in the modernisation process. Organisational change is found to be very active. Six types of re-organisation are practised by DG COMP. Two waves of organisational change at the directorate level were successfully accomplished as part of DG COMP's conduct. A series of new organisational changes, namely the CCE and Cartel Directorate, also indicates the organisational capacity of DG COMP. The organisational capacity of DG COMP is further seen in the organisational development of modernisation-related sectors. The incremental development from Cartel Unit to Cartel Directorate, the expansion of CET members, the development of Deputy Directors-General, and the relocation of Consumer Liaison Officer, are evidence that DG COMP is extensively exercising its organisational capacity. The second half of

Chapter 5 focuses on the personnel capacity of DG COMP, in particular, the role of the bureaucratic chief in the modernisation reform, the personnel-related activities and the availability of independent recruitment. Two Directors-General are candidates qualified to protect the interests of DG COMP and to accomplish the modernisation reform. The extensive training programmes for DG COMP officials, national competition experts, and national judges suggest that DG COMP is able to maximise its influence over other officials. The exploration of recruitment flexibility testifies whether DG COMP has achieved the advanced level of bureaucratic autonomy so as to act as an independent regulatory agency (IRA). The analysis of organisational and personnel capacity provides a helpful illustration of the autonomy change of DG COMP.

Chapter 6 continues to focus on the procedural change in the modernisation reform, in particular, the network relationship of DG COMP. The analysis starts with the exploration of DG COMP's horizontal cooperation in the Commission and its activities in the Enlargement process. Limited evidence is found in direct support of the political multiplicity. However, the bilateral and multilateral relationships of DG COMP guarantee its multiple connections outside the European Union. The effort of DG COMP is seen in the growing volume of bilateral arrangements with major trading partners in the global context. DG COMP also engages extensively in the WTO and ICN to secure its multiple networks. Most important of all, the regulatory design and the enforcement of ECN are decisive for the political multiplicity of DG COMP. The role of DG COMP in the ECN is one of the main focuses of this research. From the regulatory setting of ECN to the corresponding organisational changes in DG COMP and NCAs, we have found evidence to redefine the role of DG COMP since the modernisation reform. Likewise, the implementation and development of ECN are studied through some outstanding cases, namely the legal development of ECN Model Leniency Programme and the use of Article 11(6) competence. Together, the two-sided analysis reaffirms the persisting bureaucratic autonomy of DG COMP.

At the beginning of Chapter 7, the financial autonomy of DG COMP is examined through the discretionary use of regular budget and the possibility of having its own resources. The rest of Chapter 7 investigates the legal documents which initiated the modernisation reform and modified the competence of DG COMP. The legal context of competition rules defines the boundaries of bureaucratic autonomy as far as DG COMP is concerned. A comparative analysis of Council Regulation 17/62 and Council Regulation 1/2003 reveals the fundamental competence change in six areas: the power of the Commission, the investigation power, the fine and penalty competence, the judicial review, the professional secrecy and the right of hearing, and the new competence. The legislative process of modernisation reform is examined to identify whether the preferences of DG COMP are kept in the final legislation. Essential competition laws are also studied to illustrate the role of DG COMP in the modernised regime. Last, pivotal cases are studied in order to learn about the actual implementation of new Council Regulation 1/2003 and to identify whether DG COMP is capable of enforcing its enhanced competence.

Chapter 8 concludes this research. It starts with a review of the main arguments and hypotheses on the autonomy change of DG COMP. The contribution of this research is found to be threefold. First, the study reveals that DG COMP has managed to increase its bureaucratic autonomy, albeit with variations in some fields. The successful paradigm shift of economic assessment, the extensive use of organisational capacity, and the consolidation of multiple networks are the strongest affirmative evidence. The increased autonomy is further supported by the confirmation of legislative development and enforcement. Nonetheless, financial autonomy and the advanced capacity for independent recruitment are still not in the hands of DG COMP. They would probably be prospective areas for future reforms in the European competition regime. Second, the study can submit innovative findings on the multiple roles of DG COMP in the decentralised regime, the theoretical explanation of the multilateral relationship in the ECN, and the prospects of the modernised competition policy. In fact, after the reform, a

new 'supervisory' role for DG COMP emerges and mixes with the existing roles of administrator, prosecutor, and judge in the competition regime. Moreover, a new principal-agent relationship is established in the ECN, in which DG COMP becomes the principal and NCAs are the agents of the Europeanised competition regime. The value of this research is hereafter contributive to the EU public policy studies, the study of competition, and the bureaucracy studies. Third, the theoretical aspect of contribution comes from the assessment of bureaucratic autonomy conducted in this research. The assessment could be a useful model to apply to other cases of institutional change or competence reform, both empirically and theoretically. Therefore, it is hoped that this research addresses the deficiencies of previous research and provides a sound depiction of the modernised competition regime and the role of DG COMP. The puzzles of the impact of reform and the actual enforcement of Council Regulation 1/2003 are resolved in the course of empirical chapters. The focus on the role of DG COMP also contributes to further studies of the Commission and other EU institutions.

Chapter 2 – Contextual Review: Interpretations of the Modernisation Reform

The literature on the EC competition policy should be systematically studied. It provides a specific understanding of the modernisation issues and helps to generate the research question. Based on previous modernisation studies, this research identifies the deficiencies in the literature, and draws the attention to the actual changes of DG COMP's bureaucratic autonomy in the modernised European competition regime through its own empirical analysis. 'Competition policy may remain one of the least studied of the EU policy competences but, like other technical and initially duller-looking sectors (e.g. financial services regulation), it provides ample scope for research.' (McGowan, 2005: 102)

In the first part of this chapter, a brief background to modernisation reform is provided, followed by a review of the pre-modernisation literature. The background and the review may help in acquiring a preliminary understanding of the salience of both regulatory and implementing dimensions of competition policy. The review also reveals the highly professional characteristics of the competition regime, the problems of the notification system, and the existence of bureaucratic autonomy before the modernisation reform. Second, from the public policy studies, the literature on the modernisation reform mainly provides three perspectives: decentralisation, Commission dominance, and regulatory explanation. Each perspective has its special focus and interpretation of the modernisation reform. By their interpretations, the latter two challenge the decentralisation perspective. The review of these perspectives identifies the limits of public policy analysis of the modernisation reform hitherto and the relevance of the literature to this research. Third, a comprehensive and integrated overview of the modernisation reform requires other disciplines in this field to be explored. In the second half of this chapter, the economic literature provides useful interpretations of the paradigm shift of economic thinking on competition enforcement. The legal literature focuses more on the practical

aspects of implementation and its favourable perspective on the decentralisation measures. The deficiencies and the relevance to this research are also discussed in the final section.

2.1 A Brief Background of the Modernisation Reform

The background of competition policy development in the EU provides a brief overview of the core issues of the European competition regime and the rationale of modernisation reform. From the discussion of Council Regulation 17/62 and the options of reform, a comprehensive picture of competition policy development can be established.

2.1.1 The Achievement and Crisis of Council Regulation 17/62

‘There are few areas of EU policy-making where the Commission is more central or more autonomous than in competition policy. The responsibility for administering the competition rules was granted to the Commission by the Council in a series of regulations, most importantly the implementing Regulation 17/1962.’ (Støle, 2006: 88) The arrival of Council Regulation 17/62²⁰ signalled the beginning of a highly independent European competition regime. (Cini and McGowan, 1998; Komninos, 2008) Directorate-General for Competition (DG COMP) is the Commission’s competition authority, which implements the competition rules of Council Regulation 17/62, in particular, the exclusive competence in Article 81(3) cases. In the last 40 years of Council Regulation 17/62 enforcement, DG COMP simultaneously continued to improve the enforcement regime incrementally. For example, the adoption of several block exemption regulations (BERs)²¹,

²⁰ The full title of Council Regulation 17/62 is ‘Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty’, which suggests itself as the first enforcement law for the European competition policy.

²¹ see *supra* note 5 in Chapter 1.

the introduction of comfort letter²², and the application of *de minimis* rule²³ are some benchmark developments in extending the effectiveness of the principles established in Council Regulation 17/62. Therefore, the enforcement of these competition rules has always been a dynamic process with incremental changes.

The European competition regime has been implemented since the release of Council Regulation 17/62, five years after the antitrust elements were written into the Treaty of Rome. 'Since its adoption in 1962, Council Regulation 17/62 has remained almost unchanged, which is a tribute to the quality of its original drafting.' (Montag and Rosenfeld, 2003: 110) The quality of Council Regulation 17/62 is widely recognised in the eyes of academics and lawyers. (Interviewee 06, 2009; Interviewee 07, 2009) Most of the literature describes Council Regulation 17/62 as a succinct and precise regulation. This is why Council Regulation 17/62 has been implemented for more than 40 years without any substantive modification or replacement. In fact, it is an extraordinary phenomenon for any EU regulation and a rare case, considering the average life-span of Council Regulations as a whole.

Council Regulation 17/62 clearly defines the scope of competition policy and the practical aspect of enforcement. As the Commission claimed, providing greater information to competition authorities, ensuring the uniform application of Article 81 and 82, and establishing adequate legal certainty for undertakings, are the three major achievements of Council Regulation 17/62. (European Commission, 1999b) Without previous experience and expertise in the competition field, it introduced a centralised authorisation system

²² see *supra* note 6 in Chapter 1.

²³ *De minimis* rule was first introduced as a Commission Notice in 1997 and modified in 2001. (European Commission Press, 2002a) It clarifies that in certain conditions the impact of an agreement or practice on competition within the common market is *de minimis* and considered to be non-appreciable. 'Agreements or practices falling under the 'de minimis' notice are considered to be of minor Community importance and are not examined by the Commission under EC competition law.' (Directorate-General for Competition, 2002: 13) The application of *de minimis* rule simplifies the criteria of notification under Article 81(3). The main change in 2001 raised the market threshold to a 10% market share for agreements between competitors and to 15% for agreements between non-competitors. It also confirmed that agreements between small and medium sized enterprises (SMEs) qualify for this rule.

accommodating the early years of European competition regime. Business activities and agreements involving in potentially anti-competitive rules had to be notified to get their negative clearance²⁴. Such centralisation rendered the competition policy one of the most important EU policies. The achievement of Council Regulation 17/62 is further reflected by a concrete enforcement record²⁵ of administrative decisions and case law.

However, the growing volume and complexity of competition cases has resulted in two critical internal problems: the administrative backlog and the limited flexibility of institutional capacity. These have grown together with one external phenomenon: the significant expansion of EU membership (Gavil, 2007). 'Despite endeavours to reduce these, such as the introduction of BERs and *de minimis* thresholds, a backlog of cases remained which all too often diverted resources and attention away from the most serious breaches of the competition rules.' (McGowan, 2005: 995) The enlargement process towards a Union with 27 Member States only aggravates this severity. The credibility and effectiveness of European competition regime came under severe scrutiny.

Moreover, the complexity of transnational mergers and international cooperation is a new challenge for the European competition regime under a scarcity of resources. These inherent problems arising from the centralisation enforcement cannot be offset by the adoption of several administrative *modus operandi*, e.g. *de minimis* rule, comfort letter²⁶, BER, etc. Nor can

²⁴ 'When the Commission, on the basis of the facts presented to it, comes to the conclusion that there are no grounds under Article 81(1) or 82 of the EC Treaty to take action in respect of an agreement or practice, the Commission issues a negative clearance either as a formal decision or informally by way of a comfort letter. (see definition) In Article 81 cases, companies usually combine their application for negative clearance with a for notification for exemption. (see definition)' (Directorate-General for Competition, 2002: 33)

²⁵ 'After 35 years of application, the law has been clarified and thus become more predicable for undertakings.' (European Commission, 1999b: 21) There have been enough anti-competitive cases to supplement the competition laws.

²⁶ The use of comfort letter has two major problems. First, the unpublished comfort letter does not meet the general principle of transparency, which reduces the credible use in the long-term basis. Second, the ECJ rulings (Case 253/78 and Case 1-3/79) suggest that the comfort letter does not have any binding effect. It is merely an informal letter expressing DG COMP's preliminary observation.

these problems be resolved by the unlikely organisational expansion of DG COMP, the Commission's competition authority. As a result, the incremental adjustments cannot accommodate the growing backlog of antitrust cases, since the 1990s in particular. DG COMP became a 'reactive' authority overloaded with administrative tasks, rather than a 'proactive' institution pursuing its own-initiatives against the most serious infringements.

2.1.2 The Possible Options of Reform

Consequently, a fundamental reform of the enforcement rules was deemed necessary. In fact, DG COMP initiated a series of minor modifications under the Council Regulation 17/62 regime. For example, the use of a Commission Notice helped to regulate the relationships between DG COMP, national courts, and national competition authorities. The adoption of *de minimis* rule, comfort letter, and BERs also contributed to the reduction of administrative workload.²⁷ However, these measures did not and cannot resolve the fundamental increase of administrative overload.

Facing the backlogs and the criticisms of its enforcement, DG COMP has explored several alternatives not involving the abandonment of Council Regulation 17/62. First, interpreting Article 81(1) as a 'rule of reason' would jeopardise the effect of Article 81(3). Second, decentralising the application of Article 81(3) in accordance with the centre of gravity principle would fail to reduce the volume of notification, but merely redistribute 'the total number of current and future cases between the Commission and national competition authorities' (European Commission, 1999b: 24). Third, decentralising the application of Article 81(3) on the basis of turnover threshold might lead to the possibility of forum-shopping, the renationalisation of competition policy, and the jeopardy of uniform application of Community Law. (European Commission, 1999b) Fourth, broadening the scope of Article 4(2) of Council

²⁷ 'Efforts to improve the situation have not been absent, but they have developed incrementally, as the Commission has introduced remedies to ease its workload, for example through block exemptions, notices on agreements of minor importance, and by setting cases informally using administrative letters or 'comfort letters'.' (Støle, 2006: 89)

Regulation 17/62 and simplifying procedural rules would still restrain DG COMP's capacity to refocus on its own-initiatives and on serious infringements. While effective in the short term, these alternatives seem unlikely to solve the core issue: administrative backlog.

Therefore, DG COMP, recognising this predicament, initiated the largest ever "modernisation" reform by the introduction of a White Paper in 1999. With a strong enforcement record achieved by Council Regulation 17/62, Council Regulation 1/2003 was implemented in 2004 and continued to draw attention to its performance and the resulting changes²⁸ in the competition regime.

2.2 Literature on the Competition Policy before the Modernisation Reform

The literature discussing the pre-modernisation period provides adequate information about the development of European competition policy. It mainly focuses on the enforcement, laid down by the Treaty. The impact of regulatory settings in Council Regulation 17/62 and the development of competition policy pillars, in particular the merger regime and the outlook of state aid control, are the key topics in the literature.²⁹ In addition, there is growing attention to the effectiveness of notification system and its impact on the competition regime, which leads to a concern with DG COMP's bureaucratic strength. In regard to the main research question of DG COMP's bureaucratic autonomy, the following review identifies the existence of

²⁸ As discussed in Chapter 1, three main changes of the modernisation reform are the focus of the research. 'Among the many important changes wrought by Council Regulation 1/2003 are the decentralization of responsibility for enforcing EU competition law from Brussels to Member States and the creation of the European Competition Network to encourage coordination and information-sharing among the 26 competition authorities in the EU.' (Ginsburg, 2005: 427) The enhanced power of inquiry is the third primary change to assist the competition authorities with better tools for detecting the most serious infringements.

²⁹ 'From the initial emphasis on restrictive practices in the 1960s, to monopoly policy in the 1970s, and state aid and merger control in the 1980s and 1990s, competition policy has continued to expand into new industrial sectors using well-established legal and administrative instruments whilst at the same time continuing to consolidate and extend the competition acquis through the accumulation of case law.' (Cini and McGowan, 1998:36)

bureaucratic autonomy for DG COMP in the Council Regulation 17/62 regime and the extensive manoeuvring on the road towards Council Regulation 1/2003.

2.2.1 The Enforcement of Council Regulation 17/62 and the Problems

The EC Treaty lays out specific objectives of competition policy in several Articles. As a result, 'the enforcement of the competition rules has been one of the most important instruments available to the Community for promoting economic integration' (Brittan, 1992: 9). In the procedural aspect of enforcement, the Commission has introduced a prior notification system into Council Regulation 17/62, which provided useful function and foundation in the early days of European competition regime.³⁰ Upholding the exclusive role of the Commission in the implementation, Council Regulation 17/62 has 'resulted in a low level of private enforcement of competition law rules and in complicated rules of interaction between national proceedings and investigations by the Commission' (Montag and Rosenfeld, 2003: 109). However, plenty of enforcement problems have arisen in recent years and attracted the attention of the competition epistemic community³¹.

First, the notification cases occupy most of DG COMP's limited organisational capacity. The heavy workload from notifications results in serious backlogs and impedes a proactive and efficient competition authority in the Community. (Cini and McGowan, 1998; European Commission, 1999b) 'A large number of agreements are therefore notified, and the Commission labours under a very heavy case load.' (Neven, Papandropoulos and Seabright, 1998: 165) Sir Leon Brittan (1992: 7), former Commissioner for competition, has given a vivid description of it: 'the effective application of competition policy is also limited by the scarcity of resources at our disposal.

³⁰ For example, the Commission issues the formal negative clearance in some pivotal cases for the purpose of establishing case law or clarifying its stance.

³¹ 'An epistemic community is a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge.' (Haas, quoted in Zito, 2001: 585)

There are only so many cartels we can investigate, so many decisions under Article 85 we can adopt each year and so many state-aid schemes we can review'. 'The Commission is forced to devote a large percentage of its resources to areas of little pay-off, and has too few resources left for areas of greatest pay-off.' (Fox, 2001: 125) As a result, fewer staff are available to deal with the most urgent and malevolent anti-competitive cases. (Türk, 2006)

Second, the notification system cannot reveal the most hazardous anti-competitive cases. 'The most serious infringements are not being detected quickly enough or often enough, and they are never notified in practice.' (Temple-Lang, 2000: 14) 'The Commission is never notified of these practices; they are hidden ever more ingeniously from the eyes of the competition authorities', says another former competition Commissioner Mario Monti (2001: 5). The logic is simple. Those notified cases tend to be at less risk of being assessed as a positive violation to Article 81 EC because 'the filing of a notification could draw attention to a transaction that might otherwise go unnoticed' (Forrester, 2001: 103) Therefore, 'firms naturally tend to notify agreements that are likely to be fairly "safe"' (Neven, Papandropoulos and Seabright, 1998: 115).

Third, enterprises sometimes decide to notify their cases because they believe that their cases have been under a preliminary investigation by DG COMP or under the attention from third parties. For example, 'when the Commission has started a procedure on its own initiative or if a complaint has been lodged, the suspected firms may then notify their agreement in order to reduce the possible fine' (Neven, Papandropoulos and Seabright, 1998: 129). In this context, the notification merely serves the purpose of getting a legal guarantee for the enterprise.

It is safe to say, as Komninos (2008: 56) did, that 'notification of usually innocuous agreements was not cost-effective, and created an excessive administrative workload and a reactive enforcement culture, and in any case

the more repugnant anti-competitive agreements were never notified to the Commission'. Therefore, the notification system could not propel enterprises to notify their cases in a voluntary and instant way as the original design³². 'Notifications are not an effective means of surveillance of the market.' (Chambu, 2000: 79)

Facing these procedural and administrative challenges, it was nevertheless unlikely that the limited resources for DG COMP could expand to resolve these problems, leaving the option of a radical reform more favourable. 'The Commission, it is argued, is a victim of its success — expanding responsibilities, an ever-increasing stream of complaints, and requests for clearance have all added to the workload of the EU authorities, but without an equivalent increase in staffing..... The solution — more staff — is blocked both by budgetary constraints and by the turf of sensitivities of other DGs.' (McGowan, 2000: 144) Therefore, the reform of the procedural aspect is deemed necessary. In fact, the Commission has noticed this problem for some time. Sir Leon Brittan's remark back in 1992 revealed this concern: '[Council] Regulation 17/62, which sets out the basic rules implementing Article 85 and 86, is now thirty years old. We are thus examining whether it needs to be modified to enable us to streamline procedures, particularly in simple cases, to give final, legally-binding and enforceable decisions within short deadlines' (Brittan, 1992: 109). The argument has been corresponded by many scholars. For example, 'in our view, the need for a change is urgent, and current Commission proposals, which in any case relate only to vertical restraints, go nowhere near far enough' (Neven, Papandropoulos and Seabright, 1998: 167). Such criticisms suggest that the modernisation reform is not a dramatic or surprising proposal but a deliberate response from the Commission after a long period of consultations, workshops, and discussions with firms and the epistemic community, and is consistent with the Commission's regular approach of gathering adequate support before acting. (Thatcher, 2005; Coen and Thatcher, 2008)

³² In the original design of Council Regulation 17/62, firms were advised to 'register their agreements or practices on a voluntary basis' (Cini and McGowan, 1998: 98).

2.2.2 The Existence of Bureaucratic Autonomy before the Modernisation Reform

The European competition regime is one of the most independent policy sectors in the EU. (Cini and McGowan, 1998; Mavroidis and Neven, 2001a; Komninou, 2008) As the Commission's enforcement authority, DG COMP enjoys exclusive competence in the competition enforcement. 'DG IV administers the Commission's competition (anti-trust, cartel and merger policies) and state aid policy. The legal bases for these policies give the DG IV officials a rare autonomy and discretion in the adoption of individual Commission decisions.' (Cini, 1995: 6) Thinking of the massive changes by the modernisation reform, only a capable and autonomous DG COMP is qualified to orchestrate this fundamental reform. In fact, the Treaty and Council Regulation 17/62 give DG COMP unprecedented autonomy to exercise. DG COMP has been familiar with the bureaucratic autonomy since the very beginning of European competition regime.

On the procedural aspect, DG COMP 'has complete discretion about the choice of the cases it will settle by an informal decision rather than a formal one. Its choice is ruled, inter alia, by the willingness to set legal principles by case law and to clarify particular points of law' (Neven, Papandropoulos and Seabright, 1998: 120). Likewise, Cini and McGowan's analysis of Council Regulation 17/62 has discovered that a certain level of bureaucratic autonomy for DG COMP is observed in the competition enforcement.

It was the procedural framework of Regulation 17 that provided the Competition Directorate-General with its most important attribute: autonomy. The capacity to act independently from the Council of Ministers was an effect of the powers vested in the Commission in this policy area. These allowed DGIV [DG COMP] scope to implement and enforce its policy without recourse to national constituencies. This autonomy has been paramount in differentiating DGIV [DG COMP] from other Commission DGs,

instilling in its officials the sense of difference that remains so central to their self-perception as ‘guardians’ of the public interest. (Cini and McGowan, 1998: 53)

The procedural autonomy for DG COMP correlates to the possibility of substantive change in the competition enforcement. In fact, DG COMP has established ‘a high degree of autonomy, helped by the prevalence of a liberal market doctrine, backed by an epistemic community of expert lawyers and economists’ (McGowan, 2000: 115). The prevailing liberalist perspective of competition rules and the extensive discussion of a paradigm shift by the competition epistemic community make the modernisation reform a plausible venue for DG COMP to advance its autonomy and to conduct a paradigm shift from the SCP paradigm to the Chicago School paradigm.

As a result, there is no special *ad hoc* periodical check on DG COMP’s enforcement activities, subject only to judicial reviews. There is only some non-statutory pressure from the Member States, coupled with internal dissidence within in the Commission, epistemic communities and private actors who argue that DG COMP should implement the competition law cautiously. Therefore, ‘competition policy offers a prime example of how European integration has been driven by a regulatory dynamic from a powerful and autonomous bureaucracy, utilizing a supranational legal order’ (McGowan, 2000: 116).

2.2.3 The Road to the Modernisation Reform

Council Regulation 17/62 provides a strong foundation of competition enforcement, given that there was no previous implementation rule for the competition policy and the fragile economy after the establishment of European Community. ‘National governments have accepted initiatives to expand EC regulation. As early as 1962, they passed Regulation 17 (Council 1962), whereby the Commission implemented competition law, including acting against anti-competitive agreements and abuse of dominant position

and granting exemptions under Article 81(3).’ (Thatcher, 2005: 317) Unlike other Community policies being enforced locally at the national level, Council Regulation 17/62 has largely consolidated the implementation of competition rules as a centralised system. This centralisation also confirms the unique and central role played by DG COMP, which holds ‘a *de facto*, and in some instances, notably the granting of individual exemptions under Article 81(3) EC, a *de jure* enforcement monopoly’ (Komninos, 2008: 25).

As previously noted, the problems of the notification system cannot be resolved without a radical shift of the core issue: notification. From the comfort letter and BERs to the recent Green Paper on vertical agreement, DG COMP has enacted various measures with a view to rescuing Council Regulation 17/62 and its enforcement monopoly of Article 81(3) EC. Furthermore, ‘four years before the publication of the White Paper, the then Commissioner Van Miert had argued that the conditions were not yet ripe for the elimination of the notification system; national competition authorities had not yet acquired sufficient experience, national competition law were not sufficiently harmonised, and national ‘exemption decisions’ would have to be horizontally recognised throughout Europe, which was politically difficult’ (Komninos, 2008: 40). Nevertheless, the serious backlogs in DG COMP and the inability of the notification system to detect serious infringements have had detrimental effects on the very existence of this enforcement system. Therefore, a determined consideration of the abolition of the notification system has been discussed internally in the Commission. (Cini and McGowan, 1998; Komninos, 2008) In fact, the White Paper on the modernisation reform has pledged to terminate the notification system and introduced a decentralised “directly applicable exception” system. ‘The removal of routine cases and greater decentralisation to national authorities would allow the Commission to tackle the more blatant examples of anti-competitive conduct.’ (McGowan, 2000: 145) Finally, the modernisation reform has been settled, representing the arrival of a new enforcement regime.

2.3 The Public Policy Literature on the Modernisation Reform

With regard to the public policy aspect, the literature on the modernisation reform has gradually branched into three perspectives: decentralisation, Commission dominance, and an alternative explanation of the regulatory aspect. In fact, the literature in the early days of modernisation reform attempted to interpret the reform, in line with the Commission's rationale, as a decentralisation of enforcement. Not until the arrival of Commission dominance perspective has there been a limited analysis to deconstruct the reform other than by interpreting it as decentralisation. The Commission dominance perspective proposes a different view that the modernisation process gives DG COMP a dominant role in the competition regime. Following the Commission dominance perspective, the regulatory perspective appears to use a different focus, highlighting the regulatory changes in the reform.

Three perspectives collectively facilitate the public policy studies on the modernisation reform and EU competition policy as a whole. A close correlation with the bureaucratic autonomy approach is seen in the following reviews, in terms of their interpretations of the modernised competition system and their distinctive arguments on specific issues.

2.3.1 The Decentralisation Explanation

This perspective is a straightforward approach, explaining the modernisation reform pursuant to the Commission's argument — the decentralisation of competition rules. It appeared in the days immediately after the Commission proposed the modernisation of competition rules. It is the first of the three primary explanations of the modernisation reform. This perspective is expected to stimulate the most discussion and criticism. The value of this literature is to provide a comprehensive and detailed understanding of the new enforcement regulation, with a focus on some specific areas, such as the functioning of ECN, the institutionalisation of Chief Competition

Economist (CCE), the application of Article 81 and 82, etc. Arguing that the reform is a decentralisation process, this perspective has close relevance to the autonomy change of DG COMP.

McGowan (2005) summarised the three factors leading up to the reform: the acknowledgement of growing problems for the centralised competition regime; the changing economic circumstances; and the increases in case load for DG COMP in the past 40 years. He argued that the centralised notification method ‘had effectively pushed DG COMP into reactive mode’ and proven to be ‘unworkable’. (McGowan, 2005: 994) Hannay (2003) also provided three similar reasons for the modernisation reform: the notification does not resolve the core problems for competition; the drafting of notification and the collection of necessary information result in heavy backlogs and improper use of scarce resources to both the undertakings and the Commission; and the reform is a response to the latest enlargement. Both authors examined the motives of reform in a similar stance to the Commission’s — that a ‘directly applicable exception’ system to the competition rules is inevitable in a Union with 27 Member States.

The decentralisation perspective perceives the reform as a process of modernisation and Europeanisation, as opposed to a move to possible re-nationalisation. Based on tangible empirical evidence, this perspective argues that in spite of the introduction of comfort letter³³, *de minimis* rule and the BERs, the centralised authorisation system in Council Regulation 17/62 has failed to accommodate the growing number of cases and the enlargement process, which necessitated the reform. The White Paper and the follow-up Commission Proposal expressly address this concern and support a new decentralised ‘directly applicable exception’ system.

³³ ‘Due to the administrative burden caused by an approval system requiring many contractual arrangements to be notified, for a long time the Commission has been unable to cope satisfactorily with the volume of notifications. As a consequence, undertakings have had to suffer lengthy delays before obtaining the negative clearance or exemption decision they require, and the Commission has been unable to produce sufficient numbers of individual decisions. To compensate for this shortcoming, the practice of issuing “comfort letters” was introduced, which, for a number of reasons, has never been a sufficient substitute for adopting a formal decision.’ (Montag and Rosenfeld, 2003: 109)

In this regard, ‘the EC has given up some of its “monopoly power” over Article 81(3): national authorities and judges could also give exemptions’ (Motta, 2007b: 33). ‘The new procedural framework of EC competition law forms a system of decentralised enforcement and parallel competences, where the European Commission shares its competence with the national authorities.’ (Cseres, 2007: 469) Thus, the establishment of ECN³⁴ and the institutionalisation of NCAs are the necessary steps to maintain the constellation of European competition regime. Such changes of competition enforcement are described as a decentralisation process. The bureaucratic autonomy of DG COMP is collaterally affected.

McGowan (2005) observed that the structure of NCAs has very much in common with the ‘cartel-like agency’ of DG COMP. ‘This assimilation of national models to the EU model greatly facilitates the operation of a genuine decentralised competition policy.’ (McGowan, 2005: 998) In this regard, the EU competition system has been replicated at the domestic level. ‘The national authorities are becoming *de facto* branches of the Commission.’ (McGowan, 2005: 1001) He concluded that the modernisation process would lead to a ‘federal system of competition regime’ with ‘the multi-level of consultancy’.

Apart from the decentralisation perspective, McGowan (2005) also attempted to open up another discussion to explain the reform through the view of Europeanisation. Arguing that the reform is ‘one of the best examples of actual Europeanisation’ (McGowan, 2005: 1002), he indicated that the new arrangement in the competition regime is consistent with a ‘bottom-up’ approach, and identified it as ‘construction’, one of the four dynamics in the Europeanisation literature. Nonetheless, to some scholars, the

³⁴ The establishment and structure of ECN are legitimated by Article 11 of Council Regulation 1/2003, ‘Joint Statement on the Functioning of the Network of Competition Authorities’ by all Member States, and the ‘Commission Notice on Cooperation within the Network’. Thus, the interaction between DG COMP and NCAs is a compulsory requirement and the necessary result of decentralisation.

Europeanisation literature has not been consolidated as a theoretical approach to explain the EU competition policy. (Börzel, 2003)

On the other hand, Hannay (2003: 4) had an early judgement that ‘the regulation merely enlarges the number of agencies and courts that can apply it’. Being a practitioner, he gave his attention to the possibility of forum-shopping and inconsistent implementation. ‘Complainants and leniency applicants are expected to bring their case to whatever authority they consider to be the best place to handle it. And such inconsistency interpretations would fracture the cohesive nature of EU competition law along national boundaries.’ (Hannay, 2003: 3) However, his concern with the allocation of cases was resolved later by the Commission Notices. (Wilks, 2005b)

Meanwhile, Türk’s (2006) article, *Modernisation of EC antitrust enforcement*, focused on the details of the allocation of cases and the exchange of information within the network. ‘The move from a centralised to a more decentralised system of parallel enforcement of Article 81 and 82 ECT allows the Commission to refocus its resources to deal with more serious infringements and permits the national authorities to participate fully in the application of these provisions. (Türk, 2006: 237) This is another decentralisation argument pursuant to the Commission’s official announcement on the purpose of modernisation reform. Moreover, Türk explained several conditions of the consultancy procedure parallel to the network paradigm. He had also provided some insights on the role of national courts and private actors, and explored the interactions and problems emerged as a result. Türk endorsed Riley’s argument (2003b) that the reform is a gradual process — less a revolutionary break and more an evolutionary development ‘towards a greater involvement of the national authorities in this field’ (Türk, 2006: 237). He highlighted the importance of the role of the ECN in ensuring uniform application and the capacity of DG COMP to manage the network coherently. He further believed that an economic approach would be applied to the enforcement of Article 81(3) EC frequently, which remains

independent from the political involvement. In his view, the paradigm shift is likely to happen.

The deficit of the decentralisation explanation stems mainly from its limited exploration of other possibilities for the modernisation reform and its failure to deliberately examine the Commission's willingness to reform. Its explanation of the reform as a decentralisation process fails to address the collateral changes to the actors in the regime, in particular the changing role of DG COMP. Such problems may have resulted from a shortage of enforcement records, as the decentralisation explanation appeared shortly after the emergence of modernisation reform. However, this perspective indeed stimulates a series of public policy studies on the modernisation issue. It has a strong impact on the bureaucratic autonomy approach to the modernisation reform.

2.3.2 The Commission Dominance Explanation

In spite of McGowan's direct support for the decentralisation explanation, his view of the "federal system of competition regimes" and his acknowledgement of the Commission's prominent role in the decentralised regime have inspired the emergence of the second perspective on the modernisation reform — the Commission dominance perspective. McGowan (2005: 1001) raised the question that 'it could also be argued that this process of decentralisation is in effect a very clever attempt by the Commission to engineer ever greater centralization of competition decision-making'.

The Commission dominance was initially introduced by Alan Riley in his two-part articles in the *European Competition Law Review* in 2003. Later, Stephen Wilks successfully incorporated this perspective into public policy studies to stimulate a series of debates over the reform. He acknowledged that the Commission gives up 'the exclusive power to apply Article 81 and 82, which comprise the core prohibitions on restrictive practices and abuse of

dominance’ (Wilks, 2007: 440). Nonetheless, this perspective implies that if the reform is a decentralisation of enforcement rules and a correction to the efficiency problems, then the inexperienced NCAs would only result in further instability and confusion in competition enforcement. The establishment of ECN is perceived as merely a means allowing DG COMP to extend its influence and maintain its autonomy. Thus, the Commission dominance perspective regards the whole package of reform as “an audacious coup” proposed by the experienced Commission. (Wilks, 2005a; Kassim and Wright, 2007) Finally, Council Regulation 1/2003 ‘has institutionalised the prestige of the European Commission as the most important enforcement agency’ (van den Bergh and Camesasca, 2006: 443).

In his prominent article, *Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?*, Wilks (2005b) offered his insight by examining the modernisation reform under the principal-agent theory. He reviewed the decentralisation rationale and challenged whether there should be further rationale behind the face value of reform pledged by the ‘non-majoritarian’³⁵ Commission. He investigated the White Paper and recent dossier, where he discovered that the Commission had transformed its wording from “decentralisation” to “cooperation and coordination”. This observation led to his main argument: that the Commission dominance phenomenon has occurred and the Commission has strengthened its influence in the new enforcement system. ‘Rather than “decentralising” European competition policy, [the modernisation reform] has “Europeanised” the national competition regimes’. (Wilks, 2005b: 437) This transcending phenomenon is strong evidence that DG COMP has exercised its autonomy.

He further elaborated Giandomenico Majone’s idea (1998, 2001) that, as the policy entrepreneur, DG COMP has become the “trustee” of the

³⁵ Non-majoritarian institutions (NMIs) are described as ‘those governmental entities that (a) possess and exercise some grant of specialised public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials’ (Thatcher and Stone Sweet, 2002: 2).

competition regime. He summarised three contributions of the reform: the decentralised application of competition rules, the modernisation of Commission resources, and an increasing use of the economic approach to merger cases.

In the competence aspect, Wilks (2005b) argued that the Commission concentrated its power through four effects: the marginalisation and substitution of national law by EU law, the competence to intervene in the proceedings of NCAs, the assumption of the dominant role in the ECN, and the enhanced power of inspection and fining. Thus, 'the European Commission's Directorate General for Competition (DG COMP) has enjoyed such a unique degree of independence that it can be analysed as a supranational agency' (Wilks, 2007: 438).

In the institutional settings, the establishment of ECN was the main focus of Wilks's concern. However, his depiction of the ECN generally followed the Commission's statement, in particular the problems of inadequate resources and forum-shopping. Thus, the Commission dominance perspective has not developed a sound explanation for the institutional changes of modernisation reform.

Nevertheless, Wilks (2005b, 2007) highlighted two main problems in the Commission dominance interpretation, namely the failure to explain the tension between the principal and the agent, and the neglect of the excessive reliance on epistemic community. He tried to explore the dominance argument through both the principal-agent conception and the sociological-institutionalist perspective. He talked about the resemblance of ECN to the European Central Bank (ECB) networks and wonders whether the ECN could be explained through the policy-network concept. Nevertheless, Wilks failed to provide further explanations of his sociological-institutionalist approach and policy-network ideas concerning the modernisation reform.

In short, the primary deficit of the Commission dominance perspective is the lack of practical assessment in its arguments. Without any empirical study, it is uncertain whether there has been a case of Commission dominance in the modernised competition system. Moreover, this perspective requires a clear explanation of the implications of Commission dominance. In other words, it should provide examples of accessible fields which are dominated by the Commission. For example, the development of ECN is a clear illustration of the Commission dominance perspective. These deficiencies could be fixed by some relevant research.

2.3.3 An Alternative Explanation: the Regulatory Perspective

An alternative perspective, known as the regulatory perspective, contests that the dominance argument ignores the complexity of the reform impetus and results in a restrictive impact on other interpretations. The third approach offers 'an alternative perspective from a regulatory processes perspective, bringing back in the distinctive features of decision-making in competition policy that were recognised in earlier scholarship, but have been overlooked in more recent analyses' (Kassim and Wright, 2009: 741).

First, the regulatory perspective builds up its argument by drawing attention to the internal decision-making process in the Commission, *inter alia*, and questioning whether the Commission initiated the reform spontaneously or under external pressure. This perspective directs attention to the internal divisions and processes. It argues that there were 'divergent views within the Commission' (Kassim and Wright, 2009: 748) and 'the Commission was internally differentiated' (Kassim and Wright, 2007: 1).

Second, this approach then presumes that the reform is very likely to be a negotiated result, which is 'shaped by classic techniques of regulatory conflict management' (Kassim and Wright, 2009: 738). The Commission is situated in a multilateral community of competition regimes. Therefore, studies on the modernisation reform should also take the external dimension into

consideration. In McGowan's view, long-established competition authorities would intensify the fragmentation of competition rules and the modernisation reform is 'far from being automatic or a foregone conclusion' (McGowan, 2005: 995). For example, he believed that the Bundeskartellamt, Germany's Federal Cartel Office, took a resistant attitude in discussions about the change of notification system but failed to cluster a blocking minority in the Council to oppose the reform proposal. Likewise, from a similar perspective, the British Office of Fair Trading (OFT) was anxious about the varied capacity of different NCAs to apply Article 81 and 82 EC and the problem of forum-shopping. With these in mind, the arrival of Council Regulation 1/2003 and the process of modernisation reform have certainly been through the negotiation process.

Kassim and Wright (2007) brought up four propositions from the Commission dominance perspective, namely, the extension of authority, the pursuit of individual interests, the unilateral capacity to negotiate, and the internal homogeneity. They challenged with four counter propositions: the institutional pride, the acceptance of external impetus, the limited competence in a multilateral system, and the internal differentiation. In the first proposition, they challenged that the Commission dominance approach discounts 'the possibility that the Commission may be concerned principally to ensure that the provisions of the Treaty are respected or that the general interests of the European Union are advanced' (Kassim and Wright, 2007: 11) and disregards the external factors in the reform. In the second proposition, they contested that the expansion of competence is a vague description which cannot guarantee a substantial proposition for the power extension argument. They further believed that the third proposition is 'the most self-evidently problematic of the four propositions' (Kassim and Wright, 2007: 12), since the policy-making process in the EU is very interdependent. As for the fourth proposition, Kassim and Wright believed that the Commission is a 'multi-organisation'; thus the internal confrontation and cooperation are ubiquitous in both vertical and horizontal dimensions.

While vigorously challenging the Commission dominance perspective, this regulatory explanation fails by far to provide a comprehensive description of the modernisation reform as a whole. It gives only fragmented arguments, such as the internal dimension of the Commission and the external impacts of the policy-making process. This perspective requires further integration before it can provide a sound and complete explanation.

2.4 The Economic Literature on the Competition Policy

One of the strongest inputs to the EC competition regime by the economic studies is the paradigm shift from the structure conduct performance (SCP) paradigm to the so-called Chicago School paradigm, in particular, regarding vertical agreements and joint dominance³⁶. This shift has strongly affected the essence of modernisation reform and the enforcement of anti-competitive cases.

2.4.1 The Origin and Saliency of the SCP Paradigm

Deriving from the neo-classic economic theory, the structure conduct performance (SCP) paradigm, a.k.a. the Harvard School, prevailed between 1940-1960³⁷. It met 'the practical needs of bureaucrats, legislators, and judges by providing simple decision rules' (Eisner and Meier, 1990: 272). 'In the United States, the Harvard analysis became the cornerstone of competition policy in the 1960s and remained so until the neoclassical and neoinstitutional approaches began to win the upper hand in the mid

³⁶ This refers to the effect that a merger does not constitute a threat to the market power from a single firm but can have an impact on the whole market by producing a favourable condition for collusion. Sometimes, it is also called pro-collusion effect or coordinated effect.

³⁷ The SCP paradigm, a.k.a. the Harvard School paradigm, was devised by famous scholars from Harvard University, namely, Edward S. Mason, Joe S. Bain, Carl Kaysen, Donald F. Turner, etc. It tries to be 'a general theory that mapped common elements in the market structure of any industry into a performance indicator of that sector' (van Cayseele and van den Bergh, 1999: 472).

1970s.³⁸ (van Cayseele and van den Bergh, 1999: 474) Holding a similar perspective to the ordoliberal thinking³⁹, the SCP paradigm presumes a defined market structure of industry in which enterprises operate and perform which can produce benefits for customers. This structure would have a direct impact on the conduct of individual firms and the overall performance and profit of that industry. That is to say, the performance of the industry depends upon the conduct of its firms, which in turn depends on the market structure. 'By observing the structure of a market, inferences can be drawn as to how firms conduct themselves, and this allows one to evaluate the market's economic performance.' (Monti, 2007: 57)

In the SCP paradigm, certain types of market structure could be identified as the cause of anti-competitive conduct. In particular, it shows discontent with vertical restraint cases and 'high degrees of concentration, especially if they are not the result of scale economies but of barriers to entry' (van Cayseele and van den Bergh, 1999: 474). This is because the SCP paradigm believes that 'firms in highly concentrated markets will more likely collude and this collusive behaviour leads to higher prices and higher profits, as well as to allocative inefficiencies' (Cseres, 2005: 44). In this context, 'a monopoly will be prohibited even if the monopoly is socially desirable, because it leads to efficiencies (productive efficiency)' (Komninou, 2008: 44). Therefore, the Harvard School welcomes the intervention of government to scrutinise business activities, to readjust the market structure and performance, and to encourage competitiveness.

³⁸ In the 1968 Merger Guidelines of the American Department of Justice it was stated that an analysis of market structure was fully adequate for showing that the effect of a merger, as spelled out in Section 7 of the Clayton Act, 'may be substantially to lessen competition, or to tend to create a monopoly'. The Department announced that its merger policy would focus on market structure 'because the conduct of the individual firms in a market tends to be controlled by the structure of that market'. (van Cayseele and van den Bergh, 1999: 474)

³⁹ Ordoliberalist believes the need of state intervention to maintain the liberal competition in the market. It is originated from the Freiburg School scholars in 1930s. In this regard, the 'ordoliberal thinking on the application of competition law is based on notions of fairness and that firms with market power should behave as if there were effective competition. (Rose and Ngwe, 2007: 8).

2.4.2 The Emergence of the Chicago School: towards an Efficiency-based Approach

However, the SCP paradigm is methodologically problematic under scrutiny in that its studies are based on empirical evidence and narrow interpretations of the market. ‘The Harvard School is criticised for lack of theory. Chicago economists seek explanations for practices observed in real markets which conform to the foundations of economic theory.’ (van den Bergh and van Cayseele, 2001: 42) The emergence of the Chicago School results from the inherent deficit of the SCP paradigm and the core concern with the previously neglected issues of efficiency, profit, and welfare. ‘The Chicago School tradition sought to constrain antitrust law—chiefly by ridiculing its excesses—but accepted antitrust enforcement as an underlying background condition of market activity.’ (Priest, 2009: 8) As this research aims to identify the modernisation reform with the debate on a paradigm shift in the economic assessment, a comparative discussion of the paradigm shift is necessary to understand the essential arguments of the Chicago School, as shown in Table 2.1.

Table 2.1 The Comparison of Harvard School and Chicago School

	Harvard School	Chicago School
Goals of antitrust	multiple: distribution of equity, economic stability, optimal allocation, workable competition	consumer welfare
Research method	- empirical investigation and case studies - lack of economic theory	- general economic theories - neo-classical price theory
Concept of measurement	models of imperfect competition	productive and allocative efficiency
Competition approach	structure, conduct, performance	efficiency, rationality

	Harvard School	Chicago School
Competition policy	- Interventionist - market regulation	- self-correcting market - deregulation
Vertical restraints	illegal	<i>per se</i> legal free-riding problem
Mergers	'big is bad': concentration facilitates collusion	'big is good': mergers are the result of efficiency

(based on Cseres (2005) and Motta (2007b))

First, the fundamental argument of the Chicago School is that competition promotes efficiency and brings positive effects on the consumer welfare, as opposed to the SCP perspective, which incorporates multiple goals of equal distribution, economic stability, optimal allocation, workable competition, etc. The strong support for the idea of an efficiency-based approach differentiates the Chicago School paradigm from the SCP paradigm. Second, the Chicago School paradigm is mainly derived from the neo-classical price theory. (Eisner and Meier, 1990; van Cayseele and van den Bergh, 1999; Cseres, 2005) Therefore, the promotion of efficiency, the economic interests of producers and consumers, and the efficiency of competitive markets, are the main themes in the Chicago school studies. (Cseres, 2005) Third, while the SCP paradigm upholds the government intervention and the need for regulation, the Chicago School believes that the self-correcting function of the market will ensure the competition and openness of the market. The Chicago School scholars believe in 'the superiority of the market to political allocation of resources' (Priest, 2009: 2). From the Chicago School viewpoint, government interventions cause unnecessary inefficiencies and reduce the welfare.⁴⁰ 'Concentration mostly will be the result of efficiency, hence if antitrust authorities interfere with an existing market structure, they are likely to cause inefficiencies, and reduce rather than enhance welfare.' (van Cayseele and van den Bergh, 1999: 475) 'Interference with existing market structures may lead to inefficiencies and the reduction of overall

⁴⁰ The Chicago School strongly oppose any form of governmental intervention, notably when 'judicial interventions generally have no coherent analytical basis' (Priest, 2009: 2).

welfare.’ (Cseres, 2005: 46) Therefore, the Chicago School suggests that a certain level of deregulation tends to enhance the competitiveness and efficiency of the market and the total welfare⁴¹.

In the competition enforcement, the view of Chicago School is fundamentally different from the SCP paradigm, in particular, the vertical agreements and mergers. ‘Vertical and conglomerate mergers, resale price maintenance, vertical restrictions, and other conduct that was often viewed as anticompetitive under the older antitrust regime [are] given pro-competitive and efficiency interpretations.’ (Ghosal, 2011: 736)

First, in contrast to the endorsement of *per se* illegal rule by the Harvard School on vertical agreements and mergers, ‘the most far-reaching proposal of Chicago scholars was to introduce “*per se* legality” for restricted distribution’ (Posner, quoted in van Cayseele and van den Bergh, 1999: 487). In fact, the Chicago School perceives that ‘vertical agreements are aimed at the enhancement of efficiency in the organisation of production and distribution, so they promote competition and welfare’ (Cseres, 2005: 52). Vertical restraints may stimulate the incentives for further investment in the service and quality of products that increase the total welfare⁴² and efficiency. Therefore, vertical agreements are regarded as *per se* legal in the eyes of Chicago School economists. ‘In the 14 years following the abandonment of the *per se* rule against non-price vertical restraints, federal courts ruled for the defendants in 41 of the 45 reported cases addressing the reasonableness of non-price vertical restraints.’ (Ginsberg, 2005: 438)

⁴¹ ‘Total welfare is the combined welfare of the consumer and producer, that is, consumer surplus plus producers’ gross profit on the product. This total welfare standard, in line with the Chicago school, treats the distribution of wealth between consumers and producers neutrally.’ (Kalbfleisch, 2011: 111)

⁴² ‘If efficiency gains are large enough, it will reduce sales price so as to attract new consumers and increase its market share. As a result, market prices will decrease and both consumer and total welfare will increase.’ (Motta, 2007b: 273) Ginsberg (2005) also criticised that the the *per se* illegal rule of SCP paradigm ‘had almost certainly penalized businesses for engaging in practices that were procompetitive’ (Ginsberg, 2005: 438)

Second, merger cases with more efficiency and innovation are welcomed by the Chicago School.⁴³ (Sidak and Teece, 2009) 'It is well established in the economic literature that efficiency gains might offset the enhanced market power of merging firms and result in higher welfare.' (Motta, 2007b: 273) From the Chicago School perspective, merger cases are applicable in the competition assessment since they are the favourable option⁴⁴ to bring about better efficiency and welfare for customers.

The impact of Chicago School successfully shifts the focus of competition enforcement 'to areas of clearer harm to welfare such as price-fixing and horizontal mergers in concentrated markets' (Ghosal, 2011: 736). In other words, price-fixing cases and horizontal mergers are in the eyes of Chicago School scholars the most serious anti-competitive activities. The change denotes the arrival of a paradigm shift from the SCP paradigm to the Chicago School paradigm in the antitrust enforcement.

2.4.3 A Comparative Analysis of the Paradigm Shift in the U.S. and the EU

After reviewing the essential argument of both the SCP and Chicago School paradigm, it is time to rethink the development of the competition regime in the EU by means of a comparison with the U.S. There is a fundamental difference between the U.S. and the EU: the U.S. is itself a federal state, whilst the *sui generis* EU still strives for the market integration and economic prosperity. 'The main goal of European competition law has always been the promotion of market integration. A similar goal is absent in American antitrust law, since the latter rules came into being when a common market was already established.' (van Cayseele and van den Bergh, 1999: 484) This difference also differentiates the development of competition regimes respectively in terms of policy-making and enforcement. In the policy sectors,

⁴³ The Chicago School welcomes innovation as the determinant of market structure. Rather than being the dependent variable of market structure, innovation shapes market structure. (Sidak and Teece, 2009)

⁴⁴ It is generally accepted that efficiency arguments should be accepted only as long as costs savings achieved by the merger could not be achieved otherwise (that is, they should be merger-specific). (Motta, 2007b: 274)

the federalised U.S. does not have to regulate the “state aids”, which in the EU have contributed many “national champions” in concentrated industries and public utilities. Likewise, the assessment of anti-competitive cases in the EU has different priorities. In the early 1990s, ‘the “Chicago School” approach currently in favour in the USA is not directly relevant to EC competition policy. Chicago [School] does not need to worry about creating a single market. Rather, it presupposes the existence of an integrated market’ (Brittan, 1992: 3). Therefore, under the priority of achieving market integration, the SCP paradigm has been the prevailing approach since the implementation of Council Regulation 17/62. The decisions and judgements are mostly formalistic and hardly ever seen as an efficiency-based approach. Regarding the enforcement of Council Regulation 17/62 and the prevalence of SCP perspective, it is fair to say that ‘European competition law is at the same stage of development as American antitrust law was in the 1960s’ (van Cayseele and van den Bergh, 1999: 484). Therefore, we can witness a remarkable difference from the anti-competitive assessment in the EU, in particular, the pricing, vertical restraints, and merger cases, after the adjustment of the mindset in the U.S.

In the 1970s, the SCP paradigm was challenged and largely replaced by the Chicago School in the U.S.⁴⁵ This paradigm shift arrived relatively late on the other side of the Atlantic. But with more than 40 years of competition enforcement and the success of market integration, the EC competition regime is now ready to endorse an efficiency-based approach on the ground of Chicago School, which is closer to the appearance of a single market, and

⁴⁵ The Chicago School challenge to the SCP paradigm began as early as in the 1950s when Aaron Director and Ronald Coase had published and co-edited a series of papers in the *Journal of Law & Economics*. ‘Director was one of the founding members (along with Milton Friedman, Frank Knight, Ludwig von Mises, and George Stigler, among others) of the Mont Pelerin Society, organized by Freidrich Hayek in 1946. The Mont Pelerin Society was, and to some extent still is, dedicated to the proposition that political interference with market activities is harmful to freedom, though the Society avoided a purely libertarian approach, and to broader individual and societal goals. Coase was not present at the first meeting of the Society but became a member two years later, in 1948, and at some later point, a Life Member.’ (Priest, 2009: 2) Students of Aaron Director include Robert Bork, Frank Easterbrook and Richard Posner, who are also influential in the paradigm shift towards the Chicago School thinking.

contributes to the overall quality of economic assessment in the Commission decisions and court rulings. 'The modernisation of the enforcement of EC competition law has, in its widest sense, brought about a shift from a form-based approach to an effects-based approach.' (Rose and Ngwe, 2007: 9)

2.4.4 The Paradigm Shift and the Modernisation Reform

The above discussions suggest that the paradigm shift propels (1) the substantive change in assessment of the vertical agreements and mergers and (2) the necessary procedural change in the enforcement. They are the main changes in the modernisation process by and large. (Cseres, 2005) Therefore, the modernisation reform largely corresponds to the paradigm shift from the SCP paradigm to the Chicago School paradigm.

First, evidence can be found on the vertical agreements and merger cases, the main divergence between the Harvard and Chicago School. 'The treatment of vertical agreements under a more economic-based approach is inextricably connected with the modernisation drive.' (Komninos, 2008: 41) In addition, 'the increased importance of economic analysis in the interpretation of substantive EC competition law has clearly affected the traditional position of lawyers in the public enforcement of EC competition law. Instead, the contribution of economists has grown in importance, in particular in the area of merger control. The same will apply progressively to the application of Article 82, provided the more effect-oriented interpretation of the notion of abuse is approved by the Courts in Luxembourg.' (Ehlermann, 2008: 5)

Second, the procedural change of enforcement also corresponds to the direction towards the efficiency-based economic approach. 'The passage from a legalistic to a more economic approach necessitated a radical overhaul of the procedural rules, moving from notification and exemption to a system of legal exception and self-assessment.' (Komninos, 2008: 41) Similarly, the decentralised enforcement requires a consistent, clear and comprehensive economic assessment 'to provide clear guidelines for

compliance on the basis of legal advice and sufficiently flexible to accommodate the emerging corporate actions and strategies in the new Europe' (McNutt, 2000: 50). Consequently, there would be certain degrees of organisational and personnel change in the competition authority to reflect the needs for more economic-based assessments.⁴⁶ Therefore, the modernisation reform on procedural matters, notably the change from a prior notification system to a directly applicable exception system, is mainly in line with this paradigm shift.

In sum, recent developments in the European competition regime have displayed a change towards the consistency of enforcement, the pro-active detection of infringement, the harmonisation of competition rules in Member States, and the efficiency of case allocation and handling. 'Greater reliance on decisions rules based on economic effect would ensure greater consistency.' (McGowan, 2000: 145). These pursuits require further economic explanation to construct a good competition regime that holds effective deterrents of cartels, effective removals of barriers to entrepreneurship, sophisticated merger reviews and avoidance of waste and harm in all other areas. (Bishop, 2000)

2.5 The Legal Literature on the Competition Policy

Legal studies of the modernisation reform tend to welcome the initiative of decentralisation and the abolition of notification. Apart from the focus on the operational side of NCAs and national courts to apply Article 81(3) EC, legal experts pay attention to correlated issues, such as the harmonisation of discrepant enforcement among different competition authorities, the capacity of national courts, the prospect of further private enforcement, the exchange of information between authorities, the clarification of detailed changes in the power of inspection, etc. They try to identify the problems in the

⁴⁶ In the U.S., the Economic Policy Office (EPO) was established within the Antitrust Division of DoJ in 1972, along with the procedural change that each case would be assigned with an economist to provide independent economic analysis at the initial stage. Likewise, the Chief Competition Economist (CCE) and the Competition Economist Team (CET) were established within DG COMP during the modernisation reform.

modernisation process and to provide tangible solutions. In other words, the literature in legal studies is more practical and technical, rather than challenging or proposing a grand interpretation of the modernisation reform.

First, legal studies mostly welcome the decentralisation of Article 81(3) EC enforcement. There are plenty of factors contributing to this decentralisation. For example, the decentralisation is motivated by 'the need to expand the resources utilised to enforce Community rules, given the growing difficulties encountered by the Commission, in terms of resources, in carrying out the extensive caseload resulting from the notification system' (Tesauro, 2000: 9). After 40 years of enforcement, the conditions for decentralisation are mature. 'There is now a large body of case-law of the Community courts and many decisions of the Commission so that the legal principles which national courts and competition authorities should apply are reasonably clear.' (Temple-Lang, 2000: 13) Member States have also established competent competition authorities to implement national competition law and decentralised European competition law.

Second, the praise of decentralisation is accompanied with the advantage deriving from the cease of notification. To a large extent, such change has both advantages and disadvantages. 'The most important benefits of the new system are reduced costs and delays for industry. There would be no unnecessary notifications, few multiple procedures, and no waiting for the Commission's reaction. Unnecessary differences between national laws will be reduced, and national authorities will more and more apply either Community law or national competition laws based on Community law.' (Temple-Lang, 2000: 28) Nevertheless, 'the undertakings would have to make their own assessment of the compatibility with Community law of their restrictive practices, in the light of course of the legislation in force and the relevant case-law' (Tesauro, 2000: 10). They also have to ascertain that their agreement can survive 'an attack by a regulator or other third party during the life of the arrangements or even after they are concluded' (Lomas and Long, 2004: 2). There are also benefits for the Commission to relieve its backlog of

notification and to refocus on own-initiative cases, in exchange for its exclusive enforcement of Article 81(3) EC and the interpretation of competition rules. Therefore, 'the new system will mean substantially increased responsibility for lawyers and companies. Lawyers will have to advise whether draft agreements are valid and lawful, not merely whether they should be notified' (Temple-Lang, 2000: 28).

Third, legal studies also recognise the Commission's dominance. 'The reform would in any case recognise the Commission as having a prominent role in shaping the Community competition policy.' (Tesauro, 2000: 10) As discussed earlier, the Commission dominance perspective is first argued by Allen Riley in his two-part article. Legal experts believe that the role of the Commission would be strengthened after the modernisation reform. 'The Commission is now the intellectual leader and supreme enforcer of the competition rules in Europe, and it is not an overstatement to say that it leads in the formation of 'competition culture'.' (Komninos, 2008: 57)

Fourth, Komninos also raised the attention to the private enforcement of competition law. In the foreword to Komninos's recent book, Ehlermann argued that private enforcement has several advantages: the preservation of competition as a process beneficial to the competitiveness of European economy; the contribution to the overall enforcement; and the economical and political desirability of creating a favourable legal environment. (Ehlermann, 2008) Ehlermann believed that private enforcement would create a new type of competition bar for lawyers specialising in private litigation. Komninos (2008) further emphasised that the modernisation reform and the advent of Council Regulation 1/2003 have offered the appropriate environment and motive for the private enforcement by enterprises.

The brief review of legal studies confirms the favourable support for the abolition of notification, the decentralisation of enforcement, and the dominant role of DG COMP in the modernised competition regime. The legal literature tends to focus on the technical discussion and the applicability of

new rules. These details are helpful in identifying and constructing core research questions on the bureaucratic autonomy of DG COMP, the Commission's competition authority.

2.6 Discussion: the Limitation of Existing Literature and the Link to this Research

From the above exploration, we have seen the regulatory and implementing salience of the European competition regime. The pre-modernisation literature confirms the existence of bureaucratic autonomy in the competition regime and the need to reform in the notification system. Three perspectives from public policy studies provide a non-exhaustive understanding of the modernisation process and their correlation with the bureaucratic autonomy. The economic literature provides a detailed comprehension of the paradigm shift from the SCP to the Chicago School. The substantive change in the modernisation reform follows the debate on the paradigm shift and provides DG COMP the room for manoeuvring its autonomy. The legal literature recognises the problems of notification system, the dominance of DG COMP in the modernised regime, and the prospect of private enforcement. The extensive review of different perspectives and disciplines is helpful to acknowledge the research question on the autonomy change of DG COMP. Nevertheless, there are still deficits and limits in the existing literature for this research to resolve.

First, the decentralisation explanation appears right after the launch of modernisation reform. Generally speaking, it agrees with the Commission's explicit claim that the modernisation reform is a decentralisation process distributing the responsibility of enforcement among multiple enforcers, in particular, inviting NCAs to apply European competition rules. The most important value of this perspective is that it identifies the emergence of a federal structure consisting of multiple competition authorities in the EC jurisdiction. It also raises concerns with the functioning of ECN, the problem of forum-shopping, the allocation of cases, and the stringent need for

information exchange. Its existence fills the vacuum of public policy studies on the modernisation reform and stimulates other public policy perspectives to challenge its explanation.

However, this perspective fails to address the relevant changes in the new enforcement system, such as the role of DG COMP, the interactions among different enforcement authorities, and the possible solutions to the inconsistent implementation. Its support for the decentralisation explanation does not incorporate a deliberate examination of the Commission's willingness to reform. Furthermore, the enforcement records of the modernised competition regime since 2004 hardly follow the track outlined by the decentralisation explanation. For example, the legal advancement of ECN Model Leniency Programme and the growing international participation are some incidents beyond the scope of the decentralisation explanation. Therefore, this perspective requires some modification and refinement of its main arguments.

Focusing on the role of DG COMP, this research tries to fill in the aforementioned gaps in the decentralisation explanation. The study on the bureaucratic autonomy of DG COMP gives the answer to some key issues raised by the decentralisation explanation. For example, does the administrative decentralisation reduce the bureaucratic autonomy of DG COMP? Likewise, the structural resemblance between NCAs and DG COMP, outlined by the decentralisation explanation, should be further explained by the bureaucratic autonomy approach in this research. The decentralisation perspective's concern with the issues of forum-shopping and inconsistent application is further addressed in our study of ECN. Therefore, the decentralisation explanation has a close link with this research, notably in the network relationship of DG COMP.

The second explanation, the Commission dominance perspective, competes with the first perspective by stating an opposite perception of the modernisation reform. This perspective is seen in both legal and public policy

studies. It argues that the reform is actually an 'audacious coup' (Wilks, 2005b) by the Commission to increase its dominance in the competition regime. In this context, the creation of a competition network is in the interests of the Commission. It identifies that four areas of the Commission's competence have been increased, namely, the inspection and periodical penalty competence, the overriding authority to intervene in NCA proceedings, etc. This perspective anticipates that the Commission would become the trustee of the competition regime, an implication of the non-majoritarian institution (NMI).⁴⁷ In fact, the decentralisation and Commission dominance perspectives are both taking the positivist approach to explain the impact of modernisation reform.

The major problem with the Commission dominance perspective is the lack of practical assessment of its main arguments. There is no empirical study based on this perspective that practically assesses whether a Commission dominance case in the modernised regime exists. In addition, this perspective requires a clear explanation of the implications of Commission dominance. It needs to identify accessible areas that are dominated by the Commission and its degree of dominance. For example, the ECN may be an important case to test the degree of dominance by the Commission. These deficiencies put severe pressure on the Commission dominance explanation.

The Commission dominance approach emphasises the advantage gained by the Commission. To some extent, this research shares the same rationale in seeking the actual autonomy change of DG COMP, the Commission's competition authority. The Commission dominance explanation is particularly helpful in the analysis of the ECN and the identification of more economic thinking in the competition enforcement. In fact, this study takes a further step to practically assess the role of DG COMP in the regime, which is the most needed empirical research among the public policy studies towards the

⁴⁷ Egan (1998: 485) believed that the advantages of NMI are to 'provide an important safeguard against national and sectoral factionalism.....to avoid the swings of public opinion, and to insulate agencies from interest group pressures'.

modernisation reform. Thus, this in-depth investigation complements the above mentioned deficits in the Commission dominance perspective.

The third perspective, the regulatory explanation, pays more attention to the policy-making process to examine the underlying rationale of reform. It criticises the previous two competing arguments for their narrow focus on the impact of reform alone and neglecting the internal divergence within the Commission during the policy-making process. It perceives that the Commission is not a single, unilateral voice. Therefore, the internal dimension of the Commission should be considered as another factor in the policy-making process of the modernisation reform. The reform should be a negotiated outcome after several stages of consultation. Building on the criticism of previous perspectives, this alternative view requires further integration to propose a comprehensive, independent explanation on the modernisation reform, as opposed to the current fragmented interpretations.

The regulatory perspective discusses the policy-making game and puts its focus on the internal divergence of the Commission and the relevant decision-making process. As this research focuses on DG COMP's autonomy change, the regulatory perspective is less relevant than that of the previous two perspectives. Nevertheless, some of our discussions on the cooperation with other DGs and the staff mobility are still related to the regulatory perspective.

Generally speaking, different perspectives provide varied viewpoints to collectively strengthen the scope of this research on the modernisation reform. These three perspectives are still in their early stages of their development, which require more testing and critical assessments. Nonetheless, 'there has been a tendency to see competition as enjoying a higher priority in the hierarchy of policies so that it is almost a "meta-policy" (Wilks, 2007: 454). Through the literature review, the salience of competition policy and three challenging perspectives has been clarified, helping to generate the research question. Therefore, this research does not

aim to reject these three perspectives completely, but tries to provide an empirical analysis with a strong argument on the autonomy change of DG COMP, which may be complementary to their arguments.

Despite the divergent views on the modernisation reform, three things are certain. First, 'European competition policy is entering a new phase — one of multi-level regulation, characterised by a shared agenda between national and European authorities' (McGowan, 2000: 145). The role of DG COMP is even more decisive in ensuring the consistent enforcement. The relationship between DG COMP and NCAs, European and national courts should be further studied. Second, 'the so-called modernisation of European competition law has consolidated this system of centralised substantive rules and decentralised enforcement with respect to Article 81 and 82 EC' (van den Bergh and Camesasca, 2006: 404). This is the best explanation of the new competition regime. Third, according to one DG COMP official, 'history has shown that Commission decisions have a strong precedent value beyond the individual case involved. Combined with the existing case law built up over 40 years, the power of direct enforcement by the Commission will play a major role in the maintenance of a coherent application of the rules.' (Paulis, 2001: 406) This remark confirms the leading role of DG COMP in the modernised competition enforcement system.

Chapter 3 – Theory and Methodology

Having identified the deficiencies of the present modernisation literature and the main objectives of this research, we now discuss the theoretical basis upholding the research topic and the method to be used here. Focusing on the autonomy change of DG COMP, this research draws on three theoretical approaches: the principal-agent theory, the concept of delegation, and the bureaucratic autonomy approach.

The first half of the chapter discusses these theoretical approaches and their relevance to this research. First, the principal-agent theory and the concept of delegation provide a strong theoretical interpretation of the new role of DG COMP in the modernised competition regime. Delegation has been frequently applied to the public sectors. Governments delegate certain competences to agencies in carrying out the policy goals. As a result, a new principal-agent relationship emerges. The principal-agent theory aims to explain this kind of relationship and its related issues. It further helps to understand the causality and consequence of delegation, such as the legitimacy problem, the agency escape and control, and so on. The arrival of modernisation reform requires the principal-agent perspective to give a suitable explanation of the relationship between DG COMP and NCAs in the ECN. Second, the bureaucratic autonomy approach is able to explain the autonomy change of DG COMP in the modernisation reform. The approach interprets the bureaucracy as a rational entity, whose goal is pursuing further competence. It also discusses the structural and personnel idiosyncrasy of bureaucracy, the conditions for autonomy, and the consequential relationship between autonomous bureaucracies and their controls. Following the theoretical review, the research is enriched by a comprehensive explanation of why and how the EU competition regime evolves. It would answer the research question of whether DG COMP becomes more autonomous since the modernisation reform.

The second half of this chapter mainly investigates the methodological dimension of the research. In a broader sense, this study is constructed as a qualitative study and supplemented by some quantitative elements. For example, the section on fine and penalty payment is mainly presented by numerical evidence that can give a clear understanding of the actual enforcement of modernised competition rules. Likewise, the staff mobility is better understood through a quantitative explanation. The methodological section also discusses the strength, validity and reliability of data, and the measurement.

Based upon the principal-agent theory, the concept of delegation, and the bureaucratic autonomy approach, this research develops six main hypotheses to explore the research question of DG COMP's bureaucratic autonomy. The first hypothesis talks about the substantive change in the modernisation reform. It argues that the increase of DG COMP's political differentiation is based on the paradigm shift of economic assessment. The second and third hypotheses discuss the procedural changes of modernisation reform. The research investigates the organisational and personnel capacity of DG COMP through the study of organisational change, organisational development, the role of the bureaucratic chief and staff, and the availability of recruitment flexibility. The fourth hypothesis focuses on the multiple networks of DG COMP, in particular, the bilateral and multilateral relationships of DG COMP with other competition regimes and the role of DG COMP in the ECN. The financial autonomy would be the fifth hypothesis, which examines the discretionary use of regular budget and the availability of own resources. The legal autonomy of DG COMP, the last and very important hypothesis, is studied to identify the legal boundaries of bureaucratic autonomy. Lastly, the limitation of this research is self-examined to clarify the strength of this research.

3.1 The Principal-Agent Approach and The Conception of Delegation

The first theories to be used in this research are the principal-agent theory

and the concept of delegation. They have a very close relationship and provide a strong theoretical interpretation of the new role of DG COMP in the modernised competition regime. This section discusses the key ideas stemming from the theories and their relevant implications on the autonomy change of DG COMP.

Originating from the incentive theory in economics (Kiewiet and McCubbins, 1991; Huber and Shipan, 2002; Magnette, 2005), the principal-agent theory serves as a rationalist explanation for the complex appearance of European institutions and their principals. 'It holds significant promise for understanding the complex relationships and interactions that characterise the Union, not least on account for its greater institutional sensitivity over traditional theories of integration.' (Kassim and Menon, 2003: 121) Further, It assumes that actors are 'interest-maximising and opportunistic' (Braun and Gilardi, 2006a: 3) that continuously to be a game of power struggle. It depicts the rational interaction and consequence between the principal(s) and the agent(s) with a focus on their behaviour.

Delegation is simply a transfer of competence from the principal(s) to the agent(s) in carrying out desirable policy outcomes for the principal, where the agent is 'an administrative body that is formally and organisationally separated from a ministerial, or cabinet-level, department and that carries out public tasks at a national level on a permanent basis, is staffed by public servants, is financed mainly by the state budget, and is subject to public legal procedures' (Egeberg and Trondal, 2009b: 674). It is a favourable option for the institutional choice or the organisational design. Delegation is a response to 'a ubiquitous social phenomenon linked to the growing differentiation of modern societies' (Braun and Gilardi, 2006a: 1). The collective action of agents would be able to accomplish the objectives and to resolve the administrative workload for the principals. 'Institutions (principals) delegate or confer authority upon other institutions (agents) so they can make decisions and take actions independent of the explicit approval of the principal.' (Egan, 1998: 487) The demand for good governance and the delays of over-

bureaucracy thus prompt the concerned authorities to lighten up their administrative workload and transfer the policy enforcement to the agents.⁴⁸ Thus, delegation is an ‘unavoidable consequence of the political and institutional contexts’ (Huber and Shipan, 2002: 9).

3.1.1 The Notion of Delegation and its Implication in this Research

The modernisation reform is perceived as a new delegation based on a previous delegation. In other words, the pre-modernisation competition regime is already a delegated system. As the enforcement authority of Council Regulation 17/62, DG COMP is the only agent to carry out the delegation from the Council and Member States. The modernisation reform may be seen as a recurrence of delegation from the delegated DG COMP to the NCAs. Therefore, the modernisation reform engages with the delegation literature.

There are several factors contributing to the emergence of delegation. For example, time inconsistency is a strong reason for delegation,⁴⁹ since ‘a government’s optimal long-run policy differs from its preferred short-run policy, so that the government in the short run has an incentive to renege on its long-term commitments’ (Majone, 2001: 106). Likewise, political uncertainty is another incentive of delegation that ensures the long-term credibility of the principal. (Epstein and O’Halloran, 1994; Huber and Shipan, 2002; Huber and McCarty, 2004) It gives ‘policies a longer life despite political turnover in government’ (Braun and Gilardi, 2006b: 243). Nevertheless, these factors are less important to the modernisation reform. Time inconsistency is not the main problem of the notification system. The decentralisation of competition rules is not designed for changing the successful and independent enforcement.

⁴⁸ The principals, usually the government, are always bounded by various and vast amounts of policy proposals, civil requests, administrative overloads, international affairs, etc. Therefore, the principal(s) cannot guarantee to manage all tasks with good performance, unless the citizens agree to have a Leviathan style government.

⁴⁹ ‘Delegating a function to an agent can first help reduce the problem of credible commitment due to time inconsistency or non-compliance.’ (Magnetite, 2005: 5)

On the other hand, the modernisation reform has a strong correlation with certain factors of delegation: the need for information, the avoidance of blame, the trusteeship between the principal and agent, reducing the transactional cost, and the effective enforcement.

3.1.1.1 The Need for Information

The information problem is a central issue of delegation. (Huber and Shipan, 2002) Unbiased and adequate information is crucial for policy makers to make decisions. Usually, principals do not employ and assign their officials with a single task. Although this assures the multifunctional adaptation of government to various and rapid policy changes, the principals themselves would suffer from the lack of correct and real-time information. Recruiting a large number of officials to deal with the increasing volume of information seems to be a viable option, but the cost is high.⁵⁰ Delegating to agents who are specialised in information collecting and analysing is comparatively advantageous to the principals' own recruitment. Different cases may be delegated to agents with different expertise. Thus, delegating to agencies resolves the need for information. (Epstein and O'Halloran, 1994)

In the European competition regime, the capacity of DG COMP for information collection and analysis is constrained by the volume of staff and the language barrier. The decentralisation of enforcement is an attempt to overcome this circumstance without the increase of staff in DG COMP. National competition officials may have better ways of information gathering and analysis. Therefore, the modernisation reform is consistent with the notion of delegation regarding the need for information.

3.1.1.2 The Avoidance of Blame

⁵⁰ There are several disadvantages for the principals to recruit new staff just for information collection. The principals would have to provide secured contracts to these recruited officials, to ensure a stable and accountable performance, to face the criticisms of over-bureaucracy. Sometimes, in a time-urgent situation, this recruitment with procedural delays cannot resolve the problem immediately.

‘Delegating decisions to a third party is also a means to shift blame for unpopular decisions from governments to other actors.’ (Magnetete, 2005: 6) Policies are not always welcomed by different groups of the general public. Since agencies are not always regarded as subsidiaries of the government, delegating the enforcement competence to them is a viable strategy of diverting the public’s attention and leaves the government itself intact from the criticisms. (Florin, 1982; Majone, 1998)

One of the modernisation objectives is to reduce the administrative workload of DG COMP. By inviting NCAs to apply Article 81 and 82 (now Article 101 and 102), DG COMP’s exclusive responsibility of enforcement is shared with 27 NCAs. Likewise, DG COMP’s burden for criticisms is also transferred to NCAs through this division of labour. Unlike the competition experts, the general public often condemns the closest authority for the problems of competition enforcement. Therefore, the shift of blame from DG COMP to other competition enforcers has occurred.

3.1.1.3 The Trusteeship between the Principal and Agent

Majone (2001) argued that the relationship between the principal and agent may further develop into a trusteeship. Borrowing from the concept of property law, he discovered that ‘the agent is not ordinarily the owner of property for the benefit of her principal. Strictly speaking, when property is transferred to a person who is supposed to manage it for the benefit of a third person, we have not an agency but a trusteeship relation’ (Majone, 2001: 113). Accordingly, the fiduciary principle may be viewed as ‘a rule for completing incomplete contractual arrangements’ (Majone, 2001: 117). In other words, the principal and agent have mutual interests to maintain their relationship and the conditions of property content – the policy outcomes. Trusteeship usually occurs in a long-term principal-agent relationship in which the trusteeship may encourage a diligent performance by the agent to share the gains from the property, in political terms, the credibility. (Majone, 2001)

As the competition enforcer of the European competition regime and a departmental institution of the EU, DG COMP acknowledges the existence of trusteeship by its concern for the administrative efficiency and the credibility of competition regime. The decentralisation of competition enforcement is regarded as a response to maintain this trusteeship. In addition, the decentralised enforcement by NCAs may bring about another emergence of trusteeship between DG COMP and NCAs in the modernised competition regime.

3.1.1.4 Reducing Transaction Costs

‘Principals decide to delegate powers to an agent, not for its own sake, but because that agent will reduce the transaction cost of policy-making either by producing expert information for the principals or by allowing the principals to commit themselves credibly to their agreed course of action.’ (Pollack, 2003: 21) Therefore, the transaction cost is a substantial incentive for principals to delegate, since agencies often are in a better position to ‘cost down’ the transaction cost with their expertise and capacity.

In the European competition regime, DG COMP is already an agent to reduce the transaction cost for Member States. In the enforcement of Council Regulation 17/62, DG COMP is the authority to handle the notification cases and to make decisions regarding restrictive practices and mergers. The transactional cost is also charged to DG COMP. However, the enlargement process and the growing complexity of competition cases have incurred a huge amount of administrative workload for DG COMP. Consequently, the decentralisation of enforcement is an attempt to reduce the concentration of workload in DG COMP by redistributing it to NCAs. ‘[Council] Regulation 1/2003 delegated enforcement powers to the Member States, thereby imposing a greater workload and additional costs on the national authorities.’ (Cseres, 2007: 501) The transaction cost is also shared with NCAs and enterprises in two ways. First, the administration of cases

involving two Member States or less has been decentralised to NCAs. This part of transaction cost is transferred to NCAs. Second, the change from a prior notification system to an *ex post* directly applicable exception system has made the enterprises responsible for assessing their cases pursuant to Article 81 and 82 (now 101 and 102). This is another transfer of transaction cost from DG COMP to enterprises.

3.1.1.5 Monitoring Non-compliance

Non-compliance is a severe issue when it turns to the cooperation of several actors and is caught in between 'legislative capacity and technical uncertainty' (Huber and Shipan, 2002: 221). Rational actors tend to take the risk of non-compliance in exchange for a maximal opportunity gain in three conditions: when policy conflicts with politicians are high, when non-statutory factors are ineffective, and when sanctions are low. (Huber and Shipan, 2002). 'In order to overcome such problem, a group of principals may choose to create an agent to monitor individual compliance, and provide such information to all participants, in effect painting scarlet letters on transgressor.' (Pollack, 2003: 22) This monitoring mechanism reduces the transaction cost and enhances the credibility of the principals. 'Politicians should delegate more policy-making autonomy to bureaucrats when politicians have more opportunities for *ex post* monitoring and sanctions.' (Huber and McCarty, 2004: 19) A Union with 27 Member States really needs this monitoring mechanism.

As the competition authority in the EU, DG COMP undertakes the responsibility for monitoring the effective enforcement of competition rules and detecting the non-compliance behaviour. DG COMP needs to have sufficient administrative resources and competences for this objective. However, the slow increase of administrative resources cannot catch up with the enlargement process and the growing volume of competition cases. Therefore, the modernisation reform is expected to improve the monitoring function effectively in two ways. First, the decentralisation of enforcement

gives DG COMP an opportunity to pursue 'own-initiative' cases, the most serious non-compliance infringement. Second, the decentralised enforcement allows NCAs to deal with some cross-border competition cases, which are better monitored by NCAs to reduce the workload and transaction costs of DG COMP.

3.1.2 Summary: the Factors of Delegation in the Modernisation Reform

This section discusses the factors of delegation in the modernisation reform. First, the need for information is essential to the effective enforcement of competition rules. The reform invites NCAs, who have the information advantage, to deal with cross-border cases. Second, the decentralisation of enforcement results in a network of 28 competition authorities. DG COMP is no longer the only venue where the general public lodges their complaints. A certain degree of liability has been transferred from DG COMP to NCAs. Third, a possible emergence of trusteeship is expected between DG COMP and NCAs. The development of ECN provides the best evidence that competition authorities are working together to improve the enforcement. Fourth, the modernisation reform is regarded as another delegation from DG COMP to NCAs, the second type of delegation in the competition regime. Through the decentralisation of enforcement, the transaction cost is shared with NCAs. The change from a prior notification system to an *ex post* directly applicable exception system also transfers the transaction cost to enterprises. DG COMP is relieved from severe backlogs and able to re-orientate its administrative resources. Fifth, the whole process of modernisation reform aims to give DG COMP a better position to monitor non-compliance cases. The decentralised enforcement reduces the workload of DG COMP in order to pursue own-initiative cases. NCAs are now responsible for cases in their competent scope with less transaction cost.

In short, these five reasons are interrelated and convince us that the modernisation reform is another delegation after 40 years of enforcement. It is possible to see further development of the principal-agent relationship in

the modernised competition regime. The preliminary study here helps to understand the practical aspect of delegation. It gives the grounds for further analysis on the modernisation reform — the bureaucratic autonomy of DG COMP in the modernised competition regime.

3.2 Consequences derived from Delegation: Problems and Solutions

There are two consequences stemming from delegation: the problem of non-majoritarian legitimacy and the collateral agency escape. Thus, delegation raises the concern of whether non-majoritarian institutions are justified to enforce the legitimated regulations. In addition, well-founded agencies with expertise and information advantage are expected to pursue their own agenda and interests, known as the agency escape. Hence, non-majoritarian legitimacy and agency escape are the main concerns about delegation.

The legitimacy of non-majoritarian institutions is a core issue for modern democracies, because such delegation challenges the existing norm of majoritarian democracy and results in the democratic deficit. (Majone, 1998; Sosay, 2006) However, the modernisation reform does not attempt to resolve this problem. The change from prior notification to *ex post* directly applicable exception system is irrelevant to the non-majoritarian problem. The decentralisation to NCAs, who are still non-majoritarian institutions, is not the solution to the problem either. Thus, the modernised competition regime retains the non-majoritarian characteristic and the democratic deficit derived from the delegation. It is fair to say that having non-majoritarian competition authorities to implement competition rules seems to be a necessary evil of the European competition regime.

3.2.1 Agency Escape: A Necessary Evil

On the other hand, the modernisation reform has strong relevance to the agency escape. Agency escape, or agency loss, is the most important and

fundamental problem of delegation. Scholars widely discuss this problem and reach the consensus that there are two types of agency escape: agency shirking and agency slippage.⁵¹ 'Agency losses can arise from two sources: 'shirking', because the agent follows its own preferences which diverge from those of its principal(s); 'slippage', due to institutional incentives causing the agent to behave contrary to the wishes of its principal(s).' (Thatcher, 2005: 48)

Agency slippage, as Pollack (1997; 2003) argued, occurs when constraints or incentives provided by the principal induce the agent to behave in ways systematically different from those preferred by the principal. In other words, the agent does not behave in the way pursuant to the principal's expectation. This refers to the under-performance of the agent and can be resolved by delegating to alternative agencies or changing the substantial requirements.

In fact, agency shirking, or 'bureaucratic drift', is the main focus of the principal-agent relationship when the agency possesses information advantage, better allocation of resources, and expertise. First, delegated bureaucrats may have private information that leads to the problem of adverse selection. (Huber and Shipan, 2002) 'Adverse selection occurs where one party *ex ante* to the contract exploits an information asymmetry to negotiate an especially favourable contract (e.g. selling to an unsuspecting party a defective second-hand car).' (Nicolaidis, 2005: 26) Second, unobserved activities by bureaucrats result in a post-contractual opportunism – the moral hazard. (Huber and Shipan, 2002; Laffont and Martimort, 2002; Nicolaidis, 2005) 'Moral hazard limits both the benefits to the principal and the efficiency of the transaction as a whole.' (Miller, 2005: 206) Consequently, 'agents behave opportunistically, pursuing their own interests subject only to the constraints imposed by their relationship with the principal' (Pollack, 1997: 108). The opportunism that generates the agency loss is 'a ubiquitous

⁵¹ Laffont and Martimort (2002) discussed the upper hand of agency over the principal. They believed that the advantages are 'either the agent can take an action unobserved by the principal the case of *moral hazard* or *hidden action*; or the agent has some private knowledge about his cost or valuation that is ignored by the principal, the case of *adverse selection* or *hidden knowledge*.' (emphasis included, Laffont and Martimort, 2002: 3)

feature of the human experience' (Kiewiet and McCubbins, 1991: 5).

In the study of modernisation reform, we should ask whether there is any adverse selection in the reform proposal since DG COMP has 40 years of experience in the enforcement. For example, what are the gains and losses for DG COMP in the modernisation reform? Is the decentralisation of administrative competence an exchange for DG COMP to retain its unique role in the regime? In addition, the moral hazard should be identified through the actual enforcement by competition authorities. As new enforcers of competition rules, NCAs are still exposed to national politics and lobbying. The risk of moral hazard for NCAs seems to be higher than that for DG COMP. Therefore, Article 11(6) of Council Regulation 1/2003 provides a safety measure, allowing DG COMP to intervene in the proceedings of NCA.

3.2.2 The Control Mechanism to Agency Escape

To overcome the problem of agency escape, a control mechanism is needed to ensure the consistent performance of the principal's objectives. Two measures have proven to be effective: *ex ante* administrative procedure and *ex post* oversight procedure; which could 'limit the scope of agency activity and the possibility of agency shirking' (Pollack, 1997: 108). Consequently, 'principals create formal controls such as powers over appointment, dismissal, budget setting and review or reversal of agents' decisions, to attempt to ensure that agents follow their preferences' (Thatcher, 2005: 48).

Administrative procedure, known as *ex ante* control, is consolidated when the principal defines the level of delegation. It specifies the scope of competence for the agency, namely, the legal boundaries and resources available to the agency. It appears often as a detailed administrative directive. It may also require the agency to publish relevant information of their works on a regular basis. (Pollack, 2003) Thus, administrative procedure is a factor to determine D (delegation), where $0 < D \leq 1$ (0 =non-delegation, 1 =full delegation). However, *ex ante* control has two intrinsic shortcomings: the lack

of reaction capacity, and the threat to effective delegation. Since administrative control is decided before delegation, agencies may figure out their agency escape through non-regulated areas. *Ex ante* control can hardly stop it. On the other hand, the excess of administrative control not only limits the agent's performance but also jeopardises the original idea of delegation. The level of administrative control is the inverse parameter of an effective delegation. (Pollack, 2003) Therefore, it is the principal's wisdom to decide the level of administrative control.

Accordingly, *ex post* oversight procedure is needed to supplement the insufficiency of administrative control. That is to say, oversight procedure is a variable after D (delegation) has been fixed, i.e. D is a constant. In brief, *ex post* control is a carrot-and-stick strategy. It involves 'rewards (such as budget increases) for desired behaviour, and sanctions (such as budget cuts and the passage of statutes restricting agency actions) for undesired behaviour' (Hammond and Knott, 1996: 123). Therefore, 'the more effective the incentive system, the less often we should observe sanctions in the form of congressional attention through hearings and investigations' (Miller, 2005: 209). Apart from the positive rewarding mechanism, oversight control has two effective tools: monitoring and sanction. It begins with the monitoring process to confirm the degree of agency escape, and then decides the sanction level, such as the budgetary reduction, review of the mandate, or even adopting new regulations to override the agency loss, etc. According to several principal-agent studies, three types of oversight procedure are useful. (Kiewiet and McCubbins, 1991; Pollack, 1997; Majone, 1998) First, 'the on-sight police-patrol oversight includes public hearings, field observations and the examination of regular agency reports' (Pollack, 1997: 111). Second, the fire-alarm oversight invites third parties to monitor and report the behaviour of the agency. Third, the institutional checks further elaborate the fire-alarm function by using multiple agents to monitor each other with a similar delegation. They are the primary mechanisms available in *ex post* control. In fact, 'the Commission is subject to a very large array of oversight procedures' (Magnetite, 2005: 17).

Just as delegation has its collateral consequence of agency escape, these *ex post* controls also have their costs. The first option of police-patrol constantly increases the principal's expenditure, even when there is no agency escape. This option would offset one of the main purposes of delegation, to reduce the principal's transaction cost. The second option of fire alarm oversight requires the involvement of the third party. This method creates another agent for the purpose of *ex post* control. It cannot exclude the possibility of another agency escape and the collateral cost of oversight. The last option is rather controversial by using a network of interrelated agents to watch over each other. A group of agents with same delegated competence is even problematic. (Huber and Shipan, 2002; Laffont and Martimort, 2002)

In general, the control mechanisms have three effects. First, *ex ante* and *ex post* controls are interrelated and supplementary. 'The threat of *ex post* sanctions creates *ex ante* incentives for the bureau to serve a congressional clientele.' (Miller, 2005: 209) Likewise, 'the availability of ongoing controls makes legislators more willing to grant agencies discretion *ex ante*' (Epstein and O'Halloran, 1994: 699). Second, we should notice that 'the ability of the principal to influence agency performance depends on both control mechanisms and its use of those mechanisms' (Thatcher, 2005: 49). That is to say, given the versatile options of control tools, the effective control depends upon the capacity of the principal(s) to use these mechanisms successfully. Third, 'the greater the centralisation of agency decision-making processes, the greater the executive control over bureaucratic outputs' (Wood and Waterman, 1991: 822). In addition, 'higher levels of political control suggest lower levels of policy and financial autonomy' (Yesilkagit and van Thiel, 2008: 151). From the regulatory aspect of competence, we now have a preliminary understanding of the level of autonomy for the agency. To conclude, Nicolaïdes (2005: 34) provided his judgement on the control mechanism.

These *ex ante* and *ex post* instruments are not panaceas. The root of the problem in principal-agent relationships is that important aspects of the behaviour of the agent may be neither observable, nor measurable. For example, in terms of *ex ante* monitoring it is very difficult to know whether someone is trying hard enough to come up with innovative ideas to solve regulatory problems. In terms of *ex post* assessment, it is impossible to know what would have happened if a different measure were adopted.

3.2.3 Summary: The Principal-Agent Theory in this Research

The discussion of principal-agent theory gives us a strong theoretical basis for this research to study the role of DG COMP and the change of its bureaucratic autonomy.⁵² To reiterate, there are two problems stemmed from the delegation: non-majoritarian legitimacy and agency escape. (Pollack, 2003) The modernisation reform is highly relevant to the latter one. Before the reform, DG COMP, as the Commission's competition authority, is the only agent to multiple principals in the EU. The reform allows NCAs and national courts to apply Article 81 and 82 (now Article 101 and 102) within their scope of competence. Consequently, the role of DG COMP would be more complex and multiple, which is one of the main focuses in this research.

The study on the control mechanism helps to identify the changes in the reform. The decentralisation of enforcement, the change from prior notification system to *ex post* directly applicable exception system, and the creation of European Competition Network (ECN) are the most important changes in the modernisation reform. First, NCAs are new agents in the competition enforcement. To resolve the inconsistent enforcement and the aforementioned agency escape, Article 11(6) of Council Regulation 1/2003 gives DG COMP the competence to intervene and correct the proceedings of

⁵² 'Principal-agent models are quite successful in predicting the functions delegated to the Commission and the Court of Justice, which are indeed devoted to monitoring compliance, filling in the details of incomplete contracts, regulating economic activity and setting the legislative agenda.' (Pollack, 2003: 9)

NCA. DG COMP is entrusted with this fire-alarm mechanism, because this arrangement may have the least cost for the system. Second, the creation of ECN is an *ex ante* administrative measure to reduce the inconsistent implementation and the possible agency escape. DG COMP's role in the network would be decisive, which requires an in-depth analysis. Third, the change from prior notification system to *ex post* directly applicable exception system gives DG COMP the opportunity to pursue own-initiative cases. It is interesting to see whether the relief of administrative workload is a necessary change or a strategy for DG COMP to escape further controls.

3.3 Bureaucratic Autonomy: A Special Condition of Delegation

The principal-agent literature suggests that 'agencies are supposed to enjoy some autonomy from their respective ministerial departments as regards decision making, including decision making in managerial, personnel, and budgetary matters' (Egeberg and Trondal, 2009b: 674). Following a similar approach of the principal-agent theory⁵³, another prominent study on the bureaucratic autonomy explains why the agency develops its institutional culture, escapes from the political designated assignment, and becomes the policy entrepreneur⁵⁴. (Majone, 2001; Crowe, 2007) In fact, 'effective public policies could not be made without vesting discretion in nonelected bureaucrats' (Eisner and Meier, 1990: 269). Since the competition policy is one of the most independent EU policies (Komninos, 2008), a thorough study of the changing role of DG COMP in the modernised regime is essential to many inquiries on the effect of modernisation reform. In this regard, the bureaucratic autonomy approach provides a solid theoretical basis for this research to identify the autonomy change of DG COMP.

Traditionally, 'bureaucracies are seen as a precondition for converting inputs

⁵³ The differences between the bureaucratic politics and principal-agent perspective are differences of degree rather than differences in kind. (Eisner and Meier, 1990)

⁵⁴ Political entrepreneurship refers to actions taken by 'creative, resourceful, and opportunistic leaders whose skillful manipulation of politics some how results in the creation of a new policy or bureaucratic agency, creates a new institution, or transforms an existing one' (Sheingate, quoted in Crowe, 2007: 76).

into outputs, or, to put it in another way: for producing and implementing public policies' (Egeberg, 1999: 156). This functional explanation points out the *raison d'être* of bureaucracy, who promotes 'a system of administrative efficiency' (Lawton and Rose, 1994: 29). Therefore, 'modern bureaucracies are staffed with individuals who, by virtue of "rational" bureaucratic organisation, are highly skilled policy experts who in principle should be able to help less knowledgeable politicians achieve their goals' (Huber and McCarty, 2004: 1).

In the organisational composition, bureaucracies usually consist of selected officials and are bounded by humanly constructed instructions of operation. The instructions include 'formal constraints (rules, laws, constitutions), informal constraints (norms of behaviour, conventions, and self-imposed codes of conduct), and their enforcement characteristics' (North, 1996: 344). Under such conditions, 'the bureaucracy must either seek to have its actions legitimated formally or be capable of bargaining successfully for influence over decision. It must also bargain for funds to continue its existence and operations' (Peters, 1984: 174). These expansionist activities in the pursuit of further competence and organisational capacity are consistent with the idea of bureaucratic autonomy, which is one of the possible developments after delegation.

3.3.1 The Definitions and Conditions for Bureaucratic Autonomy

As this research focuses on the role of DG COMP and its bureaucratic autonomy, the definitions and key arguments of bureaucratic autonomy should be explained to give us a strong knowledge basis for the conduction of research.

Since bureaucratic officials should conduct their administrative works and other activities within a pre-defined legal boundary of competence, their skill and expertise 'create the possibility that bureaucrats will usurp the rightful role of politicians in policy-making processes' (Huber and McCarty, 2004: 1).

In fact, 'autonomy represents a concern with the capacity of institutions to make and implement their own decisions' (Peters, 2000: 8). Therefore, 'bureaucratic autonomy occurs when bureaucrats take actions consistent with their own wishes, actions to which politicians and organised interests defer even though they would prefer that other actions (or no action at all) be taken' (Carpenter, 2001: 4). Bureaucratic autonomy could also be understood 'when political differentiated agencies take sustained patterns of actions consistent with their own wishes, patterns that will not be checked or reversed by elected authorities, organised interests, or courts' (Carpenter, 2001: 14). In this regard, such bureaucracy possesses 'a minimum level of autonomy, which is the capacity to change the agenda and preferences of politicians and the organised public' (Yesilkagit, 2004: 531) and 'some degree of independence in making its own decisions without dictation from outside actors' (Keohane, 1969: 862). Likewise, bureaucratic autonomy has also been described as 'a "discretionary floor", a minimal amount of discretion given to any agency' (Epstein and O'Halloran, 1994: 702). These definitions give a rather thorough understanding of what bureaucratic autonomy is.

In public policy studies, the critical factor for the bureaucracy to acquire autonomy lies in whether it can establish its political legitimacy⁵⁵, which is 'a reputation for expertise, efficiency, or moral protection and a uniquely diverse complex of ties to organised interests and the media — and induce politicians to defer to the wishes of the agency even when they prefer otherwise' (Carpenter, 2001: 4). Once the bureaucracy has established its legitimacy, either through given authority or administrative delegation, it can enjoy 'a privileged position to influence bureaucratic behaviour during policy implementation' (Huber and Shipan, 2002: 13) and be autonomous from its political control. In other words, 'the sources of the bureaucracy's power and

⁵⁵ In fact, 'the bureaucrats who value their autonomy will act in measured ways to preserve it, refraining from strategies of consistent fiat or defiance' (Carpenter, 2001: 15). They cautiously exercise this autonomy on a daily basis to influence the policy-making agenda and the preference from politicians and organised public incrementally. Further, the political heads do not get involved into routines and daily decision-making. The bureaucracy may proliferate its leverage and refine its expertise little by little. Once the policy content is regulated, decision-makers at the political level then realise that a change of content would be difficult and incur huge costs. The bureaucratic legitimacy is seen in this way.

autonomy are its ability to extract resources from the environment and its discretion in the use of these resources. This ability is a function of the bureaucracies' political support, expertise, leadership, and cohesion' (Eisner and Meier, 1990: 271). The following paragraphs continue to discuss the essential arguments of bureaucratic autonomy.

3.3.1.1 Political Differentiation

One of the very first things for the bureaucracy to pursue its autonomy is to achieve its political differentiation. Political differentiation is the outcome of a process, which consolidates the agency's preferences different from the principal's priority. (Caughey, Chatfield and Cohon, 2009) Consequently, it allows bureaucratic preferences to be "irreducible" from others, in particular, the societal and political actors. In other words, 'bureaucratic preferences are irreducible only if they are distinct both from societal preferences and from the preferences of elected officials' (Carpenter, 2001: 25). 'Even if a bureau does not have different preferences from all other actors, it may still be autonomous if it reached its preferences through an independent process that could have yielded differentiated preferences and goals.' (Caughey, Chatfield and Cohon, 2009: 14) Therefore, political differentiation refers to the external differentiation between the bureaucracy and other actors, rather than the differentiation within the bureaucracy. It gives the bureaucracy a higher degree of independence in the implementation and procedural process. In other words, 'autonomous bureaucracies are politically differentiated from the actors who seek to control them' (Carpenter, 2001: 14).

Most of the time, the bureaucracy achieves its political differentiation through enforcement. (Carpenter, 2001) Based on the enforcement competence, the bureaucracy is able to generate its distance from the politicians, to alienate itself from the constituent pressure, and to increase its bureaucratic autonomy at the same time. 'The vagueness of legislative mandates, the policy goals of bureaucrats, the constituent ties of bureaucracies, the values incorporated into expertise, and bureaucratic

incentive mechanisms promote the redefinition of policy at the implementation stage.’ (Eisner and Meier, 1990: 270) The redefinition of policy through the enforcement is often referred as the paradigm shift. To carry out the enforcement, the bureaucracy is able to set up particular administrative procedures pursuant to its preferences and eventually conduct the paradigm shift through the implementation. In this way, bureaucracies can ‘produce public policies more consistent with the values of bureaucrats than the goals of elected officials’ (Eisner and Meier, 1990: 275). Therefore, we should examine whether a paradigm shift occurred pursuant to the bureaucratic preference, notably the statutory administrative procedures, the relevant institutional changes, and the assessment philosophy behind the implementation.

The European competition regime is one of the most independent policy sectors in the EU. (Cini and McGowan, 1998; Mavroidis and Neven, 2001a; Komninos, 2008) However, the rationale of Commission decisions in the competition cases is changing over time. Concentrating on price-fixing cases, recent enforcement in the EU is closer to the Chicago School’s perspective. (van den Bergh and Camesasca, 2006) The modernisation reform aims to correspond this shift with additional organisational and personnel changes. Likewise, the high threshold of competition knowledge generates a rather homogeneous staff composition of economists, legal and policy experts. (Trondal, 2008; Monti, 2010a) It allows DG COMP to consolidate its preference to the antitrust cases. Presumably, the modernisation reform, proposed by the Commission, does not aim to change the independence of enforcement and the salience of political differentiation. Member States and other principals, such as the Council and the EP, are still isolated from the enforcement of competition rules. In addition, the creation of ECN and the organisational similarity between DG COMP and NCAs could be interpreted as an extension of political differentiation. Therefore, the modernisation reform retains the political differentiation for the European competition regime in the least extent.

3.3.1.2 Unique Organisational Capacity⁵⁶

‘Bureaucratic autonomy requires the development of unique organisational capacity – capacities to analyse, to create new programmes, to solve problems, to plan, to administer programmes with efficiency, and to ward off corruption.’ (Carpenter, 2001: 14) The capacity means the actual expertise and power to manipulate and implement the policy content, and it is irreplaceable. ‘The very expertise that bureaucrats and other actors enjoy, along with their structural role in policy processes, provides them with opportunities to work against the interests of politicians and their supporters.’ (Huber and Shipan, 2002: 2) Once the bureaucracy establishes its capacity, it could carry out its preferred agenda, affect the policy performance, and escape from political controls. In addition, a bureaucracy with strong organisational capacity may evolve as a policy entrepreneur to promote the policy in accordance to its preferences. (Majone, 2001) For example, Crowe’s (2007) study on the American judicial reform showed the phenomenon of political entrepreneurship exercised by key bureaucrats in forging the autonomy. Such bureaucracy can deliver ‘benefits, plans, and solutions to national problems found nowhere else in the regime’ (Downs, quoted in Yesilkagit, 2004: 531). On the contrary, ‘low bureaucratic capacity diminishes incentives for bureaucrats to comply with legislation, making it more difficult for politicians to induce bureaucrats to take actions that politicians desire’ (Huber and McCarty, 2004: 1). It is fair to say that organisational capacity is the most important factor for the study of bureaucratic autonomy.

The bureaucracy may achieve its unique capacity through organisational and personnel changes. First, organisational changes are the most frequently seen effect in any institutional reform. It highly affects the integration or separation of various concerns and considerations at different hierarchical

⁵⁶ According to Carpenter (2001), there are two types of bureaucratic capacity: informational capacity and planning capacity. The former capacity is about the power to analyse the policy problems; and the latter capacity is ‘the ability to utilise information and forecasting to plan and to execute plans in rationalised form’ (Carpenter, 2001: 28).

levels in the bureaucracy. (Egeberg, 1999) In this way, the study should incorporate different types of organisation changes, such as re-organisation, new sectors in the existing structure, the termination of existing units, etc. 'Changes in laws or the enactment of a new statute may require the establishment of new organisational structures or the re-organisation of existing organisations, for example, the creation of new units within an existing public organisation for the purpose of implementing the new goals of statutes.' (Yesilkagit, 2004: 529) In addition, the analysis should look at the background and other relevant factors for the occurrence of organisational change, since they would reveal whether the changes are initiated by the bureaucracy or by politicians. In particular, the development after organisational change would be decisive for the the long-term autonomy of bureaucracy. Therefore, the assessment of organisational capacity usually incorporates a qualitative analysis to reflect the essence of organisational capacity.

Second, the personnel changes is necessary for the bureaucracy to have competent staff in charge of the delegated works and the routinisation of administration. (Egeberg and Trondal, 2009b) A thorough examination of all personnel changes would be the best case scenario. However, due to the access constraint and time limitation, we may only examine important cases of personnel change, as long as they are representative. In practice, the analysis is qualitative in nature to describe individually routes of personnel change. Moreover, the personnel change is highly involved with the recruitment process, whereas the bureaucracy is capable of selecting the preferred staff independently. 'Different procedures for recruitment tend to bring in different people and keep them more or less autonomous *vis-à-vis* past constituencies.' (Trondal, 2008: 473) Lastly, we should also notice that more organisational and personnel changes do not always imply more organisational capacity. It requires further qualitative analysis and the consideration of existing organisational and personnel structure for a sound judgement. Thus, it is necessary to examine the organisational and personnel change to realise how much capacity has been achieved or modified.

The modernisation reform is proposed by DG COMP, who holds unique expertise and experience from its forty years of enforcement. There are many examples derived from the modernisation reform to identify the exceptional capacity of DG COMP in the competition regime. For instance, DG COMP has managed several measures to share its expertise with NCAs, such as training programmes and staff exchanges. The establishment of Chief Competition Economist (CCE) and Competition Economist Team (CET) are some organisational innovations in response to the criticisms. In this regard, it is necessary to study the organisational and personnel capacity of DG COMP in the modernisation process that may identify its strength of bureaucratic autonomy.

3.3.1.3 Political Multiplicity

Having the actual capacity and political differentiation are not enough to consolidate a sustainable autonomy. The bureaucracy as an actor in the multi-dimensional network of governance system should have the self-awareness of mutual dependency. A singular network renders the bureaucracy with close vigilance and intervention by the political principals and other actors. (Kassim and Wright, 2009) That is to say the bureaucracy has no alternative to mobilise its support but to comply with its mandate and top-down changes. In this case, the bureaucracy may be replaceable. Hence, the bureaucracy should be embedded in multiple networks to align vertical and horizontal supports, to acquire further independence, and to construct coalitions around the preferred policies. (Carpenter, 2001; Yesilkagit, 2004) 'Networks can be viable sources of support and persuasion even if they are secondary — that is, even if they are networks not of the entrepreneur himself but of someone to whom the entrepreneur is networked.' (Crowe, 2007: 84) This multiplicity assures the uniqueness and minimises the possibility of displacement of the delegated bureaucracy.

It is rather straightforward to examine political multiplicity by looking at the

bureaucracy's bilateral and multilateral relationships with other actors, in particular, those recognised networks. The level of involvement in these networks would represent the qualitative aspect of political multiplicity, whilst the quantitative aspect is seen through the various networks in which the bureaucracy participates.

'The main EU executive body, the European Commission, lacks its own agencies at the national level for the implementation of EU policies. In order to create more uniform implementation across the Union, there are indications that the European Commission in cooperation with EU-level agencies establishes kinds of partnerships with national agencies for this purpose, partly circumventing ministerial departments.' (Egeberg and Trondal, 2009b: 686) The argument tacitly suggests that the Commission is trying to establish its multiple links with national agencies. Therefore, having political multiplicity is definitely the case for DG COMP. The international participation of DG COMP confirms its pivotal role in the global competition regime. DG COMP establishes strong bilateral links with major competition partners through the signing of specific competition agreement and memorandum. DG COMP also shares its expertise with other countries, who are developing their competition rules. The modernisation reform is another expansion of its multiplicity within the Union. The quasi-binding ECN provides DG COMP with a legitimated basis to coordinate with NCAs. Therefore, this research further investigates the developments of ECN, such as the ECN Model Leniency Programme, the replication of DG COMPs' institutional structure, etc. The study of DG COMP's multiple networks would confirm whether it has successfully increased its bureaucratic autonomy.

3.3.1.4 The Role of the Bureaucratic Chief

In addition to the idea of political legitimacy, the role of the bureaucratic chief is an in-house factor for the study of bureaucratic autonomy. Bureaucratic chiefs 'have had the durability, official authority, and the capacity to learn about individual programmes and operations' (Carpenter, 2001: 15). Since

bureaucratic chiefs are based on the civil service designation rather than the political or electoral appointment, their terms of service are stable and longer, regardless of the political change. Therefore, 'most bureau chiefs seek maximal long-term control over the programmes and offices under their direction' (Carpenter, 2001: 21). Such stability encourages the chief's willingness to establish both personal relationship and bureaucratic reputation with other political actors and thereafter act as the policy entrepreneur. Consequently, the officials at the top of the organisation could be effective advocates for the bureaucratic autonomy. (Crowe, 2007) 'In this case, a bureaucratic organisation emerges as the result of the personal devotion of a group of individuals towards a charismatic leader. The organisation that thus emerges serves the goal of perpetuating the ideas of this leader.' (Yesilkagit, 2004: 530)

Practically, the study of the bureaucratic chief may be extended as the study of personnel capacity, which incorporates not only the analysis of bureaucratic chiefs but also the training and mobility of staff. On the one hand, the analysis of the bureaucratic chief usually incorporates a study on the background, the expertise and previous career. It is also necessary to examine the chief's administrative activities in reflecting the impact of bureaucratic autonomy. An additional focus on the career path might be helpful and supplementary. On the other hand, the training of staff is a common strategy for a quick and homogenous access to understand the political and social value of the bureaucracy. (Peters, 2001) It provides the basis for the bureaucratic chief to pursue the interest and autonomy of the organisation. The mobility of staff is also indicative of the personnel change and the capacity of bureaucracy. However, we should be careful that different case may have different interpretations on the mobility of staff. It requires further examination to unveil the meaning of such mobility in each individual case. Usually, a stable mobility of staff means that officials are rather consistent and familiar with their tasks. It would be easier for the bureaucratic chief to manipulate a stronger consensus among the staff to pursue further autonomy. In any case, 'bureaucratic autonomy is indeed contingent on the

organisational embeddedness of the bureaucrats' (Trondal, 2008: 484). The training and mobility of staff and the analysis of bureaucratic chiefs would provide a thorough understanding of the personnel capacity of bureaucracy.

The modernisation reform is indispensably involved with the change of staff. Under the unique Commission structure, we need to examine Directors-General for DG COMP and other top officials, as well as the staff mobility in the modernisation reform. Together, they can draw up a complete picture of the impact of bureaucratic chiefs and staff. Traditionally, a Director-General is usually a senior official who has been a Deputy Director-General or a Director-General for other DGs. The modernisation reform seems to preserve this tradition. The extensive content of training by DG COMP is studied to discover its value for the increase of bureaucratic autonomy. The staff mobility will also provide supplementary information for the analysis of bureaucratic chiefs and the political differentiation. They are the main areas of assessment for the role of the bureaucratic chief in the modernisation reform.

3.3.1.5 The Financial Aspect of Bureaucratic Autonomy

There are other conditions strongly related to the bureaucratic autonomy. For example, Yesilkagit (2004: 531) argued that 'financial and legal autonomy are contingent on the main norms of political accountability that prevail in a political system at a certain point in time'. He applied these areas to compare the bureaucratic autonomy between a departmental bureau and an independent administrative body (IAB) in the Netherlands. In practice, the financial aspect of bureaucratic autonomy can be operationalised in terms of 'budgets and autonomous sources of revenue' (Peters, 2000: 8). Therefore, two distinctive areas are essential to the study of bureaucratic autonomy: the discretionary use of regular budget and the availability of own resources.

Having budgetary discretion is important for the bureaucracy to exert its autonomy. (Peters, 2001; Huber and Shipan, 2002) Such discretion may be

subject to different budgetary regulations, implementing conditions, and *ad hoc* auditing. Furthermore, recent developments of delegation and the retrenchment of government budget suggest that some bureaucracies are allowed to arrange additional financial mechanisms to support their operations. 'Success in getting money is one means for agencies to demonstrate their political clout and their importance to the remainder of the political system.' (Peters, 2001: 262) Therefore, financial discretion is important for any bureaucracy to pursue further autonomy.

In the operational aspect, the discretionary use of regular budget and the availability of own resources are two substantive areas to identify the level of financial autonomy of any specific institution in the enforcement. 'At the low autonomy end of this dimension, an agency is entirely dependent on appropriations for its funding; at the high autonomy end, an agency may either raise funds through sales proceeds or be exempted by law from prior ministerial approval when using its budget.' (Yesilkagit, 2004: 539) For example, Thatcher's (2005) study on the independent regulatory agencies (IRAs) revealed a typical concern with the budgetary (in)dependence. 'IRAs can develop their own resources and networks with regulatees and the public. IRAs have created new procedures, such as producing consultation papers and draft decisions and inviting comments. They have published a much greater volume of information than governments did.' (Thatcher, 2005: 61) Therefore, financial autonomy is another pivotal element in the exploration of bureaucratic autonomy.

The financial aspect is not the primary objective in the modernisation reform. However, it is still valuable to be explored through the possible changes of financial arrangement to identify whether DG COMP increases its financial autonomy. As aforementioned, the study should compare the discretionary use of regular budget and the availability of own resources before and after the modernisation reform. In this way, we may have an understanding about the change of financial autonomy for DG COMP.

3.3.1.6 The Legal Aspect of Bureaucratic Autonomy

Other than the financial aspect of autonomy, the rules defining the competence of bureaucracy are very much relevant to the bureaucracy's autonomy. In fact, institutional reforms begin with the change of laws or the adoption of new laws. (North, 1996) These formal rules provide the legitimacy for the bureaucracy to implement policies and gradually increase its bureaucratic autonomy. 'It is the formal rules established in a bureaucracy that regulate, constitute and construct the decision-making behaviour and role perceptions evoked by civil servants, ultimately advancing bureaucratic autonomy.' (Barnett and Finnemore, quoted in Trondal, 2008: 470) Therefore, the assessment of bureaucratic autonomy should include the legal dimension, which defines the boundaries for the bureaucracy to manoeuvre.

In the operational aspect, the legal autonomy is better understood through a comparative study on the change of rules before and after the reform. In addition, the assessment should incorporate both statute law and non-statute law, if necessary. 'Legal autonomy is high when a piece of legislation authorises the agency to issue general regulations to fulfill policy goals defined by law.' (Christensen, quoted in Yesilkagit, 2004: 540) Thus, legal autonomy can be examined through the relevant legal documents, which are *ex ante* regulative controls for the delegation. Moreover, it is necessary to examine the actual implementation of the mandate by the bureaucracy to understand whether there is any implementation gap and to what extent the bureaucracy enjoys the legal autonomy. 'The *de facto* autonomy of agencies may vary according to various circumstances, such as agency tasks and the political salience and conflict potential of an issue area.' (Egeberg and Trondal, 2009b: 676) To conclude, a typical reform may entail a series of legal changes. The study of legal autonomy requires the comparative analysis on the changes of rules and the assessment on the implementation that can give an integrated picture of bureaucratic autonomy in the legal aspect.

As 'the EU competition regime is most likely a classical regulatory system in those aspects where the Commission combines rule making powers with its monitoring and enforcement functions' (Scott, 2005: 70), it is necessary to study the legal autonomy of DG COMP. Simply speaking, the core of modernisation reform is the replacement of Council Regulation 17/62 by Council Regulation 1/2003. A comparative analysis of the regulations is essential to reveal the most important legal changes. In addition, the collateral legal documents of modernisation reform should be examined to have a complete understanding of DG COMP's legal autonomy. The practical side of DG COMP's enforcement should be examined as well. The operationalisation of practical enforcement rests upon the qualitative and quantitative methods regarding key competition cases since the modernisation reform.

3.3.2 Summary: the Bureaucratic Autonomy Approach in this Research

In Section 3.3, the discussion focuses on the conditions of bureaucratic autonomy and their relevance to the bureaucratic autonomy assessment. Based on Carpenter's argument and other scholarly studies, the elements of bureaucratic autonomy are: the political differentiation to distinguish the bureaucracy from other actors in the enforcement; the organisational capacity of bureaucracy as the policy entrepreneur to advocate its autonomy; the political multiplicity to increase the network existence and the development of bilateral and multilateral relationship for the bureaucracy; the role of the bureaucratic chief and the composition and mobility of bureaucratic staff to pursue further autonomy; the financial independence of budgetary discretion and the availability of own resources; and the legal boundary of autonomy for the bureaucracy to manoeuvre.

These factors collectively construct the fundamental basis for the bureaucracy to secure its autonomy and enforcement independence. Being non-exclusive from each other, we can examine these factors individually in the operational aspect to identify the autonomy change of DG COMP.

Therefore, the bureaucratic autonomy approach provides the most important theoretical basis for this research to study the role of DG COMP in the modernised competition regime and the actual performance of modernised competition rules.

3.4 Research Hypotheses and Methodology

Having discussed the theoretical background of this research, we are now able to develop the research methods and hypotheses in the path of the principal-agent theory and the bureaucratic autonomy approach. The first part discusses the methods to be used and the collection and style of data in the executive aspect of the research. The rethinking of the rationale of reform and the justification of research question are the adjacent sections to assist the construction of research hypotheses.

3.4.1 The Research Methods and Data

This research is mainly a qualitative study and accompanied by some quantitative elements. For example, the discussion on cartel fines and penalty payments is better presented by numerical facts to reveal the effect of autonomy change. In addition to the information provided by the quantitative analysis, this research is based on the qualitative method, which is useful in the exploration of change or conflict (Holloway and Wheeler, 2002) and satisfactorily answers the key questions than the quantitative analysis (Bryman, 2004). Hence, the main context of this research is a qualitative assessment that covers a comprehensive scope of DG COMP's bureaucratic autonomy.

This research also follows the characteristics of the case study approach⁵⁷, which tend to give a descriptive and in-depth analysis (Gerring, 2004) on the

⁵⁷ 'A case study is a method for learning about a complex instance, based on a comprehensive understanding of that instance obtained by extensive description and analysis of that instance taken as a whole and in its context.' (United States General Accounting Office, 1987: 9)

impact of modernisation reform and the autonomy change of DG COMP. The study explores the possibility of multiple principal-agent relationships in the ECN. The assessment of bureaucratic autonomy may be applicable to other public policy studies relating to the institutional change and competence reform. This generalisability is often seen in the case study approach to enhance its academic value. (Black, 2000; Gomm, Hammersley and Foster, 2000) The study of political differentiation, organisational and personnel capacity, network relationship, financial and legal autonomy of DG COMP, has constructed the research as a hybrid case study research design, which mixes the type I, II, and III case study characteristics. (Gerring, 2004)

With regards to the data collection and analysis, this research is mainly based upon two categories of resources: the first-hand interview and the secondary documentation from official EU publications and other academic works. The European competition regime is occupied by a rather closed and highly technical epistemic community. Few people are familiar with the modernisation reform and most of them are Commission officials, competition lawyers and academics. They are the target for our first-hand data collection. These competition experts are rather difficult to get access for academic research than a random selection of the general public. Regarding the limited scale of qualified first-hand resources, standard sampling logic is unrealistic for this research. (Yin, 2008) Conducting interviews would be practical than other first-hand data collection methods, such as surveys or direct observations in this research. It is more powerful than conducting surveys in discovering the most important information and gathering comments from the participants, due to the survey's specialisation in representing quantitative results. (United States General Accounting Office, 1987; Golafshani, 2003) In this research, 20 interviews are conducted. The interviewees include officials from DG COMP and NCAs, competition lawyers, and academics that can give different perspectives towards the impact of modernisation. Most of them have multiple backgrounds, which is a common phenomenon in the competition regime. For example, a former lawyer becomes the Head of Unit (HoU) in DG COMP; a retired NCA official becomes a practice lawyer in a

private law firm; another lawyer also works as a part-time academic. This phenomenon suggests that they may be able to provide a larger scope of information.

The interview adopts a semi-structured method to facilitate the focus on the bureaucratic autonomy of DG COMP. (Fossey, Harvey, McDermott, and Davidson, 2002) 'The choice of semi-structured rather than structured interview was employed because it offers sufficient flexibility to approach different respondents differently while still covering the same areas of data collection.' (Noor, 2008: 1604) All interviews have some common questions on the background of interviewees and the perspective towards the modernisation reform. Specific questions are designed to accommodate different interviewees. For example, the national competition experts and the staff of ECN Unit are consulted with the ECN issue. With regards to the issue of triangulation, lawyers and academics are questioned with critical questions regarding the role of DG COMP in the reform. Most of the interviews are recorded and lasted for approximately one hour long, with some longer interviews of 90 minutes. All interviews are conducted in English and all interviewees are very fluent in English. The anonymity rule applies in this research, despite some interviewees explicitly agreeing to reveal their names. In short, these first-hand interviews provide the important data for this pivotal research of DG COMP's bureaucratic autonomy.

However, there is still insufficiency in the first-hand data collection that requires our exploration of the secondary materials. Two resources construct the collection of secondary data: the existing academic works and the official publications by the EU. First, the academic studies are reviewed. They are helpful in providing different interpretations on the modernisation reform and constructing the boundary for further exploratory studies. Their deficiencies motivate this research to analyse the changing role of DG COMP in the modernised competition regime, which is a much needed study to supplement the scope of public policy studies about the reform. Second, the official publications, such as Annual Reports, Annual Management Plans, and

Annual Activity Reports, provide a huge amount of useful information to this research. The essential legal documents relevant to the modernisation reform, namely the White Paper, the Commission Proposal, Council Regulation 17/62 and Council Regulation 1/2003, are the necessary data as well. In addition, the Commission Press Releases and DG COMP website also provide needed explanations and information on important issues of the modernisation reform. These official publications are publicly available and are not solely published for the study of modernisation reform. It is our responsibility to discover the relevant data within these documents and to make the best use of them.

In fact, the validity of this research is determined by whether the measurements in the research produce a consistent observation with the research objectives and the truthfulness of research results. (United States General Accounting Office, 1987; Joppe, 2006) The aforementioned categories of assessment cover a rather complete scope of DG COMP's bureaucratic autonomy. The results are discussed in Chapter 8 to illuminate the research questions established in Chapter 1. In other words, the design of assessment has a strong validity. Likewise, the reliability of this research is also confirmed, simply because the data analysis in the research is based on the first-hand data collection and secondary EU publications and relevant literatures. With the same method of first-hand data collection and the invariability of secondary data, the results can be reproduced with a similar research design at another time.

3.4.2 The Justification of Research Question

The review of the existing literatures reveals the deficiencies in the study of modernisation reform. There are two main puzzles unresolved: the lack of empirical public policy analysis on the actual performance of modernised competition rules, and the vacuum of works redefining the role of DG COMP in the modernised competition regime. First, the available public policy studies of European competition policy provide only abstract explanations

with little empirical analysis. The interpretations of reform are either from the decentralisation perspective, which cannot explain the collateral development of the ECN and the changed role of DG COMP, or from the Commission dominance perspective, which fails to give a practical assessment as the testimony to their argument. The regulatory perspective is unable to give a comprehensive interpretation. Second, the modernisation reform decentralises the enforcement competence to NCAs. The termination of prior notification system ends the prolonged workload for DG COMP, who can now resume its 'active' performance and focus on 'own-initiative' proceedings. Thus, the role of DG COMP in the modernised regime is different and requires a redefinition.

Therefore, our research aims to provide an empirical analysis on the role of DG COMP and to assess the impact of new enforcement rules. In this research, the pre-modernisation period is the time before the introduction of the White Paper⁵⁸ in May 1999, the post-modernisation period is the time after the enforcement of Council Regulation 1/2003 in May 2004. Therefore, there is also a transitional time between 1999-2004 regarded as the process period. (see Table 1.1) The coupling of this research to the existing literature adds our understanding about the modernisation reform. Since the competition policy is one of the most independent policies in the EU (Cini and McGowan, 1998; Mavroidis and Neven, 2001a; Komninos, 2008), the role of DG COMP is best explained through the assessment of its bureaucratic autonomy. Moreover, DG COMP's activities in the modernisation process also provide some valuable information for the assessment of the impact of new Council Regulation 1/2003. For example, DG COMP's involvement in the ECN is a special focus of this research in order to identify the success of modernisation reform and to provide a possible explanation of the multilateral relationship between DG COMP and NCAs.

⁵⁸ European Commission (1999b) 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty', available at: http://ec.europa.eu/comm/competition/antitrust/wp_modern_en.pdf, (accessed 12 May 2009)

In this regard, the concept of delegation, the principal-agent theory, and the bureaucratic autonomy approach provide the appropriate theoretical grounds to examine the autonomy change of DG COMP and the impact of new competition rules. There are two projected contributions from the assessment of DG COMP's bureaucratic autonomy: the identification of the actual change of DG COMP's bureaucratic autonomy, and the practical use of bureaucratic autonomy measurement. After reviewing the limits of existing research and identifying the main puzzles of the reform, the research question is finally generated: **the consequence of modernisation reform – does DG COMP have more bureaucratic autonomy since the modernisation reform?**

3.4.3 The Construction of Hypotheses

Having explained the construction of research questions, we now develop the research hypotheses as the framework for the next stage of research operation. The extensive discussions of principal-agent theory and bureaucratic autonomy approach have generated six main areas for the hypotheses, respectively, political differentiation, organisational capacity, personnel capacity, network relationship, financial autonomy, and legal autonomy. These hypotheses help to understand the changing autonomy of DG COMP. The practical assessment of bureaucratic autonomy in this research may be an applicable model, which is able to assess the bureaucratic autonomy of any specific organisation or governmental institution, with some adjustments in the operation of assessment.

First, the existence of political differentiation assures the long-term bureaucratic autonomy. It should be examined in the first phase to identify the availability of bureaucratic autonomy. In this regard, the first proposition of this research is: **(P1) the modernisation of competition regime results in the further political differentiation of DG COMP.** The key research question regarding the political differentiation is: **(Q1) does DG COMP have more *political differentiation* since the modernisation reform?** In fact, the modernisation reform provides the opportunity to institutionalise economists

as in-house experts within DG COMP. The phenomenon is accompanied by the increase of economic thinking in the enforcement and the interpretation of competition laws. Most important of all, the underlying methodology of antitrust assessment has evolved from the SCP paradigm to the Chicago School paradigm, notably the regulatory development of merger regulations, block exemption regulations for vertical restraints and horizontal agreements. These changes should be analysed systematically as the sub-hypotheses to justify whether there is a growing political differentiation for DG COMP after the modernisation reform.

H1 DG COMP has more *political differentiation* in the modernised competition system.

H1-1 There is the institutionalisation of economists within DG COMP.

H1-2 There is more economic thinking in the enforcement.

H1-3 There is the paradigm shift from the SCP to the Chicago School.

Second, the organisational capacity and personnel capacity of DG COMP are the most decisive factors for its sustaining autonomy. As discussed in Section 3.3.1, we notice the salience of organisational change and the role of the bureaucratic chief and staff in the pursuit of autonomy. In this regard, we may develop the second and the third proposition of this research: **(P2) the modernisation of competition regime changes the organisational capacity of DG COMP; and (P3) the modernisation of competition regime changes the personnel capacity of DG COMP.** The research questions regarding the capacity of DG COMP would be: **(Q2) does DG COMP have more *organisational capacity* since the modernisation reform?** And **(Q2) does DG COMP have more *personnel capacity* since the modernisation reform?** In practice, re-organisation and new organisational establishment are two commonly seen options of organisational change to demonstrate the institution's capacity. The organisational development also reflects a certain degree of organisational capacity. The study of the bureaucratic chief and staff helps to clarify the

personnel capacity of DG COMP in the modernisation process. In addition, a new field of recruitment flexibility is tested to see whether DG COMP might have an advanced level of bureaucratic autonomy. Therefore, these sub-hypotheses are constructed to justify the organisational and personnel capacity of DG COMP.

H2 DG COMP has more *organisational capacity* in the modernised competition system.

H2-1 The organisational change in DG COMP suggests an *increase* of its organisational capacity.

H2-2 The organisational development in DG COMP suggests an *increase* of its organisational capacity.

H3 DG COMP has more *personnel capacity* in the modernised competition system.

H3-1 The personnel changes of bureaucratic chiefs and officials in DG COMP suggest an *increase* of its personnel capacity.

H3-2 The existence of independent recruitment for DG COMP suggests an *increase* of its personnel capacity.

Third, the bilateral and multilateral participations of DG COMP in the international context are important to its political multiplicity. In addition, the modernisation reform invites NCAs and national courts to apply Article 81 and 82 (now 101 and 102), which results in the constellation of multiple enforcers in the competition regime. The role of DG COMP in the enforcement network — European Competition Network (ECN) — is crucial in reflecting DG COMP's political multiplicity and its relationship with these authorities. The development of multiple networks would be helpful for the bureaucracy to enhance its political multiplicity and long-term autonomy. (Carpenter, 2001) Therefore, the fourth proposition of this research is: **(P4) the modernisation of competition regime results in the further political multiplicity of DG COMP.** Deriving from this proposition, the fourth research question has developed: **(Q4) does DG COMP have more *political multiplicity* since the modernisation reform?** In practice, DG COMP's horizontal cooperation with other DGs provides a minimal level of political multiplicity. The bilateral and

multilateral networks of DG COMP in the international context have extended the scope of DG COMP's political multiplicity. Moreover, the study of DG COMP's involvement in the ECN provides very important evidence for DG COMP's political multiplicity. The regulatory framework requires a comprehensive analysis to identify the role of DG COMP in the ECN. The enforcement of ECN and the development of ECN Model Leniency Programme are able to indicate the leading role of DG COMP in the network. Therefore, the leading role of DG COMP in the ECN is hypothesised as the sub-hypothesis H4-4 to highlight the multiple principal-agent relationships of DG COMP. Together, these sub-hypotheses answer the third main hypothesis of whether DG COMP has more political multiplicity to increase its bureaucratic autonomy.

H4 DG COMP has more *political multiplicity* in the modernisation process.

H4-1 DG COMP's horizontal cooperation with other DGs in the Commission suggests an *increase* of its multiple networks.

H4-2 The development of DG COMP's international bilateral and multilateral networks suggests an *increase* of its multiple networks.

H4-3 The regulatory framework of ECN suggests an *increase* of DG COMP's political multiplicity.

H4-4 The implementation of ECN gives DG COMP a *leading* role in the modernised competition regime.

Fourth, having independent financial means would be extremely useful for DG COMP to increase its autonomy. In this regard, we should examine the changes in the financial aspect to identify DG COMP's financial autonomy. Therefore, the main proposition is: **(P5) the modernisation of competition regime results in the financial changes in DG COMP.** And the research question regarding the financial changes of DG COMP would be: **(Q5) does DG COMP have more *financial autonomy* since the modernisation reform?** There are two dimensions to explore the financial autonomy: the availability of independent financial resources for DG COMP and DG COMP's

discretion to use the regular budget. The main hypothesis and sub-hypotheses are listed below.

H5 DG COMP has more *financial autonomy* in the modernised competition system.

H5-1 DG COMP has established its own financial resources in the modernisation process.

H5-2 DG COMP has increased its discretionary use of regular budget in the modernisation process.

The last section of this research design is about the legal dimension of DG COMP's bureaucratic autonomy. Legal settings provide the basis and boundaries for any institution to exert its discretion. In the modernisation reform, we should investigate the legal autonomy of DG COMP. In this sense, the main proposition of this section is: **(P6) the modernisation of competition regime results in the legal changes in DG COMP.** Likewise, the research question for the legal changes is: **(Q6) does DG COMP have more *legal autonomy* since the modernisation reform?** In this context, we adopt the qualitative analysis to reflect the strength of DG COMP in the legislative process. The in-depth comparison between Council Regulation 17/62 and new Council Regulation 1/2003, along with the examination of legislative processes from the Commission Proposal to the Council Regulation, would be very helpful to understand the nuance of legal change. Moreover, the study of essential laws related to the modernisation reform may supplement the assessment of DG COMP's legal autonomy. The assessment on the practical enforcement of new rules is further needed to verify whether DG COMP is capable of exercising its new competences. The following parts are the methodological lay-out of the main hypothesis and sub-hypotheses for the judgement of the legal autonomy of DG COMP in the modernisation process.

H6 DG COMP has more *legal autonomy* in the modernised competition system.

H6-1 The comparative study of Council Regulation 17/62 and Council Regulation 1/2003 suggests an *increase* of DG COMP's legal autonomy.

H6-2 The legislative process of Regulation 1/2003 suggests an *increase* of DG COMP's legal autonomy.

H6-3 The selective laws confirm the *increase* of DG COMP's legal autonomy.

H6-4 The implementation of Council Regulation 1/2003 suggests DG COMP is capable of exercising the changed competence.

3.4.4 The Limitation of this Research

Any research has its limitation; this study of the modernisation reform is no exception. The major limitation comes from the scarcity of competition epistemic community. As mentioned earlier, qualified interviewees are rather few. Obtaining interviews may be difficult. In addition, since the research topic focuses on the changing competence of DG COMP, some DG COMP officials are somewhat reluctant to give their personal opinions, which could be very important to this research. It requires further interview techniques and the guarantee of being anonymous to relieve their anxiety. The interviews with lawyers and NCA officials have given different perspectives towards the modernisation reform, which would be important to reduce the singular bias in favour of the Commission's argument.

Likewise, secondary sources also have deficiencies. For example, the official publications do not aim to provide the information about the institution and competence change and other relevant issues to the modernisation reform. Existing academic works also provide limited analysis on this specific research question, or otherwise adopt different theories or disciplines, e.g. legal studies or economic studies. Therefore, the analysis have to draw on a large body of Commission dossier, national reports, and academic studies, for a systematic study of the hypotheses.

Chapter 4 — Political Differentiation of Directorate-General for Competition

With regards to the research question of DG COMP's bureaucratic autonomy, this research aims to assess the autonomy change of DG COMP and to explain the role of DG COMP in the modernised European competition regime. To operationalise the research, the empirical analysis shall proceed with an examination of substantive changes, followed by an analysis of procedural changes, to answer the puzzles of the modernisation reform. Accordingly, this chapter focuses on the underlying substance of competition enforcement in the European competition regime, in particular, the economic methods used in the assessment and the relevant corresponding organisational developments.

The arrival of Council Regulation 1/2003 gives DG COMP an opportunity to practically review its approach to competition enforcement and to forcefully endorse the more mainstream economic theories for the case assessment. These effects have led to a paradigm shift in the European competition regime. The shift can be studied by examining three correlative levels undergone by DG COMP: the institutionalisation of economists, greater economic thinking in the enforcement, and the shift from the Structure Conduct Performance (SCP) paradigm to the Chicago School paradigm for the economic methodology of competition assessment. As discussed in Section 2.1, we noticed that, before the modernisation reform, there were relatively few debates about the use of economic theories in different stages of case assessment, compared to the political and legal factors. Consequently, the reform introduced several organisational changes, including the creation of Chief Competition Economist (CCE) and Competition Economist Team (CET). A thorough examination of the underlying effects of these changes is needed. The incorporation of more economic analysis and the tacit shift towards greater economic thinking are expected. Following the organisational and the mindset change, a paradigm

shift from the SCP toward the Chicago School has occurred in the EC competition system. It has since then been further evidenced by several regulatory updates, such as the new merger Regulation 139/2004, block exemption regulations (BERs), and several administrative advances.

The above discussion provides an overview for the first proposition of this research (P1) — **the modernisation of competition regime results in the changes of DG COMP's political differentiation**. Based on Section 3.3.1, political differentiation is the outcome of a process that consolidates the agency's preferences, which are different from the principal's priority. (Caughey, Chatfield and Cohon, 2009) It allows the bureaucratic preferences to be "irreducible" from others, in particular, the societal actors and political principals. (Carpenter, 2001) Consequently, it is necessary to address some key questions: what are the substantive changes brought about by the modernisation reform? Do these changes make DG COMP more powerful and autonomous? To what extent do the changes affect the role of DG COMP in the European competition regime? These questions will be investigated in the following sections; and they deductively lead to the first main research question Q1: **does DG COMP have more political differentiation since the modernisation reform?**

It can be seen that these changes in substance actually reinforce, or at least sustain, the political differentiation of DG COMP from other actors in the competition regime. The substantive change in the EC competition system resembles the antitrust development in the U.S., where their capacity for economic thinking is greatly expanded. Other actors in the European competition regime may have some influence, but they can hardly impose a different economic methodology on DG COMP and dictate its approach in the competition assessment, which remains within DG COMP's own discretion. In this regard, we would then be able to argue that **DG COMP has more *political differentiation* in the modernised competition system**, which we shall call the first main hypothesis H1. In the course of the analysis of H1, three sub-hypotheses are to be studied:

- (H1-1) there is the institutionalisation of economists within DG COMP;**
- (H1-2) there is more economic thinking in the enforcement; and**
- (H1-3) there is the paradigm shift from the SCP to the Chicago School.**

The structure of this chapter follows the above layout. Section 4.1 discusses the details of sub-hypothesis H1-1 on the institutionalisation of economists in terms of the structural development of CCE and CET. The tendency towards increased economic thinking in the enforcement is studied in Section 4.2. Section 4.3 then focuses on the paradigm shift from the SCP to the Chicago School. The regulatory modifications of merger regulation and block exemption regulation, along with the administrative progress of the adoption of non-infringement decisions and sector inquiries, are extensively analysed to verify sub-hypothesis H1-3. The conclusion is elaborated in Section 4.4.

4.1 The Substantive Change I – The Institutionalisation of Economists

The presence of economic expertise in the European competition regime is growing on several occasions. For example, the strong economic backgrounds of some DG COMP officials may be helpful to the increasing use of the economic approach. The criticism from other actors of competition regime, namely the European Court of Justice (ECJ), the undertakings, further justify the need for in-house economists in the competition authority.

Prior to the modernisation reform, there has never been such an institutional development within DG COMP in this area. It goes without saying that any institutional development for the incorporation of economists within DG COMP in the modernisation reform would be a substantive change and contributive to the argument of further political differentiation for the Commission's competition authority. 'Institutionalisation refers to the development of a regularised system of policy making.' (McGuire, 2004: 129) It is often regarded as the 'internal development of the institution' (Peters,

2000: 7). It involves the infusion of value into a pre-existing institution. (Peters, 2000) Therefore, the institutionalisation of economists in DG COMP is one of the most important modernisation developments for this research to study. Such institutionalisation provides DG COMP with enough momentum of political differentiation from the previous competition regime, in which economic studies and economists are not the primary focus for the enforcement.

The creation of CCE and CET by the modernisation reform is an obvious attempt of DG COMP to institutionalise the economists' presence within the administration. The establishment and subsequent development of CCE and CET would be very important to DG COMP's pursuit of bureaucratic autonomy. This phenomenon requires further discussions to identify its essential effect on the European competition regime and to answer the first sub-hypothesis:

(H1-1) there is the institutionalisation of economists within DG COMP.

To find the convincing evidence of more presence of economic expertise, there is a good example from the other prominent competition authority in the world, the U.S. Antitrust Division, that can provide a systematic analysis to reveal the substantive change in this regard. Drawing from the U.S. experience, the section then discusses the relevant organisational development of CCE and CET in details, which manifests the greater availability of more economic thinking within DG COMP and verifies the increase of political differentiation of DG COMP.

4.1.1 The U.S. Antitrust Development as an Analogy for the European competition regime

In Section 2.3.1, we have discussed the paradigm shift from the SCP paradigm to the Chicago School paradigm in the U.S. antitrust regime and emphasised the overt difference between the federal system of U.S. and the

sui generis EU before the modernisation reform. In spite of that, the antitrust development in the U.S. gives us a useful case of analogy and a way to explore the current evolvement of the European competition regime. Therefore, it is necessary to spend some paragraphs to summarise the antitrust development in the U.S. and observe its relevance to the European competition regime.

In the institutional dimension, the creation of Economic Policy Office (EPO) within the Antitrust Division in Department of Justice (DoJ) started the shift towards professionalisation in 1970s.⁵⁹ 'The goal was to create a staff of sufficient size and quality that an economist could be assigned to each potential case at an early stage. Rather than serving as a support staff, the economists were to function as independent analysts.' (Eisner and Meier, 1990: 276) A few years later, 'the EPO's chief economist was elevated to the position of deputy assistant attorney general for economic analysis in 1984' (Eisner and Meier, 1990: 277). In the procedural dimension, several modifications strengthened the importance of economic thinking. For example, it was changed so that cases must incorporate supporting economic analysis before coming to a conclusive decision. The EPO was given the task of training the legal staff in economic analysis. (Eisner and Meier, 1990) In the regulatory dimension, 'the Merger Guidelines were revised several times (in 1982, 1984, 1992, 1997) to take account of developments in economic thinking concerning the competitive effects of mergers' (van den Bergh and Camesasca, 2001: 33). The 1968 Merger Guidelines were consistent with the SCP paradigm's emphasis on the importance of market structure which reasoned that the effect of a merger, as spelled out in Section 7 of the Clayton Act, 'may be substantially to lessen competition, or to tend to create a monopoly' (van Cayseele and van den Bergh, 1999: 474). However, the new 1992 Merger Guideline made no explicit reference to the SCP paradigm and redirected the attention towards the concept of 'efficiency defense', which is essentially a Chicago School's

⁵⁹ 'In 1972 Assistant Attorney General Thomas Kauper initiated a professionalization process that would bring a large number of Ph.D. Economists into the Antitrust Division as part of an Economic Policy Office (EPO).' (Eisner and Meier, 1990: 276)

approach.

The U.S. antitrust development has offered two experiences that are useful for this study. First, it allows us to observe the organisational response of introducing such an unit as the EPO. Second, it draws attention to modifications of essential regulations indicative of the paradigm shift from the SCP to the Chicago School. 'The professional makeup of the institution may shape the economic and political direction of law enforcement. When U.S. agencies hired and integrated economists in the 1960s, the agencies' approach became more economic and less legalistic.' (Monti, 2007: 5) In other words, 'the redefinition of policy priorities was driven by a professionalization process; economists were brought into the division and provided a crucial position in the policy process' (Eisner and Meier, 1990: 283). In addition, the recruited economists in the EPO were influenced, or even educated, by the Chicago School scholars. Unsurprisingly, 'the Antitrust Division provided an institutional basis for Chicago school values' (Eisner and Meier, 1990: 277). In this regard, the U.S. antitrust authorities do not consider 'the obtaining or maintaining a monopoly as an antitrust violation, unless the potential or actual monopolist has engaged in exclusionary conduct' (Abbott, 2005: 9). Thus, Chicago School ideas had become as the principal intellectual foundation of modern U.S. doctrine and policy. (Kovacic, 2007) The substantive change in the U.S. Antitrust regime has four features: the institutionalisation of economists into DoJ, the increase of economic thinking in the case assessment, the paradigm shift from the SCP to Chicago School⁶⁰, and the regulatory modifications, notably the merger regulations.

Realising the development of antitrust enforcement in the U.S., it is time to see whether the European competition regime may follow a similar path of the U.S. evolution that the changes in intellectual climate affect the way DG COMP enforces the competition rules.

⁶⁰ The Chicago School acquired a strong influence on American antitrust policy from the 1970s onwards and reached the apogee of its influence in the 1980s. (van Cayseele and van den Bergh, 1999: 486)

First of all, the organisational positions of CCE and CET within DG COMP ensure a certain degree of independent role for economists in the case assessment. Members of CET are welcome to join the case assessment team at an early stage. In addition, 'a review of the analysis of the case team at a late stage of the procedure by a set of different Commission officials has been introduced' (Neven, 2006: 778). Such arrangement is able to ensure the correctness of Commission Decisions made by DG COMP officials, following several successful appeals to the CFI by enterprises regarding the use of evidence and economic assessments.⁶¹ 'It is essential both for morale and influence that a member of the Chief Economist's unit be attached individually and substantively with each significant investigation.' (Lyons, 2004: 258)

In addition to the organisational settings of CCE and CET and their involvement in the case assessment, the overall staff background in economics has been largely increased. 'In the early 1990s the ratio of economists to lawyers in DG Competition was one to seven. It is now [2008] roughly one to two.' (Evans, 2008: 2) Such increase of economic background, to some extent, corresponds the demand for in-house economists in early stage case assessments. Likewise, in the competition regime, 'the proportion of antitrust lawyers with a sound understanding of economics and the proportion of competition economists with a good understanding of the law has increased' (Neven, 2006: 780). The role of economists has been recognised and established.

Along with the modernisation of competition rules, DG COMP is increasingly using sophisticated quantitative techniques to address the problems of collusive behaviour and to tackle serious infringements. Both quantitative and qualitative analysis are able to make the Commission Decisions more

⁶¹ For example, *Airtours/First Choice* (Case No IV/M.1524); *Tetra Laval/Sidle* (Case No COMP/M.2416); *Schneider/Legrand* (Case No COMP/M.2283), are some successful cases appealed to the CFI.

accurate and evident.⁶² Most important of all, the practice of competition regulations by DG COMP has shifted from a *per se* rule and form-based approach to an effects-based approach to assess the compatibility of antitrust cases. (Röller and Stehmann, 2006) Such transformation ‘from a formalistic rule based – *per se* – approach towards a more economic – effects based - approach’ (Evans, 2008: 3) is largely attributed by the arrival of Chicago School paradigm in the European competition regime. In addition, *de minimis* rule is applied; SIEC (significant impediment to effective competition) test becomes the mainstream method in the assessment of merger cases. In a speech to competition lawyers, Deputy Director-General Lowri Evans stated that ‘we are well aware that the Commission and the Courts have been accused of focusing on form instead of on effects, and therefore of underestimating the pro-competitive element of some practices, and the potential efficiency benefits that may stem from them... I should also mention, however, that focusing on form rather than effects also risks the opposite problem – of underestimating the harm of some practices. It is unlikely for example that we would have been able to bring our tying case against Microsoft using a form based analysis’ (Evans, 2008: 4). Therefore, it is fair to say that the intellectual climate has changed within DG COMP and been outspoken by DG COMP officials.

The following discussions will examine the CCE and CET, and compare its characteristics with the first feature derived from the U.S. experience: the institutionalisation of economists.

4.1.2 Chief Competition Economist (CCE) and Competition Economist Team (CET)

The creation of Chief Competition Economist in 2003 was arguably the most important organisational change of the modernisation reform and the apparent institutionalisation of economists within DG COMP. ‘The

⁶² ‘It is now normal for quantitative analysis to help shape our approach. But actually the main message is to stress that such analysis is used only as a complementary tool. We use it to strengthen our cases. It will never replace our qualitative analysis.’ (Evans, 2008: 4)

appointment of a Chief Economist forms an integral part of my commitment to strengthen further the economic underpinnings of our competition analysis', said Competition Commissioner Mario Monti in 2003.⁶³ *'The office was created by Mario Monti. It is really a response to the criticisms of DG COMP perceived at that time, following a couple of decisions being challenged and put at the courts against some cartel and merger cases.'* (Lawyer, Interviewee 17, March 2012) The creation of CCE and CET was prompted by the practical needs in the assessment of competition activities. The CCE and CET were supposed to provide objective opinions and to be involved in the early stage of enforcement. Therefore, 'the tools for formulating and maintaining a rigorous economic approach are in place at the European Commission, with the creation of the position of Chief Economist within DG Competition' (Rose and Ngwe, 2007: 9).

'Structurally, the CCE is placed within DG Competition, attached to the Director-General to whom he reports directly. Meetings with the Commissioner take place on a weekly basis.' (Clifford Chance, 2004: 1) The CCE would be assisted by a specialised economist Unit, named the Competition Economist Team (CET). Moreover, 'the Chief Competition Economist will also be responsible for maintaining contact with the academic world and will organise and chair meetings of the Academic Advisory Group for Competition Policy, a group of leading academics working in the area of industrial organisation and in the field of State aid' (European Commission, 2004a: 21).

'The two principal charges of the CCE are to provide economic advice for case and policy initiatives and to develop the economic expertise of DG COMP further, that is, to build capacity to perform economic analysis.' (Gavil, 2007: 183) That is to say the CCE is responsible for giving 'guidance on economics and econometrics in the application of EU competition rules. This may include contributing to the development of general policy instruments' (European Commission Press, 2003: 1). *'Institutionally, the role*

⁶³ see Commission Newsletter IP/03/1027.

of Chief Competition Economist would be extremely more important than the role of economists in the previous Merger Task Forces or Task Force Team. Institutionally, you also have a PhD academic economist that is becoming somehow one of the ears of the Commissioner and Director-General to hear more economic analysis.' (Academic, Interviewee 16, March 2012)

The detailed function of CCE is further explained: 'there are two fundamental functions that the Chief Competition Economist (CCE) performs: (i) the CCE (supported by a team) is closely involved with the day-to-day work of case teams, getting involved early on in the investigation, giving economic guidance and methodological assistance ("support function"). (ii) the CCE provides the Commissioner with an independent opinion, in particular before a final decision to the College of Commissioners is proposed ("check-and-balances" function)' (Röller and Buigues, 2005: 6). In other words, 'the role of the Chief Economist is to provide guidance on methodological issues of economics and econometrics in the application of the EC competition rules and in individual competition cases (in particular cases involving complex economic issues and quantitative analysis)' (Rose and Ngwe, 2007: 9). There has been three CCE since 2003, Dr. Lars-Hendrik Röller (2003-06)⁶⁴, Dr. Damien Neven (2006-2011), and Dr. Kai-Uwe Kühn (2011-).

Having identified the profile of CCE, a further study reveals three distinctive features of the CCE and CET. First, according to the recruitment advertisements⁶⁵, the CCE is a non-permanent post for a term of three years

⁶⁴ 'An academic economist, Lars-Hendrik Röller, has recently been appointed to advise on specific high-profile cases in DG Comp (including state aids), and to provide general guidance at an early stage in enquiries and more widely on economic methodology.' (Lyons, 2004: 258)

⁶⁵ The advertisements for CCE are available on Economist, Times Higher Education (<http://www.timeshighereducation.co.uk/story.asp?storyCode=202333§ioncode=26>), and other magazines. (accessed 11 May 2009)

and the term is non-renewable⁶⁶. Because of the vast scope of competition issues, DG COMP needs a variety of different and fresh ideas from the contemporary economic studies. A restrictive condition against renewing the term of CCE allows different economists to bring in different perspectives and knowledge that the staff of DG COMP may exchange and consider, and take advantage of keeping the economic thinking up to date. It is a major function of the CCE to be involved in many cases in their early stage. Despite the cost for a new CCE to be *au fait* with the work⁶⁷, having a CCE every three years would reduce the bureaucratic negatives and increase the neutrality and independence of CCE and CET. Furthermore, such a type of non-renewable contract would neither jeopardise the promotion of permanent staff nor incur extra costs (e.g. pension) other than the necessary payment. From the bureaucratic autonomy perspective, the specific design of tenure results in the effect of political differentiation, as the CCE and CET is not directly exposed to any constituent pressure. It would be difficult for other actors in the competition regime to lobby them. This arrangement was proposed by DG COMP and it has been proven functional since the modernisation reform. *'It is a design that should have been replicated by national competition authorities where appropriate.'* (NCA Official, Interviewee 11, March 2011) To a certain extent, DG COMP verifies its discretionary power in the institutionalisation process of economists. The set up of this non-renewable feature contributes to the argument of the first main hypothesis H1, that the modernisation reform has resulted in greater political differentiation for DG COMP.

Second, the post of CCE is a very high-level technocrat in the Commission. In the grading system of the European Commission, the CCE is given Grade

⁶⁶ Although the original design for CCE is a non-renewable post, the Commission had reappointed Dr. Damien Neven in 2009 for another three-year term in an 'exceptional' condition. As explained in the Commission Newsletter (IP/09/1287), 'the Commission decided exceptionally to reappoint Professor Neven for a further period of three years to ensure continuity in projects that last beyond a period of three years, and to avoid continuity problems, which may be particularly relevant in the current times of financial and economic crisis'. In May 2011, Dr. Neven is replaced by Dr. Kai-Uwe Kühn to start a new mandate for three years.

⁶⁷ According to the Commission Staff Regulation, the nine-month probation would be applied to all *functionaires*, therefore including the Chief Competition Economist.

AD14 and categorised as 'economic expert' (either Grade AD13 or AD14), whilst the Director-General is either Grade AD15 or AD16.⁶⁸ In 2009, there are only 464 officials at AD14 level, among 12836 administrators (AD) and a total of 35103 officials in the Commission.⁶⁹ The importance of the CCE is discernible. Since the CEE requires a PhD degree and the assignment is limited for three years, it is reasonable to set a high-level grade for this position to '*attract the best candidates in the field*' (DG COMP Official, Interviewee 04, August 2009). Therefore, the CCE can be regarded as a unique figure in DG COMP with special expertise, providing objective opinions and balancing the case assessment by giving more weight to the economic approach. Compared to the EPO's development in the U.S. Antitrust Division, the CCE in DG COMP holds a very high organisational position right since the beginning of its establishment. DG COMP shows great confidence and considerable discretionary competence in setting up such a high grade for the CCE. This institutional feature is a positive answer to indicate more presence of economic expertise in DG COMP.

Third, apart from the language proficiency and other general requirements, the potential candidates for CCE should hold a Ph.D. degree in economics and have at least 15 years of experience⁷⁰ in the field. Such criteria guarantee that the CCE is selected from among the best candidates in the field and is worthy of the grading scale. Since the CCE should be the most important advisor to the Director-General, it is not surprising that the qualification for CCE is very demanding. 'The Chief Competition Economist

⁶⁸ The Commission has two kinds of staff: administrators (AD) and assistants (AST). For administrators, the grade scale goes from AD5 to AD16, according to their seniority and professional skills. For example, AD16 is for director-general. AD15 is for director-general and director. And AD14 is available for director, head of unit, adviser and experts. For further details, see the Commission Staff Regulations (http://ec.europa.eu/civil_service/docs/toc100_en.pdf). (accessed 15 May 2009)

⁶⁹ For further details of the composition and distribution of staff in the Commission, see the Commission Civil Service website (http://ec.europa.eu/civil_service/about/figures/index_en.htm). (accessed 15 May 2009)

⁷⁰ According to the recruitment advertisement, eligible CCE candidates should 'have at least 15 years' postgraduate professional experience at a level to which the qualifications referred to above give admission including at least 10 years at a senior level in fields relevant to the post'. (European Commission, 2006b)

attends the weekly meeting with the Commissioner. In addition, he provides written advice in all cases where he has been involved.’ (European Commission, 2005a: 17) The dual requirements of academic background and practical experience would ensure the CCE to be well-fitted in the daily operation and make useful recommendations. (Lyons, 2004) From the analytical aspect, the highly demanding requirement has a tacit impact on the consolidation of CCE’s institutionalisation process and more presence of economic expertise within DG COMP. Moreover, this requirement might be contributive to the paradigm shift from the SCP to the Chicago School, since eligible CCEs are usually well-educated after the paradigm shift in the U.S.

Similar uniqueness applies to the CET. First, all members of CET are holders of Ph.D. degrees in economics. A study in 2005 shows that ‘approximately 200 out of the over 700 officials working at DG COMP have an economics background, where “economics” relates to all areas of economics (such as macroeconomics), as well as other related business disciplines (such as accounting). Less than 20 officials hold a PH.D. in economics, with 10 of those currently working in the CET’ (Röller and Buigues, 2005: 28). In a speech given by a Deputy Director-General of DG COMP, the ratio of economists to lawyers is roughly one to two in 2008. (Evans, 2008) Therefore, DG COMP is never unfamiliar with economics but simply lacking top experts. The CET is hereafter a special Unit meant to fill the gap, specialising the economic studies and providing top level expertise. By using the contractual recruitment scheme⁷¹, the appointment of the members in the CET is similar to the CCE that reduces the collateral costs and maintains a certain degree of mobility, neutrality, and independence. The qualification of Ph.D. and the contractual appointment for CET indicate similar recognition of the institutionalisation of economists and enhanced presence of economic expertise in DG COMP.

⁷¹ Here is an excerpt from the 2007 CET recruitment advertisement: As a requirement, the candidates should hold a Ph.D. (or possibly a masters’ degree with honours), have a strong background in industrial organisation and a specialization in competition economics, finance or public economics. Candidates should ideally have 2-3 years of professional experience but strong candidates with no experience will also be considered. (http://www.cepr.org/researchers/noticeboard/Employment_opportunities_CET2007.doc) (accessed 15 May 2009)

Second, the number of CET members has been expanded from 10 (2003-06) to 20 (2006) and eventually reached 30 (2010). In the first mandate, 'the office of the CCE consists of 10 specialised economists, all of which hold a Ph.D. in Industrial Organisation. Approximately, half of the members are permanent EU officials, while the others are temporary agents.' (Röller and Buigues, 2005: 6) Since 2006, the second mandate of CET incorporated twenty economists '*in line with the increased importance of economic analysis in competition policy*' (DG COMP Official, Interviewee 10, March 2010). The growing number of staff reveals the need for further economic input to assist the handling of cases that 'the further reinforcement of the Chief Economist Team..... reduce the risk that decisions are annulled' (European Commission, 2008b: 25) by the Community Courts. It is at the very least an indication that the contribution of CET in the first three years is greatly appreciated by DG COMP. Furthermore, it is a response to the OECD's suggestion. In 2005, the OECD Competition Committee held a peer review⁷² with a clear expression that the Commission should 'increase further the Competition DG's capacity for economic analysis by increasing the staffing in the Chief Economist team' (European Commission, 2006a: 196). Analytically speaking, the fact that DG COMP is capable of making alterations to the CET after its establishment shows its bureaucratic autonomy in the organisational change and its political differentiation to other actors in the regime. The increase of economists in CET certainly proves the importance of CET and the consolidation of the institutionalisation process in DG COMP, which is the positive answer to sub-hypothesis H1-1.

Third, the CET has been involved extensively and early in the assessment of cases.⁷³ 'All cases that the CCE and his team are involved in are put on a so-called rolling plan, which is approved by the Director-General in a weekly

⁷² The OECD Competition Committee has reviewed many countries' competition enforcement and published these reports. The one on the EU is named as: 'Peer Review of the Competition Law and Policy in the European Community', available at <http://www.oecd.org/dataoecd/7/41/35908641.pdf> (accessed 24 May 2009)

⁷³ In the first year of establishment, 'the CET was involved in a total of 33 cases (11 mergers, 15 antitrust, and 7 state aid cases)' (European Commission, 2005a: 17).

meeting between the Director-General and the CCE.’ (Röller and Buigues, 2005: 7) They can be requested to join a case or actively involve themselves in cases they believe to be important in economic terms. The CET is responsible for giving ‘general guidance in individual competition cases from their early stages; and detailed guidance in the most important competition cases involving complex economic issues, in particular those requiring sophisticated quantitative analysis’ (European Commission Press, 2003: 2). Moreover, members of CET are also involved in many economic organisations and activities. For example, they participate in the Economic Advisory Group on Competition Policy (EAGCP), one of the most important economic epistemic community. ‘The members of this group are all leading academics who publish reports on competition issues in subgroups that importantly influence European competition policy.’ (Schinkel, 2007: 20) Members of CET may also deliver their views at the Economic Seminar Series on Competition Policy (ESSCP). The role of economists in the competition regime is enhanced. Therefore, the extensive activities of CET members in competition cases and other seminars show a strong institutional presence of economists within DG COMP.

In sum, the performance of CCE and CET since 2003 provides the positive example of the need for more economic expertise in the competition enforcement, one of the major declarations in the modernisation reform. ‘The creation of the role of Chief Competition Economist at the competition authority is itself a relatively new development, the purpose of which was to provide an economic viewpoint to decision-makers, as well as on-going guidance to Commission investigative staff in the enforcement process.’ (Decker, 2009: 2) The salience of CCE and CET is different from other officials in the Commission. It highlights one of the main concerns in the modernisation reform — more use of economic approach in case assessments. *‘For a long period of time, DG COMP has been looking for changes towards more effective-based approach and economic analysis. The creation of CCE is the remedy for this thrust. It counterweighs the legal service sectors of European Commission. So I think it is a fundamental and*

extremely important change.' (Academic, Interviewee 16, February 2012) The institutionalisation of economists is widely praised by the epistemic community. As another interviewee said, *'I think it is one of the best development that was put in place. It is an interesting role of Chief Economist. The sense is the independence of economist within DG COMP provides a check-and-balance function in relation to the Commission analysis.'* (Lawyer, Interviewee 18, February 2012) In addition, the existence of CCE and CET provides another channel of communication when the cases are assessed. *'From a practitioner's perspective, it is very helpful to have another means of getting across your position on economic arguments. So the Chief Competition Economist is very useful in that way. Because you know it is another party that you can present your side of the story; and they would listen to.'* (Lawyer, Interviewee 17, February 2012) Therefore, the institutionalisation of economists within DG COMP appears to help both the elevation of the economic approach to be used in the enforcement and the reorientation of the professional background of DG COMP officials. It is also contributive to the paradigm shift from the SCP to the Chicago School.

4.1.3 The Institutionalisation of Economists – More Examples

Apart from the establishment of CCE and CET, there are other organisational changes indicating the institutionalisation of economists within DG COMP. They add the additional capacity for DG COMP to perform its duties and influence the concept of competition within DG COMP. For instance, the establishment of an "Enforcement Unit" in Merger Task Force in 2001 is an example where DG COMP is able to react promptly in setting up a unit to handle multiple tasks in the merger implementation with consistent treatment and best practices.⁷⁴ 'The enforcement unit is also seeking to develop best practice guidelines, building on the experience obtained from previous merger cases so as to identify aspects that have worked well and

⁷⁴ The Commission's aim of developing consistency of treatment and best practices in the handling of remedies was significantly furthered by its decision to establish, in April, an enforcement unit within the Merger Task Force dedicated to advising on the acceptability and implementation of remedies in merger cases. (European Commission, 2002a: 88)

those that have not.’ (European Commission, 2002: 88) Another Task Force in Merger ‘was created at the end of 2006 to conduct ex-post evaluation of merger decisions’ (European Commission, 2007b: 18). These examples may not have direct effects on the institutionalisation of economists, but they are certainly contributive towards greater economic thinking in DG COMP.

4.1.4 Conclusion: a Successful Institutionalisation of Economists in DG COMP

The institutionalisation of economists within DG COMP denotes the expansion of policy domain, the need for better management, the development of institution, and the strategic survival of bureaucracy. (Peters, 2001; Bauer, 2006) Before the modernisation reform, there was no specific institutional position for economic specialists within DG COMP. For the economic assessment, DG COMP mainly relies upon the educational expertise of its officials, which was rather inconsistent in producing sufficient economic proofs to support for the Commission Decisions. Therefore, the institutionalisation of economists is highly welcomed by the competition epistemic community. (Lawyer, Interviewee 19, February 2012) ‘Policy change found its origins in the bureaucracy — in the influx of economists into policy-making positions.’ (Eisner and Meier, 1990: 282) Considering that DG COMP is an institution with rather limited resources of budget and staff, the institutionalisation of economists is an important move aimed to provide sufficient political differentiation for DG COMP and leading to greater economic thinking in the enforcement, which would be discussed in the following Section 4.2.

The high profile and qualifications of CCE, the increase of CET members, and CET members’ early involvement in the case assessment, are the outstanding evidence in favour of the statement that **there is the institutionalisation of economists within DG COMP**. The establishment of CCE marked the beginning of institutionalisation of economists. Its high rank within the Commission and its qualifications, having to have 15 years of

practical experience in addition to holding a Ph.D. degree, speak for its significance and strengthen the evidence of DG COMP's institutionalisation effort. The non-renewable feature of only one term for the CCE further advocates the political differentiation of DG COMP by bringing in more economic academics⁷⁵. A detailed analysis of CET reveals similar traits of such institutionalisation, in particular, the steady increase of CET members and their involvement in the case assessment and epistemic community. The contractual tenure and the demanding qualifications for CCE and CET also reinforce such institutionalisation process. The positive comments from the epistemic community are contributive to the institutionalisation of economists in the competition authority. Therefore, a positive answer is found to support sub-hypothesis H1-1 that **there is the institutionalisation of economists within DG COMP**. The study suggests that DG COMP has successfully acquired the momentum of political differentiation through the institutionalisation of economists.

In addition to the institutionalisation of economists in DG COMP, the study of CCE and CET also identifies a certain level of organisational capacity of DG COMP, which would be discussed extensively in the next chapter. However, there are two points to be raised in advance. First, DG COMP can independently conduct the organisational change. It is able to set very high and very specific recruitment standards, e.g. the requirement of a Ph.D. degree, the three-year and non-renewable tenure, the AD14 grading, etc. Second, DG COMP is also capable of making alterations after the organisational change, displaying its strong and consistent discretion in establishing its organisational capacity. The increase of CET members and the extraordinary reappointment of CCE in the financial crisis are two examples. The discussion of organisational capacity will continue in the next chapter.

⁷⁵ 'The role of academic economists in the EU competition law is growing, as the revolving-door position of Chief Competition Economist at the European Commission exemplifies.' (Schinkel, 2007: 20)

4.2 The Substantive Change II – More Economic Thinking in the Enforcement

The aforementioned development in the U.S. Antitrust Division reveals the second feature of substantive change: the increase of economic thinking in the case assessment. In fact, 'the economists' professional norms and values (as embodied by the dominant school of economic thought) came to play a central role in the definition of policy. The interplay of bureaucratic evolution and critical shifts in the economics discipline provided the basis for change in antitrust.' (Eisner and Meier, 1990: 283) A bureaucratic culture of more economic thinking has become mainstream in the U.S. antitrust regime.

In the EC competition regime, 'the last century's approach to enforcement of competition by the European Commission was too much dominated by textual analysis of written clauses rather than by economic analysis of business reality' (Forrester, 2011: 76). In the previous competition enforcement regime, economic thinking did not have as much influence as other mindsets, such as the legalistic view. This approach had been criticised by other competition actors and resulted in many appeals at the courts. '*Because of the shortage of economic analysis in the decisions, companies are more and more willing to challenge the decisions for the lack of economic test and the proper examination of the market..... So, they bring their cases with their assessments to the courts.*' (Lawyer, Interviewee 19, February 2012) Therefore, the increase of economic thinking is expected as a gradual phenomenon of enforcement after the modernisation reform.

In fact, the institutionalisation of economists provides an appropriate opportunity for more economic thinking. In this context, it is expected to see the enforcement evolved to embrace more economic thinking in the enforcement⁷⁶. The tacit increase of economic thinking in many Commission

⁷⁶ In the U.S. Antitrust Division, the case team would conduct the economic assessment on their own and make the judgment. However, due to the limited number of economists, 'the principal task of the Commission case team is to critique any economic analysis and evidence presented by the parties rather than to actively assemble economic evidence and perform economic analysis to support its own case' (Decker, 2009: 115).

Decisions and court's proceedings has suggested the substantive change of competition thought with a more economic approach. In this regard, the second sub-hypothesis is established to argue that:

(H1-2) there is more economic thinking in the enforcement.

4.2.1 More Economic Thinking in the Regulatory and Enforcement Aspects

In the treaty-based domain, there have been some obvious attempts to incorporate more economic thinking into the enforcement, particularly evident in Article 81(3). The economic approach in self-evident cases reduces the unnecessary use of the comfort letter⁷⁷ for granting negative clearance. (Schaub, 2001) Moreover, 'the Commission is eager to restrict the role played by non-economic policy factors in Article 81(3) exemptions' (Monti, 2010a: 11). The introduction of a directly applicable exception system in the implementation of Article 81(3) may also reduce the number of cases. This attempt requires a more economic approach to 'lower the risk of incoherent applications of Article 81(3)' (Paulis, 2001: 410). The need for more economic thinking also applies to the enforcement of Article 82. 'The Commission's broad approach to the assessment of factors under Article 82 can be described as a combination of legal and economic insofar as it involves a consideration of both economic indicators, and economic processes, and a range of documentary evidence.' (Decker, 2009: 89)

In the regulation-based domain, the evidence for more economic thinking can be found in new block exemption regulations. 'In the substance field, the principal instrument employed is the adoption of a more economic approach. A clear example thereof is the new block exemption regulation for vertical restraints that focuses on the economic effect of agreements rather than their legal form.' (Schaub, 2001: 241) This is further reflected by the comment of former competition Commissioner Mario Monti. He believed that the

⁷⁷ Instead of giving a formal decision for the negative clearance, DG COMP issues the non-binding administrative 'comfort letter' to close the majority of notified cases. Based on the information provided, the quick-delivered comfort letter provides the views of DG COMP on the compatibility of the notified case. See *supra* footnote 6 for further discussions.

assessment of vertical restraints has changed from a form-based approach towards the economic effect-based method. (Monti, 2001) In general, 'all these group exemptions were less formal than their predecessors and were based more on economic considerations' (Korah, 2010: xxvii). The discussion on vertical restraints and mergers, along with further evidence of economic thinking in other legal documents, would be elaborated in the next Section 4.3.

The footprint of more economic thinking is further seen in the modernisation documents. 'The White Paper proposal will promote a more economic approach concentrating on the current and past effects of the agreements on competition in the relevant market.' (Schaub, 2001: 250) Two guidelines in the modernisation package clearly emphasise the use of an economic approach and the importance of economic judgment. 'The Commission Guideline on the Effect on Trade Concept contained in Article 81 and 82' highlights the equal importance of the economic and legal context in trading agreements. "The Commission Guideline on the Application of Article 81(3)" even explicitly says that the assessment method should be based on 'the economic approach already introduced and developed in the guidelines on vertical restraint, horizontal co-operation agreements and technology transfer agreements'. (European Commission, 2004j: 1)

The increased use of economic analysis is seen in the enforcement of competition law. First, as discussed in the last Section, the creation of CCE and CET denotes the growing importance of economic thinking in DG COMP. 'The Chief Economist has a staff that now exceeds 20 economists. The establishment of a separate economics unit can become the instrument by which economic analysis exerts more influence in guiding the selection and prosecution of cases. Economic analysis and the preferences of economists are likely to assume increasing importance in the Commission's investigation of proposed cases, the formulation of complaints, and the prosecution of alleged infringements.' (Kovacic, 2008b: 14) The institutionalisation of economists within DG COMP appears to increase the use of economic

approaches in the enforcement.

Second, the *Microsoft* assessment by DG COMP endorses the rule of reason approach, signaling the departure of *per se* illegal rule. 'The Commission explicitly referred to the new test as a 'rule of reason approach!.' (Diaz and Garcia, 2007: 14) The shift shows not only the growing use of economic assessments but also the adoption of the Chicago School approach in the European competition regime.

Third, more economic thinking in the enforcement is very much welcomed by the Community courts. 'The European Courts have increasingly taken a detailed interest in how the Commission uses economics in making assessments in competition matters.' (Decker, 2009: 6) In fact, economic analysis is increasingly used before the courts. The adoption of economic analysis in the litigation process enhances the correctness of rulings. 'In cases like *GE/Honeywell*, *AirTours*, *Schneider Electric*, and *Tetra Laval*, the courts have made it clear that the decisions of the Commission must be based on sound economic reasoning and substantial economic evidence.' (Gavil, 2007: 179) In addition, more economic thinking in the enforcement is recognised by the epistemic community. '*I agree with the idea of more economic thinking in the Commission. In my view, the use of economic interpretation and econometrics gives a clear message of what the Commission is thinking. The focus is clear in this way.*' (Lawyer, Interviewee 19, February 2012)

Fourth, the use of economic analysis and the assistance of forensic economists in the investigation is growing. 'The standard of economic work in many antitrust investigations is high, often leading to additional insights and a deeper understanding of economics. An advanced form of economic consulting has developed that applies cutting edge economic techniques, reasoning, and evidence.' (Schinkel, 2007: 11) Whilst the use of economic analysis is completely at the Commission's discretion⁷⁸, these cases

⁷⁸ 'Unless the court has intervened in setting out the rules, it is up to the Commission to do so and it is able to revise its approach.' (Monti, 2010b: 17)

suggests that DG COMP has greater reliance on the economic analysis, in particular, those competitive and sensitive conducts. (Gavil, 2007)

Fifth, the increased use of economic analysis by DG COMP has an impact on the way law firms prepare for clients' cases, where the trend is to get economists quickly onboard. (Lawyer, Interviewee 07, November 2009; Lawyer, Interviewee 17, February 2012) The use of economic analysis has become a common culture in the enforcement first by DG COMP and gradually by the private sectors. In this sense, more economic thinking in the case assessment and decision, based on the preference of DG COMP, would effectively produce more political differentiation for DG COMP.

4.2.2 Conclusion: More Economic Thinking as the Mainstream Approach

In conclusion, greater reliance on economic thinking has become the mainstream approach in the enforcement by DG COMP in the recent years. More economic thinking is applicable for the treaty-based interpretation and other regulatory contexts. 'The principles underlying European competition policy (as applied to vertical restraints) have been anchored to an economics based approach.' (McNutt, 2000: 49) This change has generated the atmosphere within DG COMP to employ more economic analyses towards the assessment.

In practice, 'the most common technique is for the Commission to refer an economic factor and use this as a basis to postulate a theory of competitive harm or make inferences, or predictions about how this factor might impact the incentives for co-ordinated behaviour' (Decker, 2009: 72). It is expected that there would be more consistent use of economic approaches 'to provide clear guidelines for compliance on the basis of legal advice and sufficiently flexible to accommodate the emerging corporate actions and strategies in the new Europe' (McNutt, 2000: 50). In addition, new rules introduced by the modernisation reform would be frequently applied with economic analyses that 'lead to a relaxation of the prohibition rule with regard to companies

holding no market power while it will entail a stricter application for companies with market power' (Paulis, 2001: 410). Therefore, the acknowledgement of more economic thinking in the enforcement gives an affirmative answer to sub-hypothesis H1-2 that **there is more economic thinking in the enforcement**; and it leads us to the detailed analysis of the paradigm shift from the SCP to the Chicago School in the next Section 4.3.

4.3 The Substantive Change III — the Paradigm Shift from the SCP to the Chicago School

From Table 2.1 and Section 2.3.1, we have noticed the main differences between the Structure Conduct Performance (SCP) paradigm and the Chicago School paradigm. The latter perspective emphasises the importance of efficiency and opposes in principle the *per se* rule, particularly in regards to vertical restraints and mergers. This challenging perspective successfully motivated the paradigm shift from the SCP to the Chicago School, which is the third feature of the substantive change in the 1970s U.S. antitrust development. In addition, several regulatory modifications and procedural changes are the other feature resulted from the paradigm shift. A consistent economic approach of competition enforcement is finally established.

Following last section's findings of more economic thinking in the enforcement, it is viable to take a further step to argue if **there is the paradigm shift from the SCP to the Chicago School** in the EC modernisation reform, known as sub-hypothesis H1-3. The analysis is able to reveal the most important substantive change of modernisation reform that the underlying basis of competition enforcement after the modernisation reform not only incorporates more economic thinking, but also adopts the Chicago School's doctrine of the efficiency-based approach.

The following analysis begins with the review of the salience of SCP and Chicago School and their relevance to the paradigm shift. The examination then focuses on the details of regulatory changes to understand the context

of Chicago-style thinking and the efficiency-based method of enforcement. Lastly, the argument of the paradigm shift would be verified by the regulatory change of merger regulations and the block exemptions for horizontal and vertical agreements.

4.3.1 The Rationale of the Paradigm Shift in the European Competition Regime

Before the arrival of the paradigm shift, the economic approach employed in the EC regime was not consistent with nor pursuant to the Chicago School paradigm. With the priority of achieving market integration, the SCP paradigm was the prevailing approach of Council Regulation 17/62. The Commission decisions and court judgements were mostly formalistic and hardly seen an efficiency-based approach. It has been criticised that the Commission decisions should be more clearly based on economic theories and on the likely effects of conduct that can make the Community more competitive and bring more benefit to consumers. (Korah, 2010) The Chicago School's influence was modest prior to the modernisation reform.

To examine the paradigm shift in the European Competition Regime, it is important to reiterate the salience of the SCP and the Chicago School in order to identify the regulatory changes pursuant to the process of the paradigm shift.

The SCP paradigm has three distinctive features. First, the essential element of the SCP paradigm is the market structure of the industry in which a firm operates. The market structure determines each firm's conduct and the industry's overall performance. 'Under the Harvard approach, the performance of specific industries is seen as dependent on the conduct of firms which in turn is dependent on the market structure of the industry under investigation.' (van den Bergh and Camesasca, 2001: 23) Second, the SCP paradigm is in favour of the government's intervention in scrutinising business activities and to reimpose the competitiveness in the market. 'State

intervention is an important criterion of the Harvard concepts in order to consistently scrutinise all kinds of arrangements and the prohibition of monopolies and mergers.’ (Cseres, 2005: 44) Government policies have a strong impact on the basic conditions of the market and the structure, conduct and performance of an industry. (van Cayseele and van den Bergh, 1999; Cseres, 2005) In this regard, the third feature of the SCP paradigm is distinguished by adopting the *per se* illegal rule on monopolies and mergers. It is anxious about high degrees of concentration, which would lead to higher prices, less consumer welfare, and allocative inefficiencies. ‘A monopoly will be prohibited even if the monopoly is socially desirable, because it leads to efficiencies (productive efficiency)’. (Komninos, 2008: 44)

Based on the neo-classic price theory, the Chicago School holds a different view to the features of the SCP paradigm. First, ‘where the Harvard School assigned a multitude of goals to competition law, providing the basis for a more interventionist policy, Chicago scholars acknowledged only one goal of antitrust policy: the pursuit of economic efficiency’ (van den Bergh and Camesasca, 2001: 47). Economic efficiency has become the utmost concern to justify anti-competitive activities. ‘Chicago School scholars typically propose that the attainment of economic efficiency is the exclusive basis for the design and application of antitrust rules. (Kovacic, 2007: 22) Second, the rejection of governmental intervention is pledged. ‘In the view of the Chicago scholars, the free market and the common law system provides sufficient and better protection for citizens than government intervention.’ (Cseres, 2005: 46) The intervention would be redundant and ineffective in increasing the consumer welfare and the market competitiveness.

Third, the efficiency concern allows the Chicago School to hold a different approach of “*per se* legal rule” towards monopolies, mergers, vertical restraints, etc. This is the most distinctive contribution of the Chicago School for the development of competition enforcement and the relaxation of prohibition rules. Regarding the issue of concentration, the Chicago School believes that ‘concentration is not the structural basis for collusion but an

expression of efficiency and the technical demands of producing in a given market' (Eisner and Meier, 1990: 270). Large and efficient firms could have the concentration effect without creating a dominant market power. Regarding vertical restraints, the Chicago School holds the similar view that vertical agreements may enhance efficiency, in particular, the production and distribution of product. 'Vertical restraints may provide the appropriate incentives for dealers to invest in quality of service or to appropriately advertise the product in its region.' (van Cayseele and van den Bergh, 1999: 476) In this regard, 'Chicago School economists downplay the importance of monopoly and merger cases, advocating greater reliance on price-fixing cases to combat collusion' (Eisner and Meier, 1990: 278). Despite being rare in practice⁷⁹, price-fixing cases are the most problematic ones of all anti-competitive cases. The Chicago School's attention to efficiency has successfully achieved the promotion of efficiency for manufacturers, the increase of consumer welfare and efficiency in competitive markets.

Following above discussions, we notice that the Chicago School perspective propels the paradigm shift to the unreserved support of efficiency. According to the U.S. experience, the paradigm shift from the SCP to the Chicago School can be observed, notably in regulatory changes concerning merger assessments and vertical restraints. In the European competition regime, 'the most significant legal instrument that reflects this evolution [from the SCP to the Chicago School] is the substantive test of merger control adopted by the new Merger Control Regulation no. 139/2004' (Basedow, 2007: 433). In fact, the priority of merger assessments has been switched. New Merger Regulation 139/2004 prioritises the judgement of lawfulness on whether a concentration may significantly impede effective competition, rather than focusing on the creation or strengthening of a dominant position. (Council of the European Union, 2004) Regarding vertical restraints, 'above the market share threshold, vertical agreements will not be presumed to be illegal, and Commission guidelines will help companies to assess the compatibility of their agreements with Article 81(1) and 81(3)' (Schaub, 1999: 762). The *per*

⁷⁹ Whilst price fixing was recognised as the most serious form of antitrust behaviour in theory, many regulators came to believe it was rare in practice. (Riley, 2010a: 192)

se legal rule applies. The guideline of horizontal agreement also suggests a shift of enforcement. The following sections continue to discuss the paradigm shift in the European competition regime.

4.3.2 New Merger Regulation 139/2004 — Adoption of the Substantive Test

Derived from Section 4.1.1, regulatory modifications, notably merger regulations, are the fourth feature of the U.S. antitrust development. It is expected to see EC merger regulations may have an identical update and verify the argument of the paradigm shift towards the Chicago School.

The first and most important evidence of the paradigm shift in the EC merger development is the change of assessment from the “dominance test” to the Significant Impediment of Effective Competition Test (SIEC), the so-called “substantive test”, which converts the order of assessment criteria to prioritise the judgement of whether a concentration may significantly impede the effective competition, rather than focus on creating or strengthening a dominant position. ‘The main innovation introduced by the ECMR 2004 has been the switch from a Market Dominance Test to a Significant Impediment of Effective Competition Test (SIEC), thus aligning the regulations with the U.S. standards.’ (Frenández, Hashi and Jegers, 2008: 793) Such a change embraces the Chicago School’s idea. ‘*The new framework of significant effect of competition uses more Chicago School discussion. And new rules coming in and much more inspired by economist approaches.*’ (Academic, Interviewee 16, February 2012)

Following more than two decades of antitrust enforcement, the first Merger Regulation 4064/89 was eventually endorsed by the Council in 1989 for the effective control of concentrations and mergers. ‘Under its Article 2(3), a concentration “which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded” had to be declared incompatible with the common market.’ (Basedow, 2007: 433) The assessment on the effect of concentration focused on whether it would

“create or strengthen a dominant position”. Inherently linked to Article 82 of the EC Treaty, Regulation 4064/89 adopted the “dominance test” as the test for the compatibility of concentration.⁸⁰ ‘This clearly reflects the Harvard School perspective that the structure of the market has an impact on the ultimate performance of the market. There is no explicit efficiency defence. Efficiencies are often seen as evidence of market power, rather than as benefits which may outweigh the anti-competitive consequences of mergers.’ (van Cayseele and van den Bergh, 1999: 492)

After more than a decade of merger enforcement, the Commission initiated a review of Council Regulation 4064/89 and successfully mobilised the support from enterprises and other actors in the competition regime for an update of merger rules. In 2004, it facilitated the replacement of Council Regulation 4064/89 by new Council Regulation 139/2004.⁸¹ As a result, the changes of legal provisions would be closer to economic theories in nature and broaden the enforcement power of DG COMP. (Decker, 2009)

With regard to the argument of the paradigm shift towards the Chicago School, Council Regulation 139/2004 starts to endorse the “substantive test” as the test for the compatibility of a concentration. New Merger Regulation 139/2004 prioritises the judgement of lawfulness on whether a concentration would significantly impede effective competition, rather than focusing on the creation or strengthening of a dominant position. (Council of the European Union, 2004) ‘The SIEC test is a much more powerful economic tool to assess the cost and benefits of a proposed merger in terms of balancing the anticompetitive and procompetitive effects. It should help the Commission to produce resolutions that are more consistent with what economic theory.’ (Frenández, Hashi and Jegers, 2008: 793) This is clearly seen in

⁸⁰ The abuse of dominant position is prohibited under Article 82 EC Treaty; and the creating or strengthening of a dominant position is incompatible in Article 2(3) of Council Regulation 4064/89 in this regard.

⁸¹ With a view of recent Community development, Council Regulation 139/2004 points out its three main objectives: the completion of the internal market and of economic and monetary union, the enlargement of the European Union, and the lowering of international barriers to trade and investment. (Council Regulation 139/2004)

Article 2(3) of Council Regulation 139/2004.

A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market. (Article 2(3), Council Regulation 139/2004)

In fact, Article 2(3) has changed the order of the two assessment criteria of merger control in its substantive test. 'Under the new rule, the dominance test is only an example for a significant impediment of effective competition.' (Basedow, 2007: 434) The shift is in line with the Chicago School's perspective, highlighting the overarching importance of efficiency than the market structure. The determination to actively endorse the Chicago School's perspective is also seen in the following recitals.

The notion of 'significant impediment to effective competition' in Article 2(2) and (3) should be interpreted as extending, *beyond the concept of dominance*, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would *not have a dominant position* on the market concerned. (excerpted and italic emphasised, Recital 25, Council Regulation 139/2004)

Recital 25 gives a clear explanation of the impediment to effective competition. A concentration, which impedes effective competition, would be incompatible even if it does not hold or create a dominant position.

This Regulation should accordingly establish the principle that a concentration with a Community dimension which would significantly impede effective competition, in the

common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market. (excerpted, Recital 26, Council Regulation 139/2004)

Recital 26 also confirms that the principle of new Merger Regulation is to focus on the impedance of effective competition, which is in line with the Chicago School thought.

The second evidence of the Chicago School thinking is an explicit support for the efficiency effect outweighing the anti-competitive effect, written in Recital 29. This is a genuine Chicago's belief and it will appear again in the discussion of block exemption regulations in Section 4.3.4.

The efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers..... as a consequence, the concentration would not significantly impede effective competition..... (excerpted, Recital 29, Council Regulation 139/2004)

There is a third and less prominent evidence of the paradigm shift towards the Chicago School in recent updates of merger regime: the involvement of in-house economists in the assessment of merger cases. In the pre-notification stage and Phase I investigation, the case team would be multidisciplinary⁸². However, 'it is common in a Phase II investigation for an economist to have some input into the construction of the case' (Decker, 2009: 114). Most of the economists are macroeconomists, as noted by the first CCE. 'Although the [Competition] Economist Team (CET) has in the past

⁸² 'The case team assembled at the Commission early in the pre-notification process and for a Phase I investigation will be multidisciplinary and, because of a shortage of economists — particularly industrial economists — will not necessarily include a dedicated economist.' (Decker, 2009: 110)

tended to operate separately from the rest of the economists in DG [COMP], and only tended to get involved in important cases that may have an impact on policy, it is increasingly becoming involved in Phase II merger investigations.’ (Decker, 2009: 114) Therefore, the increased involvement of in-house economists would have an indirect impact for both the increase of economic thinking in DG COMP’s enforcement and the paradigm shift towards the Chicago School.

4.3.3 The Block Exemption Regulations

In the antitrust domain, the Commission has adopted “general” block exemption regulations (BERs) and “sectoral” block exemption regulations⁸³ to alleviate the administrative workload and to relax the rules regulating anti-competitive behaviour. ‘The block exemptions have been extremely useful in saving time in dealing with agreements that the EC thought would pose few competition problems.’ (Motta, 2007a: 33) *‘Block Exemption sets up broad principles and the Guidance gives helpful assistance, that is really the best way and very useful.’* (Academic, Interviewee 14, April 2011) These BERs and the corresponding Guidance clarify that Article 81(1) would be inapplicable to certain categories of agreements. (Basedow, 2007). Therefore, the paradigm shift may be evident in these BERs, particularly in the general BERs for vertical agreements.⁸⁴

Three general BERs were first introduced in the late 90s as a response to the accumulation of Article 81(3) cases: the block exemption for vertical

⁸³ The Commission has adopted several sectoral block exemption regulations to cover several sectors, including the motor vehicles, technology transfer, agriculture, insurance, postal services, professional services, transport, telecommunications, etc. For the updated information, please see: <http://ec.europa.eu/competition/antitrust/legislation/legislation.html> (accessed 10 July 2011)

⁸⁴ There is a fundamental difference between the horizontal agreements and vertical agreements. ‘Horizontal agreements, that is agreements among competitors, usually restrict competition and thus reduce welfare and should therefore be prohibited apart from very specific cases (such as, for instance, co-operative agreements in R&D). By contrast, vertical agreements, that is agreements between firms operating at different stage of the production processes (for instance, between a manufacturer and a retailer) are often efficiency enhancing and pose problems to competition, if any, only when they are undertaken by firms which enjoy considerable market power.’ (Motta, 2004: 32)

agreements, the block exemption for horizontal agreements on research and development, and the block exemption for horizontal agreements on specialisation agreements. The arrival of these “general” BERs denotes the paradigm shift towards the Chicago School thinking. First, prior to this regulatory development, those sectoral BERs followed ‘a rigid legal structure and often fail to consider efficiency benefits in any depth’ (Neven, Papandropoulos and Seabright, 1998: 166), which is mainly a SCP approach. The rationale of general block exemption regulations is somehow different. Second, ‘the approach of the new block exemptions is no longer to prohibit all restrictions except those are explicitly exempted, but rather to exempt all restrictions except those that are explicitly prohibited’ (Paulis, 2001: 404). The approach of these general BERs suggests the adoption of *per se* legal rule by the EC competition regime, which is consistent with the Chicago School paradigm. By focusing only on the prohibited areas, the general BERs reduce the scope of legal uncertainty. DG COMP can therefore make better use of its limited organisational capacity and human resources. To clarify the effect of these general BERs, the Commission also issues guidelines⁸⁵ for the assessment of cases not covered by BERs as a supplementary measure. (European Commission, 2004i and 2004j)

There are two general BERs for horizontal agreements: the BER for research and development (Commission Regulation 2659/2000⁸⁶, replaced by Commission Regulation 1217/2010⁸⁷), and the BER for specialisation

⁸⁵ There are two guidelines issued by the Commission for areas not covered by BERs: (1) Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 2004); and (2) Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Text with EEA relevance) (OJ C 101, 2004).

⁸⁶ Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements (Text with EEA relevance)

⁸⁷ Commission Regulation (EC) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (Text with EEA relevance)

agreements (Commission Regulation 2658/2000⁸⁸, replaced by Commission Regulation 1218/2010⁸⁹). The BER for research and development authorises four conditions of exemption. It also defines three hardcore restrictions, two excluded conditions, and a market share threshold of 25%. Similarly, the BER for specialisation agreements defines three types of exempted specialisation agreements. It also lists out three hardcore restrictions (price-fixing; the limitation of output or sales; the allocation of markets or customers) and a market share threshold of 20%.

However, the prevalence of the Chicago School paradigm is not explicit in the general BERs for horizontal agreements. The recitals and articles define merely the scope of exemption by laying down several hardcore conditions and market share thresholds. There is no explicit text about the efficiency effect.

Nonetheless, positive evidence can be found in the 2001 Guidelines for horizontal agreements⁹⁰ issued by the Commission. In this extensive and detailed guideline, the efficiency effect is explicit and repeated in the definition of “economic benefits”, under the assessment of Article 81(3). ‘The first condition requires that the agreement contributes to improving the production or distribution of products or to promoting technical or economic progress. As these benefits relate to static or dynamic efficiencies, they can be referred to as economic benefits.’ (European Commission, 2001c: 5) Therefore, the efficiency effect is applied to the assessment of economic benefits for different types of horizontal agreements, including agreements on research and development, production agreements (including the specialisation agreements), purchasing agreements, commercialisation

⁸⁸ Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (Text with EEA relevance)

⁸⁹ Commission Regulation (EC) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (Text with EEA relevance)

⁹⁰ The Guidelines for horizontal agreements was first introduced in 2001: Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (Text with EEA relevance) (OJ C 3, 2001).

agreements, agreements on standards, and environmental agreements.

The focus on efficiency gains is deepened in the new 2011 Guidelines for horizontal agreements⁹¹. The application of the exception rule of Article 81(3) is subject to four cumulative conditions, which are all related to the efficiency gain. For example, ‘the agreement must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress, that is to say, lead to efficiency gains’ (European Commission, 2011: 12). The 2011 Guidelines also recognises that ‘horizontal cooperation can lead to substantial economic benefits, in particular if they combine complementary activities, skills, or assets’ (Seitz, 2011: 455). Meanwhile, it continues to serve as ‘an analytical framework for assessing the most common types of horizontal cooperation agreements, such as research and development, production, purchasing, commercialisation, standardisation, and information exchange’ (Seitz, 2011: 452) Based on these non-exhaustive explorations, it is fair to assume that the Chicago School paradigm is apparent in the application of block exemption for horizontal agreements under Article 81(3).

The general BER for vertical agreements has been one of the most important achievements in the EC competition regime.⁹² Based on the Chicago School thinking, the general BER for vertical agreements believes that these exempted vertical agreements may bring in more economic benefits of efficiency and welfare for consumers, outweighing the anti-competitive effect. The market-share threshold and the non-exemption for certain types of vertical restraint still guarantee competitiveness in the market.

In fact, the first general BER for vertical agreements, Commission

⁹¹ Communication from the Commission — Notice — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Text with EEA relevance) (OJ C 11, 2011)

⁹² By definition, vertical agreements are agreements for the sale and purchase of goods or services operating at different levels of production or distribution chains.

Regulation 2790/1999⁹³, was the first BER to incorporate the concept of 'more economic approach'. (Incardona, 2007) It has endorsed the Chicago School's ideas on the supply and distribution agreements. It also incorporates three previous sectoral BERs⁹⁴, which were introduced in the 80s to reduce the volume of notification regulated by Council Regulation 17/62. The efficiency concern is explicit in the context.

Vertical agreements of the category defined in this Regulation can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings.....
(excerpted, Recital 6, Commission Regulation 2790/1999)

Recital 6 illustrates the efficiency concern of the Commission, which is a tacit acceptance of the Chicago School paradigm. In addition, Recital 7 clearly follows the 'efficiency outweighing any anti-competitive effect' doctrine pledged by the Chicago School.

The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services..... (excerpted, Recital 7, Commission Regulation 2790/1999)

'For over ten years, the Commission has promoted an economic analysis of vertical restrictions rather than a more formalistic approach based on

⁹³ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Text with EEA relevance)

⁹⁴ This single Commission Regulation integrates Commission Regulation 1983/83 concerning the block exemption for certain exclusive distribution agreements, Commission Regulation 1984/83 concerning the exemption for certain categories of exclusive purchasing agreements, and Commission Regulation 4087/88 concerning the exemption for certain categories of franchise agreements.

theoretical concepts.’ (Vogel, 2011: 246) The influence of the Chicago School is seen. After a successful implementation record, Commission Regulation 2790/1999 has been replaced by a more succinct Commission Regulation 330/2010⁹⁵, in which there are three main requirements for exemption. First, vertical agreements should not contain any element of hardcore restrictions⁹⁶. Second, the market share should not exceed 30% for suppliers and buyers. Third, the general BER for vertical restraints specifies three restrictions: non-competing obligations during the contract; non-competing obligations after termination of the contract; and the exclusion of specific brands in a selective distribution system.

These requirements are consistent with the requirements set out in the previous Commission Regulation 2790/1999. In other words, the new general BER for vertical agreements is still a Chicago School style regulation with an ‘increased recognition of an economic analysis of vertical restraints’ (Vogel, 2010: 219). Moreover, the reserved clause of enforcement validity enables the Commission to review and update the vertical BER every ten years, an important competence for the Commission to interpret the legal boundary of horizontal agreements in practice. Likewise, Recital 6 and 7 are mostly unchanged for its underlying support of Chicago School’s doctrine of ‘efficiency outweighing any anti-competitive effect’. Therefore, the general BER for vertical agreements is indeed influenced by the Chicago School.

4.3.4 Conclusion: the Paradigm Shift towards the Chicago School thinking in the European Competition Regime

In Section 4.3, we have extensively analysed the paradigm shift towards the Chicago School in the EC competition regime. The Chicago School challenges the previous SCP paradigm with its three main concerns of the

⁹⁵ Commission Regulation (EC) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Text with EEA relevance)

⁹⁶ The hardcore restrictions concern the resale price maintenance, the territorial restrictions, the selective distribution, and the supply of spare parts.

economic efficiency, the rejection of intervention, and the *per se* legal rule, particularly in the concentrations and vertical restraints. These contested concerns lead to the sub-hypothesis: **(H1-3) there is the paradigm shift from the SCP to the Chicago School.** Recognising the resemblance between the EU and U.S. competition system, this study confirms the endorsement of an efficiency-based approach by the EC competition regime and the paradigm shift towards the Chicago School through regulatory changes, notably in merger regulations and block exemption regulations for horizontal and vertical agreements.

First, the development of the EC merger regime suggests an obvious shift from the SCP paradigm towards the Chicago School. Article 2(3) of Council Regulation 139/2004 has substituted the ‘dominance test’ with the ‘substantive test’. When judging the lawfulness of a case, the substantive test prioritises its focus on whether a concentration may significantly impede the effective competition, rather than creating or strengthening a dominant position. Recital 25 and 26 also reflect this development. Moreover, the efficiency effect is identified in Recital 29, which is further evidence of the paradigm shift. The involvement of in-house economists in merger assessments also provides an indirect and positive answer to sub-hypothesis H1-3.

Second, the extensive investigation on the block exemption regulations (BERs) largely contributes to the confirmation of regulatory change to the direction of Chicago School’s thinking. Regarding the BERs for horizontal agreements, the evidence of the paradigm shift is mainly found in the 2001 Guidelines on horizontal agreements, in which efficiency is highly praised as an economic benefit resulting from those lawful agreements. The evidence is even stronger in the new 2011 Guidelines on horizontal agreements, which emphasises ‘efficiency gains’ as the main judgement for exemption. The analysis on the BER for vertical agreements provides even more convincing arguments on the paradigm shift. The BER for vertical agreements exhibits the doctrine of ‘efficiency outweighing the anti-competitive effect’, as seen in

Recital 6 and 7. This doctrine remains unchanged in the renewed BER for vertical agreements, which is truly a Chicago School's approach.

Apart from the regulatory analysis of the paradigm shift, the study identifies that the paradigm shift of European competition regime is accompanied by the convergence of the European competition regime and the U.S. antitrust system. The analysis of restrictive practices has changed to the efficiency-based method. The difference between the two competition regimes has gradually diminished, namely the justification on mergers and vertical restraints, and the handling of complaints⁹⁷, etc. 'The European Antitrust Modernisation of 2004 is, however, bringing the European and American approaches into closer harmony. Most significantly, reliance on registration of restrictive agreements has been eliminated and replaced by what is essentially a case-specific rule of reason analysis, assisted by the issuance of Article 81(3) Guidelines.' (Abbott, 2005: 5) Such convergence has an impact on the harmonisation of competition rules and the shift towards the Chicago School approach.

In sum, the underlying economic analysis of competition has an impact on the substantive change of enforcement. The enforcement of EC competition regime is moving towards the Chicago School's thinking. The extensive analysis on the regulatory change confirms the argument that **there is the paradigm shift from the SCP to the Chicago School.**

4.4 Conclusion: the Increase of Political Differentiation

In Chapter 4, the substantive change of DG COMP's bureaucratic autonomy is based on three units of analysis: the institutional dimension of greater economic presence through the investigation of CCE and CET in the modernised competition enforcement; the substantial dimension of more

⁹⁷ Comparatively, enforcers in the EC tend to treat the complaints from competitors seriously when evaluating a proposed merger, for example in the reviewing of GE/Honeywell merger. The American enforcers tend to reject such complaints, on the ground that competitors may be expected to oppose transactions that render the merging parties relatively more efficient than the complainers. (Abbott, 2005)

economic thinking in the enforcement by the treaty-based interpretations, the regulatory contexts, and their implementations; and the paradigm shift towards the Chicago School in the trajectory of regulatory changes of merger regulations and block exemption regulations for horizontal and vertical agreements. They collectively suggest **the increase of political differentiation for DG COMP** in the modernisation reform.

The institutionalisation of economists is a prominent move that increases the political differentiation of DG COMP. The in-depth examination of the creation and follow-up development of CCE and CET affirms the determination and capacity of DG COMP. The increasing existence of economic thinking is discernible in the recent enforcement and regulatory changes, such as the evolved interpretation of EC Treaty. This development has led to the paradigm shift towards the Chicago School. The paradigm shift is further seen in the recent endorsement of the substantive test in the merger regulation. When judging the lawfulness of a case, the substantive test turns its focus on whether a concentration may significantly impede the effective competition. Moreover, the involvement of in-house economists for merger assessment is strengthening. The analysis of block exemption regulations confirms the regulatory changes in the direction of the Chicago School paradigm. Efficiency is highly valued as an economic benefit in the Guidelines on horizontal agreements, in which efficiency gains would be the main justification for exemption. The block exemption regulation for vertical agreements even has its justification based on whether the efficiency outweighs the anti-competitive effect or not. Conclusively, the paradigm shift is happening and deepening in the EC competition regime, and DG COMP has managed to accumulate the momentum for sufficient political differentiation in this change.

Following the main findings and confirmation on the political differentiation of DG COMP, this chapter also raises three distinctive submissions in the end. First, a consistent economic approach, notably an efficiency-based approach, would be further applied to all competition matters. As aforementioned, legal

instruments are designed by referencing the economic approach, e.g. the endorsement by merger regulations and block exemption regulations. It can be anticipated that other antitrust matters and the state aid issues would incorporate further an economic approach accordingly. Second, the convergence of EU and U.S. competition regime is an unintended finding from the above analysis. 'Today, the U.S. agencies and the EC have largely consistent enforcement policies, directed at the common goal of promoting consumer welfare.' (Brandenburger, 2011: 78) The direction towards the Chicago School approach is seen. 'Important areas in which the two systems have displayed substantial convergence include agreement on the goals of competition policy, the treatment of cartels and horizontal mergers, and recognition of the dangers of state-imposed restrictions on competition.' (Kovacic, 2008b: 11) The discussion on the institutionalisation of economists and the increasing use of an economic approach in the enforcement reveal that the EC competition regime has evolved along a path similar to its counterpart. The paradigm shift towards the Chicago School in the merger regulation and the block exemption regulation for horizontal and vertical agreements also recall the U.S. antitrust development in the 1970s. The U.S. influence on the EC competition regime is eminent. As a result, 'competition authorities in Europe increasingly follow the U.S. example of having a chief economist office and revolving-door positions for distinguished economists, like the position of Deputy Assistant Attorney General for Economic Analysis with the U.S. DoJ is' (Schinkel, 2007: 25). There might be more convergence in the transnational merger decisions and the enforcement of competition rules by DG COMP. Third, more economic thinking in the courts is expected and needed. 'The expanding use of economics by competition authorities has inevitably led to an increase in the use of economics also in competition law cases before the courts.' (Caffarra and Walker, 2010: 159) As a response, 'the Judiciary may have to improve upon their respective economic skills as a direct consequence of decentralisation' (McNutt, 2000: 50). The increase of economic thinking in the institutional aspect and administrative enforcement is recognised. This effect would largely affect the court's rulings and the judicial process.

Chapter 5 – The Organisational Capacity and Personnel Capacity of Directorate-General for Competition

The institutional capacity of DG COMP is highly important to the study of procedural changes in the modernisation reform. Accordingly, this study examines to what extent DG COMP has managed to exercise its institutional capacity in the pursuit of bureaucratic autonomy. Based on the new rules of decentralised enforcement and modified competences, DG COMP started to reconstruct its organisational arrangement as well as to readjust the personnel aspect. Therefore, various organisational changes and follow-up organisational developments have occurred as the procedural response to the reform. Likewise, the personnel changes of DG COMP officials and the training for competition experts would be another part of the procedural response to the modernisation reform. The availability of independent recruitment may also be an advanced area of procedural change to be considered.

In this regard, a twofold assessment of DG COMP's institutional capacity is studied: the organisational dimension and the personnel dimension. First, the consolidation of unique organisational capacity provides a source of expertise and power for the bureaucracy as the policy entrepreneur to conduct policies with its preference. (Carpenter, 2001; Majone, 2001) It can be identified through the commonly seen organisational changes and the follow-up details of organisational developments. Second, 'the capacity of an agency's staff deeply influences what it can accomplish' (Kovacic, 2008b: 16). The officials are able to influence the policy outcome through the enforcement and to shape their bureaucratic culture by their deeds. 'It is administrative culture that provides shared interpretations of the world, that shapes the way in which officials communicate with one another and how they perform the tasks entrusted to them.' (Cini, 1996: 6) The availability of personnel capacity further changes the bureaucratic autonomy, in particular through the activities of bureaucrats and the recruitment process. The long-term service and the

determination of bureaucratic chiefs would be the decisive factor in this regard. (Carpenter, 2001) Their expertise and mobility affects the way in which bureaucracies exert the autonomy. The possibility of independent recruitment is another unit of analysis to establish whether bureaucracies are able to exert the autonomy in this advance field of procedural change.

The above discussion allows us to lay down the second and the third proposition of the research **(P2) – the modernisation of competition regime results in the change of DG COMP’s organisational capacity;** and **(P3) – the modernisation of competition regime results in the change of DG COMP’s personnel capacity.** Therefore, some key issues should be asked: how can we identify the organisational capacity of DG COMP by the organisational changes and the unchanged organisational sectors? To what extent do the activities of bureaucratic chiefs and officials account for the personnel capacity of DG COMP? Is there an independent recruitment process for DG COMP to manage? These questions would be explored to understand DG COMP’s capacity in the modernisation process. And the main research questions have developed – **Q2: does DG COMP have more organisational capacity since the modernisation reform? Q3: does DG COMP have more personnel capacity since the modernisation reform?**

As opposed to relatively limited organisational changes before the modernisation reform, there are some innovative organisational changes and re-organisations which taken place in the modernisation process, for example, the establishment of Chief Competition Economist (CCE), the Consumer Liaison Officer, etc. The development from the first Cartel Unit to the Cartel Directorate also reveals the importance of the cartel issue and the approach of DG COMP to strengthen its organisational capacity. Likewise, the role of Directors-General and the activities of DG COMP staff may provide useful information for the assessment of personnel strength of DG COMP. The exploration of recruitment also tests whether DG COMP further establishes the advanced personnel selection according to its preference.

Therefore, the second and third hypotheses, and their collateral sub-hypotheses on the organisational and personnel capacity of DG COMP, are constructed:

H2 DG COMP has more *organisational capacity* in the modernised competition system.

(H2-1) The organisational change in DG COMP suggests an *increase* of its organisational capacity.

(H2-2) The organisational development in DG COMP suggests an *increase* of its organisational capacity.

H3 DG COMP has more *personnel capacity* in the modernised competition system.

(H3-1) The personnel changes of bureaucratic chiefs and officials in DG COMP suggest an *increase* of its personnel capacity.

(H3-2) The existence of independent recruitment for DG COMP suggests an *increase* of its personnel capacity.

This chapter begins with the discussion on the re-organisations and new organisational changes of DG COMP to assess its organisational capacity in the first phase. The steady development of certain sectors in DG COMP, namely the cartel sector, reflects the effect of organisational stability towards the increase of organisational capacity. The second half of this chapter focuses on the analysis of bureaucratic chiefs and officials in DG COMP. The activities of Directors-General, the expertise-building and mobility for DG COMP staff would be valuable to justify its personnel capacity. In addition, this study explores the recruitment process to argue whether the advanced personnel capacity is available for DG COMP in the modernisation reform.

5.1 The Organisational Change — Re-organisation and New Organisational Changes

The organisational change is one of the tangible fields to assess the organisational capacity. Although there were a few organisational changes before the modernisation reform, notably in the anti-competition field, we

have witnessed numerous organisational changes since the introduction of modernisation reform. (DG COMP Official, Interviewee 05, August 2009; NCA Official, Interviewee 11, March 2011) In this research, the pre-modernisation period is the time before the introduction of the White Paper⁹⁸ in May 1999, the post-modernisation period is the time since the enforcement of Council Regulation 1/2003 in May 2004. There is also a transitional time between 1999-2004 regarded as the process period. (see Table 1.1) Therefore, this research compares the organisational changes since the introduction of modernisation reform, i.e since 1999, with the changes pre-modernisation to understand the organisational capacity exercised by DG COMP. In addition, some organisational changes also contribute to other factors of bureaucratic autonomy⁹⁹, as discussed in Section 4.1 and 6.4.

To understand the details of organisational change, two commonly adopted methods should be examined: re-organisation, and new organisational change. They are able to test whether the organisational capacity has been exerted and exercised by DG COMP and to argue for the first sub-hypothesis H2-1:

(H2-1) The organisational change in DG COMP suggests an *increase* of its organisational capacity.

First, re-organisation has been widely studied in academic programmes and implemented in various public sectors. 'Re-organisation activity is an indication that government is addressing a problem and that it has some real concern about the citizens impacted by the problem' (Peters, 2001: 173). In this section, six types of re-organisation are examined to realise whether the re-organisation is a feasible and fully-fledged option for DG COMP's pursuit of autonomy.

⁹⁸ European Commission (1999b) 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty', available at: http://ec.europa.eu/comm/competition/antitrust/wp_modern_en.pdf, (accessed 12 May 2009)

⁹⁹ For example, the establishment of Chief Competition Economist (CCE) may suggest both the elevation of economic approach in enforcement and the reorientation of staff profession.

Second, new organisational changes appear to be a frequent phenomenon denoting the expansion of policy domain, the need for better management, the development of institution, and the strategic survival of bureaucracy. (Peters, 2001; Bauer, 2006) They appear in an obvious way to the related actors and raise concerns about their subsequent performance. Therefore, the study on the new organisational changes accounts for the assessment of organisational capacity. In the study of modernisation reform, the organisational changes appear to have a differentiated scale from the unit level to the directorate level to reflect the capacity of DG COMP. In particular, DG COMP has conducted several organisational changes at the directorate level.

For the assessment of autonomy change, it is noticed that some organisational changes have occurred before the reform as the foregoing measures of modernisation preparation; whilst the follow-up organisational developments mainly aim to accommodate the arrival of modernisation. In this regard, it is necessary to examine the re-organisation cases and new sectors in DG COMP since 1998 to identify whether the organisational capacity of DG COMP is increased.

5.1.1 The Saliency of Organisational Change

Before analysing the organisational changes of DG COMP, the saliency of organisational change should be explained to understand its connection with the organisation capacity and the bureaucratic autonomy. First, from the micro perspective, the re-organisation takes place more often than the public expect. (Peters, 2001) The lower level of public sector is more dynamic in nature to accommodate different tasks and easier for re-organisations and other alterations as the cost is relatively minimal. Second, the impact of re-organisation is incremental and symbolic. The final outcome of change is often conciliatory among the parties involved. 'Re-organisation is sometimes denigrated as simply being an exercise in shuffling boxes on organisation charts.' (Peters, 2001: 172) Third, the organisation change is sometimes a

diversion from the essential problems elsewhere. Political leaders are willing to conduct the organisational changes as the response to external criticisms, internal demands, and to satisfy other politicians and bureaucrats' preferences. The real problems may still exist afterwards, but the public's attention has been successfully diverted. This also explains why the organisation change is seen in some non-democratic regimes – a diversion from the real problem. Fourth, the organisation change is about politics. 'Bureaucracies appear often to be thoroughly political, responding to claims made in the name of subunits, clients, and individual organisational actors. Political processes continue as policies filter through a bureaucracy to first-level administrative officials. Agencies adopt projects and implement programmes in response to political pressure or financial incentives.' (Baier, March and Sætren, 1994: 163) Therefore, the organisational changes are able to identify the organisational capacity of the bureaucracy.

5.1.2 The Re-organisation in DG COMP

Six types of re-organisation have occurred in the modernisation reform. They are able to provide an extensive analysis of the organisational capacity of DG COMP. In fact, there had been no major re-organisation in DG COMP for more than ten years before the modernisation reform. (Freshfields Bruckhaus Deringer, 2003) Therefore, the following discussion is able to explain the organisational capacity of DG COMP.

5.1.2.1 Integration or Expansion

The first type is the integration of two or several units into one unit or the expansion from one unit into several units. For example, the Deputy Director-General for antitrust and the Deputy Director-General for mergers has been integrated to only one Deputy Director-General for antitrust and merger in 2008, along with the creation of a new Deputy Director-General for operations. This change maintains the troika structure of three Deputies in DG COMP. Two more examples in 2008 show the same route. Unit A/1

(antitrust policy and strategic support) and Unit A/2 (merger policy and strategic support) have merged as the new Unit A/2 (antitrust and mergers: policy and scrutiny). Two merger units are merged as a new Unit B/3 (merger) in Directorate B (energy, basic industries, chemicals, and pharmaceuticals).

Likewise, the expansion of organisation is seen in DG COMP. In 2007, Unit H/2 (service: financial service, post, energy) has been expanded into two different units to handle the increased workload. The new Unit H/1 (post and other services) has been allocated to Directorate H (state aid II: network industries, liberalised sectors) and later relocated to Directorate F (transport, post and other services) in 2008. The other new Unit H/2 (financial services) is subordinate to Directorate H and later to Directorate D (financial services and health-related markets).

The re-organisation in DG COMP is frequent to accommodate different tasks. In this regard, DG COMP is a fully-fledged institution able to exercise its organisation capacity for both integration and expansion of re-organisation. In addition, the integration or expansion may be conducted with other types of re-organisation at the same time to increase DG COMP's discretionary power over the organisational structure.

5.1.2.2 Renaming with Competence Change

Renaming is another frequent type of re-organisation. It usually comes along with the competence change that the renamed unit or directorate would either keep the original competence or acquire new competence. The re-organisation of Directorate R in 2007 is a typical example. *'Starting from a mere concern on the mail registration, it leads to a complete re-organisation of the three registries with a new method of single document management.'* (DG COMP Official, Interviewee 03, June 2009) Unit R/2 (strategic planning, human and financial resources) is renamed twice as new Unit R/2 (resource); and its strategic planning function has transferred to Unit

A/1 (strategy and delivery). Unit R/1 (document management, information and communication) has been renamed and simplified as new Unit R/1 (document management). 'Considerable efforts were dedicated to improving document management, in line with the eDomec project, and leading to a complete reorganisation of the three registries, to take effect in early 2007.' (European Commission, 2007b: 11) Therefore, 'the Director of Directorate R and the three heads of unit of the Directorate are authorising officers for commitments and payments' (European Commission, 2007b: 13; 2008b: 26). Likewise, Unit G/4 (transparency and scoreboard) becomes Unit I/3 (state aid network and transparency) with additional competence. Unit C/1 (telecommunications and post, information society coordination) has also renamed to 'antitrust: telecoms', which indicates its concentrated focus on the telecommunications issue. Unit D/3 (distributive trades and other services) has changed to Unit F/2 (antitrust: other services) to clarify its competent scope.

These cases indicates the concern of DG COMP about the effective operation and the organisational capacity of DG COMP to promptly respond to the potential problems in the operation. The re-organised units now have clearer and simplified competence.

5.1.2.3 Renaming without Competence Change

Renaming without competence change is the simplest type of re-organisation. It requires only a minimal cost for the organisational change. However, it is sometimes complicated when it involves politically contentious issues. Hence, renaming is not always a positive gain for the bureaucracy and such change might be a redundancy.

In DG COMP, several units have been renamed. For example, Unit C/3 (information industries, internet and consumer electronics) is given the name of 'antitrust: IT, internet and consumer electronics'. Unit H/4 (enforcement) has been renamed twice as Unit H/4 (enforcement and procedural reform).

Likewise, Directorate B (energy, water, food and pharmaceuticals) is given a new name of 'energy, basic industries, chemicals and pharmaceuticals) in 2007 and simplified again as 'energy and environment'. Its subordinate Unit B/1 (energy, water) is also renamed to 'antitrust: energy, environment', which displays a clearer understanding of its function.

Without the restriction of statute, most governments are capable of renaming their subordinate sectors without giving any prior notice to constituencies. (Peters, 2001) DG COMP is one of the positive examples. Nevertheless, the importance of renaming for autonomy is minimal since the nature of renaming does not construct too much weight on the competence change. DG COMP enjoys the discretionary autonomy in a limited scope.

5.1.2.4 Change of Hierarchical Position

The change of structural location is another frequent phenomenon for the purpose of better sectoral allocation. It can also identify the importance of specific sectors through their hierarchical changes.

For instance, the Task Force (ex-post evaluation merger decisions) is previously connected straight to the Director-General and later changes as Unit A/4 (evaluation) in Directorate A in 2008. It suggests that this Task Force can be a regular unit in DG COMP, whilst the stringent need for its function is relieved. Another case is the Strategy Unit, which is a think tank unit to provide the cabinet function for the Director-General. (DG COMP Official, Interviewee 03, June 2009) It derives from the Unit R/1 (strategic planning, human and financial resource) in 2004 and operates as an independent Unit A/1 (strategy) in Directorate A (policy and strategic support). In 2008, it has been relocated as a non-directorate unit to the Deputy Director-General (operations) to continue its assisting role with policy recommendations.

Through these examples, we have seen that the change of hierarchical position has a high correlation with the competence change. DG COMP is still

learning to exercise the hierarchical re-organisation without any unnecessary relocations.

5.1.2.5 Cease to Exist

In the organisational development, some units cease to exist for various reasons. A bigger scale of re-organisation may also require the closure of individual units. This type of re-organisation may involve some collateral changes of personnel allocation to accommodate the officials in those terminated sectors.

In this concern, Unit D/2 (antitrust: pharmaceuticals and other health-related markets) is terminated because its duty is covered by other units. The termination of Advisor to Directorate C (information, communication and media) and Advisor to Directorate D (services) is further evidence that the function of advisor can be replaced by either the staff in the general units or the strategic planning units. Moreover, the renamed Directorate H (state aid II: network industries, liberalised sectors and services) is terminated as a response to the higher level of directorate re-organisation; whilst the Directorate I (state aid policy and strategic coordination) and its subordinate Unit I/1 (state aid policy) and Unit I/2 (strategic support decision scrutiny) are also terminated as a result of different needs in the state aid policy development.

These cases show that the termination of units or directorates in DG COMP is just another routine of re-organisation process. Again, DG COMP is well-equipped to use this type of re-organisation.

5.1.2.6 Hybrid Re-organisation

Apart from the above five types, there are still other re-organisation cases cannot be categorised. They are actually the mixed version of re-organisation and involve the use of different re-organisation methodology.

The 2007 sectoral re-organisation is a good example to understand the hybrid re-organisation. DG COMP decided to disintegrate the antitrust, merger and state aid directorates into sectoral directorates¹⁰⁰ that each sectoral directorate would eventually have a unit for merger-related issues and another unit for state aids, instead of the previous congregative settings.¹⁰¹ The change is ‘to lead to more specialised knowledge in these sectors, raising the quality of the Commission’s case handling, and to create a ‘one-stop-shop’ for companies whether they want to file a merger, intervene in a proceeding or submit a complaint about a cartel or market abuse’ (Freshfields Bruckhaus Deringer, 2003: 1). In addition, this arrangement provides the opportunity for officials in the same directorate to share their experience and better coordination. (DG COMP Official, Interviewee 05, August 2009) Nevertheless, DG COMP still retains a state-aid-only directorate that reveals the intrinsic difference and difficulty of state aid issues. A similar example is seen in the re-organisation of industrial-related units, whose focus is about basic industries, chemicals, pharmaceuticals, mechanical and other manufacturing. This is a rather comprehensive re-organisation case in which several units are involved, integrated and relocated.

The hybrid re-organisation is the advanced option of re-organisation and a one-stop shop to achieve multiple objectives of organisational change. Therefore, the institution requires a wider range of organisational capacity to conduct this change. The above examples indicate that DG COMP has the advance discretion and the capacity.

5.1.3 Directorate Level of Organisational Change

¹⁰⁰ ‘The envisaged changes will move merger control from the MTF to sector-specific directorates, mirroring the structures in the United States and Germany.’ (Freshfields Bruckhaus Deringer, 2003: 1)

¹⁰¹ ‘The Merger Task Force (MTF), previously a separate unit in DG Comp that undertook all merger inquiries, is being dismembered and folded into other, mainly sectoral units.’ (Lyons, 2004: 248)

The above discussions mainly concentrate on the unit level of re-organisation. In fact, the organisation change has happened at the directorate level as well, as seen in Table 5.1.

Since the initiation of modernisation reform in 1999, there has been two waves of organisational change at the directorate level, respectively in 2003/04 and 2007. (European Commission, 2004c and 2007c) The first phase sets up a new, cartel-specific directorate to incorporate all cartel units. It also distinguishes the case enforcement function from the policy development in three state aid directorates. The second phase reduces the total number of directorate from 10 to 9. It further introduces the sectoral approach of re-composition ‘to better align organisational structure with operational objectives’ (European Commission, 2008b: 22). Nonetheless, DG COMP keeps one state aid directorate to deal with ‘state aid issues falling outside the standard sectoral approach’ (European Commission, 2007c: 11).

The availability of organisational change at the directorate level indicates the organisational capacity of DG COMP. The re-organisation at the directorate level is a high-level change in the history of DG COMP and Commission. The second wave of re-organisation on the sectoral orientation also reflects the capacity of DG COMP. Such mixed design is adopted to invigorate the internal redeployment on the one hand, and to maintain the proper operation and performance on the other hand. It provides strong evidence for sub-hypothesis H2-1 that the increase of DG COMP’s organisational capacity is seen.

Table 5.1 The Organisational Change of Directorates in DG COMP

Year	Number of Directorate	Detail competence of individual Directorate	Major development
2004	10	Directorate A (horizontal): policy, coordination & strategy Directorate B-F: antitrust and merger Directorate G,H,I: state aid Directorate R: resource, information and management	

Year	Number of Directorate	Detail competence of individual Directorate	Major development
2005	10	Directorate A (horizontal): policy, coordination and strategy Directorate B-E: antitrust and merger Directorate F: cartel Directorate G,H,I: state aid Directorate R: resource, information and management	- first cartel directorate (Directorate F: cartel)
2006	10	Directorate A (horizontal): policy, coordination and strategy Directorate B-E: antitrust and merger Directorate F: cartel Directorate G,H: state aid cases Directorate I: state aid policy and strategy Directorate R: resource, information and management	- differentiating three state aid directorates to deal with cases or policy and strategy separately
2007	9	Directorate A (horizontal): policy, coordination and strategy Directorate B-F (sectoral): antitrust, merger, and state aid Directorate G: cartel Directorate H: state aid outside sectoral approach Directorate R: resource, information and management	- sectoral approach introduced at the directorate level - antitrust, merger and state aid units co-exist in a single sectoral directorate - preserving one directorate for non-sectoral aids - expected effect: share of expertise and better efficient case-handling
2008	9	Directorate A (horizontal): policy, coordination and strategy Directorate B-F (sectoral): antitrust, merger, and state aid Directorate G: cartel Directorate H: state aid outside sectoral approach Directorate R: resource, information and management	

(resource: DG COMP Annual Management Plan 2005-09)

5.1.4 The New Organisational Change in DG COMP

In addition to the organisational change at the directorate level, several new sectors are created in DG COMP in the modernisation process. These pivotal changes recognise the weakness of the existing structure and provide strong evidence for the organisational capacity of DG COMP. 'A new agency is established as a consequence of a substantial change in public policy. Changes in laws or the enactment of a new law may require the establishment of new organisational structures or the reorganisation of existing organisations, for example, the creation of new units within an existing public organisation for the purpose of implementing the new goals of statutes.' (Yesilkagit, 2004: 529) Therefore, new directorates and units would change the competition mindset intrinsically, e.g. bringing in more economic approach, providing improved enforcement expertise, etc.

Table 5.2 lists the pivotal organisational changes of new sectors and posts in DG COMP. They suggest that the new organisational change is a frequent phenomenon in DG COMP since the beginning of modernisation reform.

One of the most important organisational changes by DG COMP is the establishment of Chief Competition Economist (CCE) and Competition Economist Team (CET). 'DG COMP created the office of the Chief Economist and gave the holder of that office a direct reporting line to DG Comp's top leadership.' (Kovacic, 2008b: 14) Section 4.3 has extensively discussed the impact towards the paradigm shift and the increase of political differentiation. In the assessment of organisational capacity, the institutionalisation of economists within DG COMP is an important move by DG COMP. The reliance on these in-house economists is growing. (Decker, 2009) The CCE and CET are able to give detailed guidance on the most important competition cases with complex economic issues, in particular those requiring sophisticated quantitative analysis. (Rose and Ngwe, 2007; Gavil,

2007) The organisational capacity of DG COMP is increased through the consolidation of CCE and CET in the organisational structure.

The establishment of Cartel Unit and Cartel Directorate indicates further evidence for the organisational capacity of DG COMP. The development from the first Cartel Unit to the Cartel Directorate suggests that DG COMP has made a decisive commitment to set up the cartel-related specialised sector with credible performance and stringent resources. The existence of a Cartel Directorate is affirmative to DG COMP's organisational capacity.

There are more examples explaining DG COMP's effort to manage its organisational capacity in the policy sectors. First, the establishment of an 'Enforcement Unit' in Merger Task Force in 2001 indicates that DG COMP is able to react promptly in setting up a unit to handle multiple tasks in the merger implementation with consistent treatment and best practices.¹⁰² 'The enforcement unit is also seeking to develop best practice guidelines, building on the experience obtained from previous merger cases so as to identify aspects that have worked well and those that have not.' (European Commission, 2002: 88) Second, another Task Force in Merger was established 'at the end of 2006 to conduct ex-post evaluation of merger decisions' (European Commission, 2007b: 18). Likewise, the 'Enforcement Unit' in the State Aid Directorate for the implementation of aid recovery¹⁰³ was established in 2003. It was given 'the mandate to develop a coherent and systematic approach to the monitoring and enforcement of State aid decisions that fall within the remit of the Competition DG. During the first full year of its existence, the enforcement unit concentrated its resources on the effective implementation of recovery decisions, this being essential for the credibility of the Commission's State aid control activity' (European

¹⁰² The Commission's aim of developing consistency of treatment and best practices in the handling of remedies was significantly furthered by its decision to establish, in April, an enforcement unit within the Merger Task Force dedicated to advising on the acceptability and implementation of remedies in merger cases. (European Commission, 2002: 88)

¹⁰³ The credibility of State aid control stands or falls with the recovery of aid unlawfully paid by Member States. A dedicated enforcement unit has therefore been established to follow the implementation of recovery orders in a more structured way. (European Commission, 2003: 6)

Commission, 2005a: 176). These new arrangements suggest that DG COMP is able to enlarge its organisational discretion to all competition policy sectors.

Other than the establishment in policy sectors, DG COMP also focuses on the effective operation and enforcement of modernisation, namely the introduction of a 'Task Force' for the coordination and consultation mechanism in 2003. This unit would have connections with other Directorates¹⁰⁴ and national regulators. 'The task forces review and analyse the draft regulatory measures ('cases') notified by national regulators pursuant to Article 7. They are expected to play a key role in the market analyses carried out by national regulators. In particular, they are responsible for the receipt of notifications of draft measures from national regulators, the assessment of the draft measures (i.e. of their compatibility with Community law), the drafting of Commission decisions and contacts with national regulators, national competition authorities and other interested parties.' (European Commission, 2004a: 44) Likewise, another dedicated Task Force on ethics, security and procedures was created 'in September [2007] to review and improve all rules in those areas. Its work in 2007 focuses mainly on the preparation of the access to file action plan and the finalisation of the revised ethical code of DG COMP' (European Commission, 2008b: 31). Furthermore, the creation of a 'Strategy and Delivery Unit' in 2007 indicated that DG COMP finally has its own think tank team providing coherent strategies for better operation and consistent enforcement in line with the risk management¹⁰⁵. Similar strategies can be found in the new settings of the 'Communications and Institutional Affairs Unit'. It was created as a non-directorate unit with one administrator (AD) and one assistant (AST)

¹⁰⁴ To manage the consultation process, the Commission has set up two task forces, one in the Competition DG and another in the Information Society DG. (European Commission, 2004a: 44)

¹⁰⁵ Risk management is fully embedded in DG COMP's management processes and has been even further strengthened by the creation of the new 'strategy and delivery' unit. (European Commission, 2008b: 39)

in 2007. It linked directly to the Director-General¹⁰⁶ to provide better, undistorted connection with other DGs. In short, these organisational establishments indicate that the organisational capacity of DG COMP has been extended to various implications, in particular, the effective enforcement and the tacit control of competition policy development.

Lastly, the organisational arrangement also happens at the top level bureaucrats. 'To reflect the significantly increased activity of DG [COMP] in the areas of anti-trust, mergers and state aids, the Commission will increase the number of Deputy Directors-General in DG COMP to three.' (European Commission Press, 2002b, IP/02/124) The new Deputy Director-General for merger was established in May 2002. Later, another Deputy Director-General for operations was created in 2008 to accommodate the re-organisation process and the structural changes. DG COMP has successfully expanded its organisational scope at the top official level.

Table 5.2 The New Organisational Sectors in DG COMP

date	new structure	competence and function
1998	First Cartel Unit	<ul style="list-style-type: none"> - specialising in detecting and compacting cartels more effectively - 15 staffs have been assigned, and eventually will be about 20 officials with experience in investigations
2001	Enforcement Unit (in Merger Task Force)	<ul style="list-style-type: none"> - advising on the acceptability and implementation of remedies in merger cases - as an internal centre of expertise on the specific issues raised in merger cases requiring remedies - joining case teams to discuss remedies - ensuring the general principles set out in the remedies notice are applied consistently - developing best practice guidelines
2002	Second Cartel Unit	<ul style="list-style-type: none"> - reducing the time elapsed between initiating and concluding cartel cases

¹⁰⁶ In 2007, a unit in charge of communication and institutional relations will be created under the direct responsibility of the Director-General. (European Commission, 2006c: 12)

date	new structure	competence and function
2002	Deputy Director-General	<ul style="list-style-type: none"> - in line with the integration of MTF (Merger Task Force) into sectoral directorates - specialising in managing the mergers related Directorate G (Cartels)
2003	Task Force (consultation mechanism)	<ul style="list-style-type: none"> - reviewing the draft regulatory measures (cases) notified by national regulators - responsible for the receipt of notifications of draft measures from national regulators, the assessment of draft measures, the drafting of Commission decisions
2003	Chief Competition Economist (directly to Director-General)	<ul style="list-style-type: none"> - support and check-and-balance function: providing advice for case enforcement and policy initiatives - developing economic expertise within DG COMP - giving guidance on economics and econometrics in the application of EU competition rules - offering general guidance in individual cases - providing detailed guidance in the most important competition cases involving complex economic issues, in particular those requiring sophisticated quantitative analysis
2003	Consumer Liaison Officer	<ul style="list-style-type: none"> - constant relocations: in Directorate R (2003), directly to Director-General (2007), Unit A/7 (2008) - to facilitate the interaction between the Commission and consumer individuals - contacting with consumer organisations, e.g. the European Consumer Consultative Group (ECCG) - alerting and advising consumer groups for opinions - contacting with NCAs on consumer protection
2003	Enforcement Unit (in State Aid Directorate)	<ul style="list-style-type: none"> - developing a coherent and systematic approach to the monitoring and enforcement of State Aid decisions (that fall within the remit of DG COMP) - following the implementation of recovery orders

date	new structure	competence and function
2004	Designated Training Coordinator	<ul style="list-style-type: none"> - coordinating the training programmes - 'Strategic Training Framework' adopted in 2006 - setting up a working group (2007) to reassess training priorities
2005	Cartel Directorate	<ul style="list-style-type: none"> - as a distinctive directorate to deal with all cartel cases by four subordinate operation units and one enforcement unit
2006	Local Career Guidance Officer	<ul style="list-style-type: none"> - providing assistance for personal career planning
2006	Task Force: Human Resource Management	<ul style="list-style-type: none"> - in line with the 2006 Commission Communication 'Human Resources Management: simplifying procedures for staff' - to consult staffs and to propose measures to simplify administrative procedures - to improve services provided to staffs - a 'Report on the Progress' adopted in 2006 and the 'Final Report and Action Plan' as an annex to a Commission Communication is presented in 2007
2006	Task Force: Ex-Post Control	<ul style="list-style-type: none"> - to conduct ex-post evaluation of mergers decision and other enforcement activities - as a centralised 'ex-post control unit' in 2007
2007	Strategy and Delivery Unit (direct to Deputy for Operations)	<ul style="list-style-type: none"> - ensuring a coherent strategy on the operational and administrative planning and implementation - ensuring a holistic approach within the DG for these activities which includes risk management
2007	Task Force: Ethics, Security and Procedures (directly linked to Director-General)	<ul style="list-style-type: none"> - proposed a detailed Action Plan to improve the management of access to file procedures in order to avoid reoccurrence and fully implemented by 2007 - revising the ethical code of DG COMP - setting up the Ethics Compliance Officer (ECO) to monitor the ethical, confidential and procedural aspect of policy enforcement
2007	Communications and Institutional Affairs Unit (direct to Director-General)	<ul style="list-style-type: none"> - a non-directorate unit, directly linked to the Director-General - staff: 1 AD and 1 AST in 2007

date	new structure	competence and function
2008	Deputy Director-General (Operations)	- managing the internal operation of the whole DG COMP with efficiency and consistency
2008	Task Force: Pharmaceuticals Sector Inquiry	- to enforce sectoral inquiries in pharmaceutical industries
2008	A/3 Strategy Unit (in Directorate A: Policy and Strategy)	- to provide consistent policy strategies in the policy enforcement
2008	Directorate F (Transport, Post and Other Services)	- specialising in managing competition issues relevant to transports, post and service sectors - as part of the second wave organisational change at the directorate level in 2007
2008	D/1 Antitrust: Payment systems	- regarding the electronic payments in financial sectors
2008	G/6 Cartel Settlement	- the newest unit in the cartel directorate - in charge of cartel settlement issues

(resource: DG COMP Annual Report 1997-2008)

5.1.5 Conclusion: the Organisational Change in DG COMP

After a long period of limited organisational change, DG COMP is well-equipped to carry out the internal organisational change without any serious resistance or objection. The above paragraphs have analysed the impact of re-organisation and new organisational sectors, and from the unit level to the directorate level.

Re-organisation is one of the most important factors to study the organisational capacity and bureaucratic autonomy. With the potential

resistance to keep the status quo¹⁰⁷, six types of re-organisation have been carried out. At the unit level, the organisational capacity of DG COMP is increased in particular, the organisational expansion, the renaming with competence change, and the hybrid re-organisation. Nevertheless, DG COMP is still practicing its capacity in the hierarchical re-organisation. The re-organisation activities are mainly conducted since the initiation of modernisation reform, whilst those activities prior to the modernisation reform are also helpful to accommodate the arrival of decentralisation and the shift of notification system. Therefore, the organisational capacity of DG COMP is increased in these re-organisation cases.

Since the initiation of modernisation reform in 1999, there have been two waves of organisational change at the directorate level, respectively in 2003/04 and 2007. (European Commission, 2004c and 2007c) The first phase set up a new, cartel-specific directorate to incorporate all cartel units and gradually distinguished the dealing of cases and policy separately into three different state aid directorates. The second phase reduced the total number of directorate from 10 to 9 and introduced the sectoral approach of re-composition 'to better align organisational structure with operational objectives' (European Commission, 2008b: 22). Nonetheless, DG COMP kept one state aid directorate to deal with 'state aid issues falling outside the standard sectoral approach' (European Commission, 2007c: 11).

The analysis of the directorate level of organisational change further sustains the sub-hypothesis (H2-1) that **the organisational capacity and the bureaucratic autonomy of DG COMP is enhanced**. In 2003/04 and 2007, two waves of change at the directorate level successfully established the specialised Cartel Directorate and reshuffled the sectoral orientation for better coordination and expertise sharing.

¹⁰⁷ In fact, there is no obvious objection to the organisation change initiated by DG COMP. Two possible reasons may explain. First, the organisational change does not trigger a strong impact on the overall structure of the Commission or the competition enforcement regime. It remains as the competence of DG COMP. Second, DG COMP carries out the organisation change in a self-refrained manner for the minimal attention. Member States seem not able to pose any objection. Therefore, DG COMP has successfully conducted the re-organisation with its preference.

In regards to various new organisational sectors, we have discovered the organisational creation is available from the most important policy sectors to the deliberate policy enforcement. The arrival of in-house Chief Competition Economist and Competition Economist Team is the most important organisational change in the modernisation reform. The capacity of DG COMP is further seen in the launching of specialised Cartel Directorate and the introduction of Deputy Director-General for operations. With limited resources of budget and staff, new sectors in DG COMP are consistent with the need of modernisation reform and indicate the increase of organisational capacity of DG COMP. In addition, DG COMP is able to manage both the organisational change and the collateral competence readjustment. Therefore, **these various new organisational establishments have contributed to the increase of DG COMP's organisational capacity**, proving the sub-hypothesis H2-1. It is foreseeable that DG COMP would continue to push for further organisational changes with careful consideration.

5.2 The Organisational Development in DG COMP

The organisational capacity of DG COMP is not only identified by the organisational change analysed above, but also reflected in the organisational development of pivotal competence and policy enforcement. The organisational development is able to provide the long-term observation on the institutional capacity (Peters, 2001) and to test whether DG COMP increases its organisational capacity in the modernisation reform. In other words, the analysis of the organisational development is a follow-up approach to discover whether the previous organisational changes have been successful and contributive to the overall organisational capacity. Notwithstanding the attention to the origin of organisational change, the analysis of organisational development should also focus on the stable sectors and policy domain to identify their impact on the organisational capacity. Therefore, the study of organisational development should

incorporate the analysis on the recent organisational changes and the detailed examination on the stable sectors for a comprehensive argument on the organisational capacity of DG COMP. In this regard, the sub-hypothesis for the organisational development is developed below:

(H2-2) The organisational development in DG COMP suggests an *increase of its organisational capacity.*

The assessment of organisational development is itself a follow-up and advanced approach to investigate the organisational changes relevant to the modernisation reform. In other words, it is not a comparative study of individual organisational development but an integrated analysis of organisational capacity focusing on the core organisational changes in the modernisation reform. The detailed examination of development would take a further step to reveal the organisational capacity of DG COMP that the development is a coherent process even prior to the modernisation reform. Therefore, the steady development of certain sectors in DG COMP, namely the cartel sector, the chief competition economist (CET), reflects the effect of organisational stability towards the increase of organisational capacity. First, the process from the first Cartel Unit leading to the creation of a second Cartel Unit and finally expanding to a Cartel Directorate is the most important policy development in the antitrust enforcement. Second, the successful establishment and the following developments of CCE and CET indicate the organisational capacity of DG COMP. Third, the troika structure of three Deputies in DG COMP and the unchanged portfolio of Deputy Director-General for state aids also show the complexity of organisational structure and the importance of state aids in DG COMP's regard. Lastly, the development of Consumer Liaison Officer gives another example of the difficulty of exerting organisational capacity in the organisational development.

5.2.1 The Development from the Cartel Unit to the Cartel Directorate

The development from the Cartel Units to the Cartel Directorate is a successful case that DG COMP incrementally increases its organisational capacity.

5.2.1.1 The First Cartel Unit in 1998

The first new organisational establishment in DG COMP is the Cartel Unit in 1998. First, it is a response to the vast notifications of cartel cases and the concern of serious backlogs. It emphasises the priority of cartel cases in the antitrust enforcement and the stringent need for efficiency. 'The formation in 1998 of a specialised unit (the Cartel Unit) gave tangible expression to the priority which the Commission intended to give to the fight against cartels, although other units may also take part.' (European Commission, 2002: 29) This successful case is a positive support that the capacity of DG COMP is widely accepted. It also gives DG COMP an opportunity to exert its autonomous control in the structural design. Second, the establishment of Cartel Unit is a very early organisational change to reflect the need for modernisation reform. It could be regarded as the first attempt of DG COMP to start the enforcement reform. 'With a view to detecting and combating cartels more effectively, the Commission has decided to reorganise part of its Directorate-General for Competition and to set up a unit within its ambit specialising in proceedings of that type. This demonstrates that the Commission has placed its anti-cartel policy among the items at the top of its agenda.' (European Commission, 1999a: 36) Although it is only a unit level change, the impact is consistent with the follow-up organisational changes and the enforcement reform. It indicates that DG COMP is capable of making small scale organisational changes without any external approval and intervention.

Nevertheless, the staff composition of first Cartel Unit is not as remarkable as its specific design. With limited resources at its disposal, the Director-General has 'assigned about fifteen case-handlers to this new unit, which should eventually comprise about twenty officials with significant experience

in investigations of this type' (European Commission, 1999a: 36). DG COMP recognises its limited human resources, in particular, the overall number of staff and budget. Thus, DG COMP allocates its staff to ensure the functioning and performance of this new unit. By doing so, DG COMP has secured the opportunity for future organisational changes with this positive case.

Therefore, the first Cartel Unit is important in the observation of organisational development. First, DG COMP is capable of conducting this establishment after a long period of no prominent organisational change. The claim to have a cartel-specific unit is reasonable. It also provides an opportunity for DG COMP to construct the organisational setting with its preference — a good starting point of exerting its autonomy. Second, the detail setting of the first Cartel Unit suggests that DG COMP has a rather moderate strategy to incrementally carry out the organisational change. DG COMP is aware of its limited resources and carefully allocates its experienced staff in this unit to minimise any possible instability or underperformance. Third, there is no obvious external intervention or criticism since the establishment of first Cartel Unit. DG COMP has successfully exerted its autonomy in this case.

5.2.1.2 The Second Cartel Unit in 2002

After four years of successful operation in the first Cartel Unit and a gradual increase of resources, DG COMP has managed to set up a second Cartel Unit in 2002 to deal with the increased amount of workload and to detect the most serious infringements. The 2002 Annual Report explains the rationale and salience for the second Cartel Unit.

The Commission has devoted resources specifically to the fight against cartels since 1998, when a special anti-cartel unit was created within the Competition DG. In 2002, this gradual increase in resources culminated in the creation of a second Cartel Unit. The two new units have benefited from the introduction of a more

flexible and efficient management methodology. These units make use of advanced information technologies developed in-house in the realm of inspections and the processing of documents. Officials are specifically trained in investigatory techniques and are also specialised in the complex procedural aspects of large contentious cases. (European Commission, 2003: 28)

Similar to the purpose of first Cartel Unit, the second Cartel Unit is committed to increase the efficiency and fact-finding in cartel cases. 'During the period that these cartel units were in operation, the Commission was able, as a result *inter alia* of new management procedures, considerably to reduce the time elapsed between initiating and concluding cartel cases.' (European Commission, 2004a: 26)

Moreover, the perception of EU competition enforcement is different to 1998. DG COMP starts to urge the modernisation reform through the publication of White Paper in 1999. In this sense, the second Cartel Unit is adapted to detect the most serious infringements in accordance to Article 7(1) of Council Regulation 1/2003. 'Since July 2003, as a consequence of the internal re-organisation of the Competition DG in anticipation of the entry into force of Regulation (EC) No 1/2003, all antitrust units of the Competition DG have been dedicating — and will increasingly dedicate — greater efforts and resources to the detection and prosecution of cartels within their area of responsibility.' (European Commission, 2004a: 26)

The successful operation of first Cartel Unit, the availability of additional resources¹⁰⁸ for DG COMP, the further sophistication in cartel detection¹⁰⁹, and the call for modernisation reform are the main reasons for the creation of

¹⁰⁸ Following a gradual increase in resources, a second cartel unit was set up in 2002. (European Commission, 2004a: 26)

¹⁰⁹ The decision to create a special unit was triggered by the fact that cartel members make use of ever more sophisticated tools enabling them to conceal their activities and to cover their tracks. (European Commission, 2003: 28)

a second Cartel Unit. DG COMP is able to carry out this follow-up organisational change to enhance its organisational capacity.

5.2.1.3 The Cartel Directorate in 2005

The successful establishment of two Cartel Units gives DG COMP confidence to initiate another organisational expansion. 'In order to reinforce cartel-fighting capabilities, in 2005 a dedicated Cartel Directorate was created in DG COMP, a measure that was welcomed by the OECD in its peer review report, Competition Law and Policy in the European Community.' (European Commission, 2006a: 13; European Commission, 2006b: 5) The Cartel Directorate is the response to the growing concern with the most serious cartel cases.¹¹⁰ There are four subordinate units for operation and another unit for the cartel decision enforcement in this distinctive directorate. 'With a staff of some 60 employees, the Directorate handles the majority of cartel cases. Its main task is to streamline and accelerate the handling of investigations so that they can be completed within a reasonable time-frame. It also takes a leading role in developing policy in the area of cartel detection and prosecution.' (Röller and Stehmann, 2006: 283)

The creation of a directorate level sector is outstanding in DG COMP's history. First, the establishment of Cartel Directorate in 2005 is right after the implementation of modernised competition rules in 2004. It is rather persuasive to initiate an organisational change following the modernisation reform for the purpose of better enforcement and efficiency. Second, the external criticism is a positive factor for the creation of Cartel Directorate. 'In the area of cartels, a dedicated Directorate was set up with the aim of further enhancing enforcement and policy initiatives, a development that has been welcomed by the OECD.' (European Commission 2005c: 4) Third, with two successful Cartel Units established by DG COMP, it is not surprising that DG COMP could extend its organisational capacity and autonomy at the 'directorate' level. Fourth, the integration of cartel knowledge is needed.

¹¹⁰ This increased focus on the fight against cartels led in 2005 to the creation of a dedicated Cartels Directorate in DG COMP. (Röller and Stehmann, 2006: 283)

Sophisticated cartel cases require comprehensive investigation with strong expertise. With a single cartel directorate, the skills polished in the cases would be easier to share with colleagues. Therefore, DG COMP has shown its resolution in fighting cartel cases in the decentralised competition regime and its capacity in the serial development towards the first-ever Cartel Directorate.

5.2.2 The Development of Chief Competition Economist and Competition Economist Team

The salience and the function of CCE and CET have been extensively discussed in Section 4.1.2 to argue the increase of political differentiation. Moreover, the creation of CCE and CET is the most important organisational change in the modernisation reform. The development of CCE and CET further contributes to the organisational capacity of DG COMP.

In regards to the organisational development, the CCE and CET provide strong evidence to support the sub-hypothesis H2-2. First, the organisational hierarchy of CCE is unchanged as a top official to the Director-General. Three prominent economists have been recruited as the CCE with Grade AD14. The stability of CCE is convinced that the CCE is the most important development in the modernisation reform. *'Chief Economist is really very high profile in DG COMP. He actually intervenes in the process of decision-making or the normative aspect of discretion.'* (Academic, Interviewee 14, April 2011) Second, the gradual increase of CET member from 10 to 20 and then to 30 is a positive development to recognise the need for economists in the case assessment; whilst the qualification of Ph.D. And the contractual appointment have been kept. In this way, DG COMP has more qualified in-house economists to participate case investigation immediately. Third, it is a positive effect that the non-renewable term of CCE allows the staff of DG COMP to be familiar with different economic methodologies. (Röller and Buigues, 2005; Decker, 2009) Facing with the sophistication of antitrust cases, the CCE and members of CET would provide a non-exhaustive coverage of economic

approach to the practical enforcement of competition rules. Therefore, the role of the CCE and CET in the operation of DG COMP is increasingly important and necessary.

5.2.3 The Development of Deputy Directors-General

The establishment of a new Deputy Director-General for merger in 2002 has expanded DG COMP with three Deputy Directors-General¹¹¹. The Deputy Directors-General are in charge of antitrust function, merger function, and state aid function respectively.

In 2008, the Deputy Director-General for operation is established following the synthesis of two Deputy Directors-General for antitrust and for merger respectively as one Deputy Director-General for antitrust and merger. The development indicates the concern of DG COMP about the effectiveness and better coordination in the administration. It is also a response to the enforcement of decentralised competition rules. Other the other hand, the Deputy Director-General for state aid is unchanged to keep a troika style of organisational structure in DG COMP. The state aid issue remains outside the scope of modernisation reform.

Therefore, the organisational capacity of DG COMP is evolved with the development of Deputy Director-General. The integration of two Deputy Directors-General for antitrust and for merger is consistent with the 2007 organisational change at the directorate level. As aforementioned, the re-composition of sectoral directorates is intended to have both the antitrust unit and the merger unit in one directorate for better exchange of expertise and cooperation. In this regard, the need for two Deputy Deputy Directors-General is not necessary. Moreover, DG COMP is vigilant to maintain the size of its structure. The troika design of Deputy Director-General suggests the organisational stability on the top level of DG COMP officials.

¹¹¹ To reflect the significantly increased activity of the DG in the areas of anti-trust, mergers and state aids, the Commission will increase the number of Deputy Directors general in DG COMP to three. (European Commission Press, 2002b, IP/02/124)

5.2.4 The Consumer Liaison Officer in 2003

In 2003, 'Commissioner Monti announced the appointment of Mr Juan Rivière y Martí to the newly created function of Consumer Liaison Officer within the Commission's Competition Directorate-General.' (European Commission, 2004a: 16) The competence of Consumer Liaison Officer is to protect the consumer welfare and the market fairness. DG COMP finally has a direct channel with the general public, the consumer organisations and individuals, e.g. the European Consumer Consultative Group (ECCG). 'This post was created in order to ensure a permanent dialogue with European consumers, whose welfare is the primary concern of competition policy, but whose voice is not sufficiently heard when individual cases are handled or policy issues are discussed. It is also designed to intensify contacts between the Competition DG and other Directorates-General within the Commission, most notably with the Health and Consumer Protection DG.' (European Commission, 2004a: 16)

The establishment of Consumer Liaison Officer indicates the changing nature of competition regime. First, the general public's opinion has been taken into account institutionally in the elite-operating competition enforcement. DG COMP has been frequently criticised as '*an intangible DG in the cloud*' (Lawyer, Interviewee 06, November 2009) or '*very distant for individual consumers to lodge their complaints*' (Lawyer, Interviewee 19, February 2012). Now it has turned its attention back to the consumers. 'Consumers and their organisations at EU and national level can supply information to the Commission and comment on its policy proposals..... Contacts should not be limited to making complaints against individual firms, but should also be sectoral, highlighting broader issues of particular concern to consumers.' (European Commission, 2003: 6) The consumers, notably the EU citizens, are able to submit their complaints, appeals, and opinions through the Consumer Liaison Officer. Second, the creation of Consumer Liaison Officer also suggests a tacit convergence between the competition

regimes in the EU and the U.S. (Abbott, 2005) Institutionally, both authorities now have consumer liaison officials. It also suggests the importance of consumer welfare in the enforcement of competition law in both countries. (Brandenburger, 2011) Third, the horizontal cooperation with other DGs would be enhanced. The Consumer Liaison Officer should contact with 'national competition authorities regarding consumer protection matters' (European Commission, 2004a: 16). Fourth, 'as in the case of the Chief Competition Economist, the role of the Consumer Liaison Officer is not confined to the merger control area, but also concerns the antitrust field — cartels and abuses of dominant positions — as well as other competition cases and policies' (European Commission, 2004a: 16).

However, the development of the Consumer Liaison Officer is not as consistent and stable as other cases. The role of the Consumer Liaison Officer is clear but the problem is how to bring in the consumer's concern into the daily operation of DG COMP. The Consumer Liaison Officer has been allocated to Directorate R (registry and resources) in 2003 and relocated directly to Director-General in 2007. Later, it has become a regular Unit A/7 (advisor: consumer liaison officer) in 2008. The relocation directly to the Director-General may reflect that DG COMP recognise the importance of Consumer Liaison Officer. The second relocation as a subordinate unit in the policy-specific Directorate A (policy and strategy) may also suggest that the Consumer Liaison Officer is better allocated as a regular unit in the organisational structure.

The frequent relocation reveals the difficulty to accommodate the Consumer Liaison Officer into the expert-based institution. The development of Consumer Liaison Officer, mainly the relocation of hierarchical position, reflects the effort of DG COMP to manage this organisational establishment. Consequently, the struggling development of Consumer Liaison Officer provides contrary evidence that the organisational development may not always increase the organisational capacity of DG COMP.

5.2.5 Conclusion: the Organisational Development in DG COMP

Four key cases of organisational change have been analysed to identify the organisational development of DG COMP in the modernisation reform. DG COMP has exhibited its capacity not only in the beginning of organisational change but also in the following performance of these altered sectors. Extensive organisational developments are seen since the modernisation reform, contrary to only a handful progress of the cartel sector before the arrival of modernisation reform.

First, the successful establishment of first Cartel Unit allows DG COMP to conduct the follow-up development of second Cartel Unit and the Cartel Directorate. The whole progress of cartel sector indicates there is a minimal scale of organisational development before the modernisation reform. However, the substantial development mainly occurs since the arrival of modernisation. As a result, DG COMP is able to manage its incremental resources and staff to have a workable cartel-specific Directorate. This incremental approach by DG COMP successfully enhances its organisational capacity. Second, the development of CCE and CET is the most important organisational change in the modernisation reform. The organisational capacity is enhanced by the stability of CCE and the expansion of CET members. The input of extensive economic methodologies would be helpful to expand the staff's expertise in the enforcement. Third, the troika design of Deputy Directors-General suggests the importance of stability at the top level official. The creation of a new Deputy Director-General for operation and the synthesis of two Deputies also indicate the concern of effective enforcement and the extent of organisational changes of the antitrust and merger sectors. These cases are able to convince that **the organisational development in DG COMP suggests an increase of its organisational capacity**, proving the sub-hypothesis H2-2.

On the other hand, the development of Consumer Liaison Officer shows the difficulty that the organisational development may not always increase the

organisational capacity of DG COMP. The frequent relocation reflects the awareness and effort of DG COMP to accommodate the new sector into the expert-concentrated structure. Nevertheless, the story of Consumer Liaison Officer tells that DG COMP is attentive to the *ex-post* performance of new sectors.

5.3 The Personnel Changes of Bureaucratic Chiefs and Officials in DG COMP

The personnel capacity is identified through the determination of control by the bureaucratic chiefs, the expertise and composition of bureaucratic officials, and the availability of independent recruitment. A long-serving chief is able to lead the bureaucracy to a more autonomous direction with the assistance of in-house expertise and the support of staff. The method of recruitment also affects the pursuit of personnel capacity and the selection of staff from the very beginning. The modernisation reform is the opportunity to examine whether the personnel capacity of DG COMP is exerted. In this regard, the sub-hypothesis H3-1 is developed.

(H3-1) The personnel changes of bureaucratic chiefs and officials in DG COMP suggest an *increase* of its personnel capacity.

The initial justification of DG COMP's personnel capacity rests upon the role of Director-General, the bureaucratic expertise, and the mobility of officials. In fact, the modernisation reform is directly relevant to two long-serving Directors-General, Alexander Schaub and Philip Lowe. Their role in the modernisation reform would be decisive to the personnel capacity and the pursuit of autonomy of DG COMP. Likewise, the training courses for competition officials are important to the expertise-building of DG COMP. The mobility of DG COMP officials also strongly relates to the change of personnel capacity. These areas are studied here to argue whether the personnel capacity of DG COMP is increased.

5.3.1 The Role of Director-General in the Modernisation Reform

The experience and expertise of two Directors-General have guaranteed the important role of bureaucratic chief of DG COMP in the modernisation reform. The modernisation reform emerged during Alexander Schaub's period. He has overseen the preparations for the modernisation of competition policy. *'Alexander Schaub is extremely influential in pushing through the economic approach. He is the iconic feature for the modernisation reform. He is working closely with economist Monti to draw the new picture of antitrust system in the Europe.'* (Academic, Interviewee 12, March 2011) Later, the enforcement of Council Regulation 1/2003 commences in 2004 under Philip Lowe's surveillance. *'Mr Lowe is extremely important for the early day operation of competition enforcement under the decentralised system. He is able to maximise the influence on the enforcement within the European territory with his Director-General position. As far as I know, Neelie Kroes is very much convinced by Mr Lowe.'* (Academic, Interviewee 16, February 2012) Their services in DG COMP suggest their qualified performance and leadership, e.g., establishing a good relationship with the politically appointed Competition Commissioner.

Prior to the appointment as Director-General of DG COMP, Alexander Schaub and Philip Lowe were both senior officials in the Commission with experience and expertise in several posts. They have joined the Commission in 1973 and served a number of senior positions. For example, Alexander Schaub was the Deputy Director-General for Internal Market and Industrial Affairs; Philip Lowe was the Director-General for Development, *Chef de Cabinet* for Vice-President of Commission Neil Kinnock, and the acting Deputy Secretary-General.

In addition, their educational backgrounds in law and economic studies assure that they are familiar with the competition knowledge. Philip Lowe had worked as a Director of Merger Task Force for two years in DG COMP. His familiarity with the competition issue largely helps him to accomplish the

enforcement of modernisation reform and to accommodate different tasks in the changing environment of general economic development. *'Philip Lowe, for example, towards the end of his service at DG COMP, has a lot of emphasis on the financial restructure of the banks. So the externalities also drive the priorities of enforcement. The personality and actual role of Director-General is very important in this context.'* (NCA Official, Interviewee 20, March 2012)

To a lesser extent, Alexander Schaub and Philip Lowe are from Germany and UK. This would indirectly help DG COMP to communicate with the British Office of Fair Trading (OFT) and the Bundeskartellamt, Germany's Federal Cartel Office, two well-experienced national competition authorities. (NCA Official, Interviewee 11, March 2011; Academic, Interviewee 14, April 2011) The connection of their nationalities, however, does not jeopardise the operation of DG COMP. *'We may say that the seniority and experience of national competition authorities, for example the OFT in the UK, would have a larger say on the development of competition policy, rather than the nationality of Director-General or other senior officials.'* (Lawyer, Interviewee 17, February 2012) Furthermore, they are still given important functions after their DG COMP services. Alexander Schaub then becomes the Director-General for Internal Market and Services; Philip Lowe is now the Director-General for Energy.

In regards to the senior management in the Commission, the Kinnock administrative reform has established the general principle for the mobility of senior officials. *'Mobility should apply as a general rule to all senior officials who have occupied the same function for five successive years. In exceptional circumstances officials may be required to remain in function beyond this period within the maximum of seven years.'* (European Commission Press, 2010, IP/10/660) Between 2000-2002, Philip Lowe was

the *Chef de Cabinet* for Neil Kinnock¹¹². He is expected to be fully aware of the administrative mobility. In this regard, Philip Lowe as the Director-General of DG COMP for seven years is an exceptional case¹¹³ and confirmation of his excellence in the competition issues. *‘DG COMP has always been a strategic department in the Commission. The guy to be the Director-General should be exceptional in his resume and have extensive experience in the Commission. The post is not opened for outside candidates. It is reserved for the senior officials in the Commission..... Let me put it this way, Philip Lowe is “Mr. Competition”. He accounts for the comprehensive performance of the competition law, in particular antitrust and merger. His existence in DG COMP can offset the effect of senior official’s rotation. He is definitely the key person for the consistent enforcement after the decentralisation.’* (Lawyer, Interviewee 07, November 2009)

Therefore, it is fair to say that Alexander Schaub and Philip Lowe are qualified bureaucratic heads and suitable candidates to conduct the modernisation reform. The important role of bureaucratic chief of DG COMP is seen.

Table 5.3 The Analysis of Director-General of DG COMP

	Alexander Schaub	Philip Lowe
Served as Director-General of DG COMP	01 May 1995 - 01 Sep 2002	01 Sep 2002 - 01 Nov 2009
Nationality	Germany	UK

¹¹² ‘Mr Lowe is a senior official with wide experience of the Commission. His appointment to lead Mr Kinnock’s office emphasises the priority which the Prodi Commission attaches to full and effective implementation of the comprehensive Reform Strategy which it adopted on 1st March.’ (European Commission Press, 2000, IP/00/393) In fact, Philip Lowe was the *Chef de Cabinet* between 15 June 2000 ~ 01 Feb 2002.

¹¹³ A1s (Directors-General and Deputy Directors-General) and A2s (Directors) will be expected to “rotate” posts at regular intervals, normally every five years and not more than seven years. (European Commission Press, 2002c, IP/02/617)

	Alexander Schaub	Philip Lowe
Educational Background	- Law and Economics at the Universities of Freiburg, Lausanne, Cologne and Bonn - a post-graduate year at the College of Europe in Bruges	- Politics, Philosophy and Economics at St. John's College, University of Oxford - two-year MSc at London Business School
Joining the Commission	1973	1973
Preceding Post	Deputy Director-General for Internal Market and Industrial Affairs	Deputy Secretary-General (responsible for Relations with the Council)
Succeeding Post	Director-General for Internal Market and Services (2002-06)	Director-General for Energy
Current Post	- Non-executive Director and Chairman of Audit Committee, Schindler Holding Group - Counsel Member of the law firm Freshfolds Bruckhaus Deringer - Lecturer, University of St. Gallen in Switzerland	Director-General for Energy
Previous Posts in DG COMP		- Director of Merger Task Force (1993-1995)

(source: DG COMP, DG MARKT, and DG ENER websites (accessed 20 October 2011))

5.3.2 The Training of Staff

Training is central to the construction of personnel capacity in an institution. It is a common strategy to provide existing officials with up-to-date knowledge and new staff with required expertise. It often appears as a binding requirement in large firms or governmental organisations for the purpose of coherent operation and qualified working skills. 'Organisations may provide their members with the meaning of interpreting general social and political values, so that very strong organisations can obtain somewhat greater

freedom from control by prevailing social norms.’ (Peters, 2001: 36) Furthermore, training is a constant and periodical programme to update for external changes by giving new case studies and market briefings, to examine whether the enforcement is properly conducted, and to provide the renewed operational reference.

The quality and scope of training programmes would be crucial to the strength of personnel capacity. In the modernisation reform, the training programme is available for three groups of experts: the internal training for DG COMP officials, the training exchange for national competition officials, and the external training for national judges.

5.3.2.1 The Training for DG COMP Officials

The internal training for DG COMP officials aims to provide necessary assistance. Different types of training programmes are available to all DG COMP officials: centrally organised training courses by the Commission; in-house and on-the-job training workshops by DG COMP. In addition, there are some tailor-made training schemes to supplement the existing programmes.

First, the centrally managed training programme provides the general skills for new staff. Once recruited, the staff should participate in this grand training programme for the basic knowledge of the institutional operation.

‘I must say that there exists a general training course for new comers to the Commission about the general aspect of work in the European Commission. It treats all kinds of us as even. So it is a small general introduction with some formality. Unfortunately, I started some time ago in 1998 and at that time these training course did not exist. I was not so lucky to have one. For some years now, the training course has been organised and there are some different training cases at different levels. For example, some persons now have a mentor, and a new person can address

questions and any enquiry to the mentor for a certain amount of time. Every new comer would be more easily to accommodate the works.' (DG COMP Official, Interviewee 02, June 2009)

Second, there are also in-house and on-the-job training programmes operated by DG COMP. These courses focus on the most needed expertise, operational skills and the latest information on antitrust, merger and state aid. They largely contribute to the quality of DG COMP's case assessment and decision.

'The general introductory courses, according to the basic instruments, are being applied. So, if you become an anti-trust case handler, then you will be encouraged to go to a training which would introduce you to the basics of Article 81 and 82, how the Commission applies those Articles. Same, if you are in a merger or state aid unit, there are general introductory courses according to instruments, which would give you a very good introduction. And then in addition to that, we have several ad hoc training courses on different areas of interests. So, there was a recent case which was interesting that we did like the Intel case, not so recently, there is a training presentation done in-house explaining to the other staffs of DG COMP of how the case went, and what are the benefits and difficulties and so on. And these are pretty regular. So there are lots of opportunities [to participate].' (DG COMP Official, Interviewee 03, June 2009)

Another interviewee also expressed a similar depiction. *'As regards the training programmes for DG COMP staff, we organise comprehensive introductory courses on general Commission/EU issues as well as specific courses on antitrust, merger and state aid management. In addition, we organise short training sessions on topical issues, e.g. important case decisions taken by the Commission, the financial crisis and its effect on our work etc. whenever the need arises (but at least once a month). The above*

mentioned training courses are organised all-year-round for all new employees of DG Competition.' (DG COMP Official, Interviewee 02, June 2009)

Third, there are also 'tailor-made' training schemes for top officials. It is an appropriate strategy to provide the most needed information in a rather limited time. According to one interviewee, who has joined the Commission recently for the post of Head of Unit, this type of training provides a quick access to the portfolio. He commented, '*again, from the point of the Head of Unit, I got a nice one month period to introduce myself to the DG before getting operational. It was very helpful for me..... In my case, I got such opportunity to spend more time in my hierarchy and not being directly involved in my work.'* (DG COMP Official, Interviewee 01, June 2009)

Moreover, special sessions are organised to share the recent modifications of case-handling that 'staff will know how to properly react in situations of potential conflict of interest, how to handle the sensitive information involved in most cases, or how to follow procedures adequately' (European Commission, 2006b: 29; 2007b: 16; and 2008b: 31). In this sense, DG COMP has displayed its capacity to make training programmes effective and appropriate, even through some tailor-made schemes.

Apart from the types of internal training, we should also pay attention to the delivery of training. '*These training courses are provided by the staffs of DG COMP. But there are also external trainers or lecturers who come from university to give lectures.'* (DG COMP Official, Interviewee 03, June 2009) Corresponding to the growing needs for training, DG COMP has set up a designated Training Coordinator and a Local Career Guidance Officer to work out the annual strategic training framework.

DG COMP insists that there should be a minimal threshold of training courses to satisfy. '*It is not mandatory to attend a particular training course. But it is mandatory to have a minimal training days per year, again this*

applies to all Commission staffs. You have to have 10 days per year that applies throughout all DGs.' (DG COMP Official, Interviewee 03, June 2009) It also is found in several editions of Annual Management Plan that the ten-day training threshold has reached. 'DG COMP has an above-average level of participation of staff in training activities, and in 2005 achieved its stated goal of keeping the level of training at approximately 10 days per official (real average number of days of training per person was 9.9, without including on-the-job training). (European Commission, 2006b: 29) The application of training quantity has been achieved in both 2006¹¹⁴ and 2007¹¹⁵. It is fair to say the training programmes for DG COMP staff are helpful and effective. The personnel capacity of DG COMP is again identified.

5.3.2.2 The Training for National Competition Officials

The training programmes for national competition officials are arranged mainly by compact seminars for ECN members and by inviting national officials as an exchange or guest official to join in the daily work of DG COMP. '*[DG COMP] organises twice a year on a circle of general and specialised, i.e. case studies, training course for the "exchange officials" from the national competition authorities. Those officials stay in a unit of their choice in DG Competition during 2-4 weeks. They participate in the work of the unit and go to these training courses. The idea is to mutually exchange experience between their authorities and DG Competition and to learn from each other.'* (DG COMP Official, Interviewee 02, June 2009) Under the ECN platform, DG COMP is legitimated to organise training programmes and seminars in-house. '*They are usually take place in Brussels under the premise of DG Competition. So that means the NCA staffs have to come to Brussels..... Now we have arrived at the 8th edition of this training course. Usually we organise two of these training seminars per year. And every*

¹¹⁴ DG COMP has achieved in the past three years its stated target of approximately 10 training days per official (real average number of days of training per person was 9.9, without on-the-job training). (European Commission, 2007b: 16)

¹¹⁵ DG COMP has constantly achieved in the past years its stated target of approximately 10 training days per official (real average number of days of training per person was 7.5, with 2.5 on-the-job training). (European Commission, 2008b: 31)

national authority can participate.' (DG COMP Official, Interviewee 02, June 2009)

In addition, the seconded national experts (SNEs) serving in DG COMP are the other group for training and sharing the competition enforcement. The purposes of secondments are two-fold: to bring to the Commission the experience of issues dealt with in a national administration of the SNE and for him/her to take back home the knowledge of Community issues acquired during the secondment.¹¹⁶

From the bureaucratic autonomy perspective, there is no compulsory mandate for DG COMP to conduct such training programme for national competition officials. Such activity facilitates the central role of DG COMP in the decentralised enforcement regime. It also enhances the network relationship and the personnel capacity of DG COMP.

5.3.2.3 The Training for National Judges

National judges are homogeneous, selective, and highly professional. (Kovacic, 2008a) In preparation for the modernisation and the stringent need for consistency at the national level¹¹⁷, DG COMP has conducted a granting scheme for national judges' training programmes since 2002. *'The grants are allocated by means of an annual "call for proposals" for which the candidates (all are non-profit making organisations) submit their proposals. Depending on whether the proposals fulfill the grant award criteria, the candidates will receive a grant of up to 80% of the eligible project costs from the Commission. Since 2002, the Commission has thus been able to co-finance*

¹¹⁶ Seconded national experts (SNEs or Experts National Detachés, ENDs, in French) are national or international civil servants or persons employed in the private sector who are working temporarily for the Commission. Their task is to assist Commission officials, carrying out the duties assigned to them under the work programme drawn up when they apply for the secondment. For further information on SNEs, see the 'Seconded National Experts' section on the European Commission website: http://epp.eurostat.ec.europa.eu/portal/page/portal/pgp_insite/pge_estat/tab_staff (accessed 25 May 2009)

¹¹⁷ 'The reform of the antitrust enforcement regime introduced by [Council] Regulation 1/2003 leads also to an increased application of the Community competition rules by national courts.' (European Commission, 2006c: 25)

training projects for ca. 3500 judges in almost all Member States of the European Union.¹¹⁸ (DG COMP Official, Interviewee 02, June 2009) For example, the Academy of European Law (ERA) in Trier and the Centre for Competition Law and Policy of Oxford University are two of the tenders in this scheme, and many national judicial centres have applied to it.

The details of training are explained in Table 5.4. The creation of ECN further strengthens the *raison d'être* about the training programmes for national judges and national competition experts. The training programmes for national judges are under the supervision of ECN Unit in Directorate A. They receive a separate, special budget of € 800,000 annually to run this programme. 'They are intended for the training of national judges and the creation of networks among them. Improving cooperation amongst judges handling EU competition law cases is of great importance in view of the aim of Council Regulation 1/2003 to ensure greater involvement of Member States' courts in the application of Articles 81 and 82. (European Commission, 2004c: 6) Since 2006, this budget has been granted to Directorate A, assisted by the financial units in the Resources Directorate, as a decentralised managed budget. 'The DG will continue to support the training of national judges in Competition Law through the subsidy program which, for the first year, will run on a budget line under DG JLS's responsibility.' (European Commission, 2006c: 10) DG COMP has managed to use the budget in a full scale since 2006.

Table 5.4 The Training Programmes for National Judges

Year	Number of Projects applied	Number of Projects granted	Total Available Budget	Actual Total Amount of Grants
2002	N/A	3	€ 800,000	€ 39,858.31
2003	N/A	4	€ 800,000	€ 71,950.00

¹¹⁸ For the recent calls for proposals, please see: http://ec.europa.eu/dgs/competition/proposals2/#call_training2008; and the names of the beneficiaries are published here: http://ec.europa.eu/dgs/competition/proposals2/#call_4 (accessed 22 June 2009)

Year	Number of Projects applied	Number of Projects granted	Total Available Budget	Actual Total Amount of Grants
2004	19	10	€ 800,000	€ 431,228.29
2005	24	12	€ 800,000	€ 599,628.77
2006	17	15	€ 800,000	est. € 800,000
2007	18	15	€ 800,000	€ 798,618.96
2008	14	10	€ 800,000	€ 560,783.98

(source¹¹⁹: DG COMP website, <http://ec.europa.eu/competition/court/training.html> (accessed 29 April 2010))

In the training for judges, DG COMP chooses to outsource the training programmes to third parties, in particular those high-level training programmes for judges. This is an effective way to achieve the objective without incurring any long-term cost. In fact, the training for national judges since 2002 suggests that DG COMP is well-prepared for the decentralised enforcement.¹²⁰ The gradual increase of budget for training projects also indicates that training programmes are workable. Therefore, we have seen that the personnel capacity of DG COMP is exercised through the training for national judges.

5.3.3 The Mobility of DG COMP Officials

The mobility of DG COMP officials can indicate how the personnel capacity is exercised. 'Mobility of senior officials widens their experience and skills and

¹¹⁹ In 2006, out of the 15 granted projects, there are only 12 programmes available for the budget information. Together, they accounts for a total amount of € 512,570.41. Still, there are three programmes unknown for their individual granting amount. The estimation is based upon DG COMP's 2006 Annual Management Plan, in which it is stated that 'the DG will continue to support the training of national judges in Competition Law through its small subsidy program, trying to reach full use of the 800,000€ budget for the first time' (European Commission, 2005c: 9).

¹²⁰ Under the cooperation mechanisms foreseen in the Regulation, the Commission provides assistance to national judges and, by subsidizing appropriate projects, it encourages judicial cooperation between judges and their training with a view to ensure both an effective and coherent application of Articles 81 and 82 throughout the EU. (European Commission, 2005c: 24)

provides them with the motivation of new management and policy challenges. It also tends to stimulate new thinking and improved performance within the services.’ (European Commission Press, 2002b, IP/02/124)

First, the mobility of staff after the modernisation reform is stable, as seen in the following table. With the requirement of necessary mobility¹²¹, some officials have changed post within and across their Directorate-General. In 2006, the number of officials leaving DG COMP (50) is similar to the new officials joining DG COMP (48). In 2007, there are 125 new officials joining DG COMP, whilst only 75 officials moving to other DGs. On the other hand, the internal relocation of officials is rather stable, respectively 51 officials in 2006, and 48 officials in 2007.

The 2008 Annual Activity Report explains the increase of staff. ‘Because of the pressure on human resources in the field of State aid control – which is set to continue to increase, DG COMP was quickly granted additional resources based on the administrative arrangements decided by SG, ADMIN and BUDG (including the granting of an advance of 30 posts from DG Competition's APS 2009 allocation of 45 posts and allowing for the recruitment of some 30 additional FTEs for the 2009-2010 period).’ (European Commission, 2009b: 3) Therefore, the mobility of DG COMP officials remains at a proportionate level.

Table 5.5 The Mobility of DG COMP Officials

	2006		2007	
	type	subtotal	type	subtotal
Internal relocation (within DG COMP)	39 AD 12 AST	51	28 AD 20 AST	48
External change (moved to other DGs)	22 AD 28 AST	50	36 AD 39 AST	75

¹²¹ ‘A1 and A2 officials will be subject to mobility after 5 years and not normally stay in a post for longer than 7 years.’ (European Commission Press, 2002b, IP/02/124)

	2006		2007	
	type	subtotal	type	subtotal
New staff joined	22 AD 26 AST	48	64 AD 61 AST	125
Total number of staff		750		783

(source: DG COMP Annual Activity Report 2007 & 2008)

Second, the mobility of DG COMP officials does not jeopardise the daily function of DG COMP. As the mobility rate for departure officials remains under 10%, most of the DG COMP officials have served a rather long time. 'The longer time perspective of the permanent civil service allows them to pick solutions to problems that may take a long time to come to fruition but that may ultimately solve a problem rather than offering only a "quick fix" before the next election.' (Peters, 2001: 237)

Third, senior officials of DG COMP can either find a proper post in other DGs or shift to private undertakings after fulfilling the exclusion clause. After the modernisation reform, DG COMP completes its 'sensitive post' list for the standardisation of the mobility of officials. In 2007, DG COMP has revised its 'human resources strategy' and 'the situation is now fully in line with the Commission guidelines on sensitive functions' (European Commission, 2007b: 17). For example, Philip Lowe is now the Director-General of new DG ENER (Energy). Alexander Schaub, another former Director-General of DG COMP (1995-2002), has become the Director-General of DG MARKT (Internal Market and Services) and retired in 2006. He continues to serve in the auditing committee of a private undertaking, the Schindler Group.

Lastly, the recent financial crisis in late 2008 also reveals a certain degree of personnel capacity for DG COMP. 'In the last quarter [of 2008], DG COMP displayed unprecedented mobilisation and responsiveness with a view to devising the appropriate response to this crisis. This was possible thanks to the combined commitment of staff and the flexibility allowed by DG COMP's project based organisation. In particular, DG COMP reprioritised its activities

to be able to respond to the crisis situation. Some activities were scaled down to free the staff resources necessary to handle the crisis.’ (European Commission, 2009b: 3) There are around 30 additional officials¹²² assigned to DG COMP. This is an obvious example that DG COMP holds considerable leverage to promptly recompose its officials under critical circumstances.

Therefore, a stable and proportionate level of DG COMP staff mobility is identified, as a result of the general rules of staff mobility in the Commission and the personnel capacity of DG COMP. A healthy circulation of officials is seen in DG COMP. The DG COMP officials are able to serve for important posts in other DGs, notwithstanding in the private sectors.

5.3.4 Conclusion: the Personnel Capacity of DG COMP

The study of two Directors-General gives a positive feedback on the important role of bureaucratic chief in the modernisation reform. Their seniority, educational background, and career routes in the civil service have confirmed the role of bureaucratic chiefs in the pursuit of bureaucratic autonomy. In particular, Philip Lowe’s authority is central to the accomplishment of modernisation reform.

The analysis of training programmes reveals DG COMP’s effort to exert its personnel capacity. First, the general training programmes for all Commission staff are not designed for a specific department like DG COMP or a specific reform like the modernisation reform. There is limited evidence to argue that DG COMP has increased its personnel capacity in the general training programmes. Second, the in-house training is available for DG COMP and other DGs. It is indeed helpful for the officials in DG COMP to share their expertise and *esprit de corps*. Nevertheless, it is not unique for DG COMP to argue for a strong increase of its personnel capacity. Third, the trailer-made training is not a regular arrangement in the bureaucratic system. The

¹²² These 30 additional FTE come from, on the one hand, the ongoing intra-Commission redeployment exercise related to the financial crisis and, on the other, from the recruitment of additional national experts. (European Commission, 2009b: 3)

personnel capacity of DG COMP is seen in this type of training but the effect is rather doubtful. Fourth, the training programmes for NCA officials and national judges are the outstanding move of DG COMP to exert its personnel capacity to other actors in the competition regime. DG COMP has shown its discretionary power through the full use of the training budget and the conduct of exchange programmes for NCA officials. The personnel capacity of DG COMP is extended. DG COMP is capable to maximise its influence to other officials in the competition regime.

The study on the mobility of DG COMP officials confirms the personnel capacity of DG COMP. DG COMP is capable of maintaining a proportionate level of mobility and a healthy circulation of staff. The subsequent careers of DG COMP officials also indirectly suggest the personnel quality of DG COMP. The prompt recomposition of DG COMP officials to the financial crisis is further evidence of DG COMP's personnel capacity.

Nevertheless, the analysis on the role of bureaucratic chief in the modernisation reform cannot guarantee the trend of increase in the personnel capacity of DG COMP. It only confirms that two Directors-General are well-qualified. Likewise, the training programmes are merely able to identify the effort of DG COMP to extend its personnel influence. It is difficult to see the impact of training programmes on the capacity change of DG COMP before and after the modernisation reform. Moreover, the mobility of DG COMP officials is the result of the personnel capacity of DG COMP and the general staff mobility rule of Commission. It cannot reflect a trend of personnel capacity change. Therefore, we can only argue that **DG COMP has exercised its personnel capacity in the modernisation reform**. The personnel changes of bureaucratic chiefs and officials of DG COMP is unable to suggest an increase of its personnel capacity, failing to confirm the sub-hypothesis H3-1.

5.4 The Availability of Independent Recruitment for DG COMP

Recruitment flexibility is the advanced level of personnel capacity. With such competence, the bureaucracy can exert its preference from the very beginning of staff selection. Combined with other activities and competences, the personnel aspect of bureaucratic autonomy can be fully implemented.

In the EU, the recruitment is a centralised competence organised by the Commission, and executed by the European Personnel Selection Office (EPSO). The Commission staff, in particular the administrator (AD), should pass the centralised 'Concours' examination. If DG COMP is able to conduct the recruitment in accordance to its preference and procedural arrangement, we may argue that DG COMP's personnel capacity has been further extended from the staff recruitment to the staff training. Therefore, the exploration on the recruitment process is able to argue whether DG COMP has the advanced level of personnel control in the modernisation reform.

(H3-2) The existence of independent recruitment for DG COMP suggests an *increase* of its personnel capacity.

The study of recruitment flexibility in the modernisation process focuses on two aspects: the permanent officials and the non-permanent agents. The exploration is able to justify the advanced personnel capacity of DG COMP.

5.4.1 Permanent Staff

In the preliminary stage of recruitment for permanent staff, the open competitions (Concours), which are organised by the European Personnel Selection Office (EPSO), are the main selection mechanism. After passing the Concours, the person would be granted a 'candidate' qualification onto the reservation list. 'These lists are published in the Official Journal.'¹²³ (Civil Service of European Commission website, accessed 15 July 2009)

¹²³ The Civil Service website gives a clear explanation about the permanent official, the temporary staff, and the contract agent. For further details, please see: http://ec.europa.eu/civil_service/job/official/index_en.htm (accessed 15 July 2009)

The procedure of initial recruitment denotes that there is no room for any specific DG to exert its preference in the open competition. It is the EPSO's responsibility to ensure a equal opportunity to all qualified EU citizens. Specific selection is not the main concern in the initial stage. Therefore, DG COMP has no say in this stage. One interviewee in DG COMP has confirmed this situation, *'it would still not be independent in a sense that [recruitment] would be organised by the central selection office of the Commission, which is the European Personnel Selection Office (EPSO). But what we would do and what we try to do is to ask them to organise specific competitions in the field of european competition.'* (DG COMP Official, Interviewee 03, June 2009)

In the second phase of recruitment, 'once on a reserve list, candidates can be recruited to a vacant post by any interested service in the Commission.'¹²⁴ (Civil Service of European Commission website, accessed 15 July 2009) After some interviews or meetings, the interested DG would make its choice and report to the EPSO. The candidates have to pass the medical check and 'receive a formal job offer from the Personnel and Administration Directorate-General' (Civil Service of European Commission website, accessed 15 July 2009). Institutions with vacancies would search the most suitable candidates under its own judgement. This is where DG COMP might be able to exert its discretion within limited options of shortlisted candidates.

'Although we are now thinking about organising specific competition law related competitions in order to allow a better targeting of the staff that we would like to recruit. But for the time being, it is the general competition. And then we look among those who have passed the competition and see that for example on the basis of their backgrounds, because [someone] has been working in a law firm or in a national competition authority, or academia that

¹²⁴ Being on the reserve list does not guarantee that you will be recruited to a permanent official's position. These lists usually have a time-limit of one or two years. (Civil Service of European Commission website, accessed 15 July 2009)

specialised in competition law, they are better suited to the profile of DG COMP.' (DG COMP Official, Interviewee 03, June 2009)

In short, there is only limited discretion for DG COMP in the selection of permanent staff. All DGs in the Commission, including DG COMP, still have no say in the first phase of open competition. It is the EPSO's exclusive competence to ensure a fair and systematic selection. Nonetheless, all DGs, including DG COMP, would be able to choose their preferred candidates from the shortlist in the second phase selection of permanent staff. In addition, the limited discretion in the second phase selection is not exclusive for DG COMP. It is available for all DGs and other services in the European Union. Therefore, the personnel capacity of DG COMP in the recruitment of permanent staff barely exists.

5.4.2 Temporary (Non-permanent) Agent

Temporary agent, in the EU definition, has four different categories: (a) for non-standard and highly specialised job; (b) as supplement to the shortage of candidates on the competition reservation list; (c) as member of cabinet to Commissioner; and (d) working for scientific or research sectors in the EU. (Civil Service of European Commission website, accessed 15 July 2009) It is obvious that type (c) is under a political appointment to serve the specific Commissioner, which is outside the scope of DG COMP's competence. Type (d) is irrelevant to DG COMP's coverage. The selection for type (b) agent is very similar to the phase II recruitment of permanent staff. Thus, the most likely option for DG COMP would be type (a).

'If a Directorate-General wants to recruit a temporary agent for a highly-specialised job or temporary task, they will send the job notice and the profile of the person they are looking to recruit to the Permanent Representations of the Member States and also publish it on the EPSO website. They may also publish the vacancy on their own DG website.' (Civil Service of European Commission website, accessed 15 July 2009) This is how type (a) agents are

advertised and recruited. Since competition issues are highly technical and specific, DG COMP may be capable of exerting more specific requirements in the selection of type (a) agent. The recruitment for members in the Competition Economist Team (CET) is one of many examples. Nonetheless, all type (a) agents may only work for a maximum of six years, which is a centralised regulation.

To conclude, the only visible exercise of DG COMP's personnel autonomy is seen in the selection of type (a) staff. DG COMP still have no say for other types of temporary agent. Moreover, the discretionary selection of type (a) agent is available to all DGs, not a exclusive case for DG COMP. It is not a DG COMP's own initiation or exclusiveness. Therefore, the study of temporary agent provides limited evidence to support the argument of the advanced personnel capacity of DG COMP.

5.4.3 Conclusion: Limited Discretion of Recruitment

The details of recruitment are the advanced justification for the personnel capacity of DG COMP. The extent of recruitment flexibility reflects the capacity and independence of the bureaucracy.

From the permanent staff to the temporary agent, we have examined the possibilities of further discretion for DG COMP in the staff recruitment. In the recruitment of permanent staff, DG COMP has no leverage in the first phase of open competition (Concours), which is exclusively managed by the EPSO. In the second phase of selection, DG COMP would be able to choose suitable candidates from the reservation list. It is a very limited and regulated discretion. In the study of temporary recruitment, DG COMP has some discretion in the recruitment of type (a) temporary agent. DG COMP would be able to give the details of recruitment and decide when to recruit with the budgetary concern.

Nonetheless, the positive evidence on the recruitment flexibility, such as the type (a) agent and the phase II selection of permanent staff, is available to all DGs and other service sectors. In other words, DG COMP does not enjoy any exclusive or independent recruitment flexibility. Such flexibility is given equally to all EU institutions by the centralised arrangement. DG COMP is unable to extent any further autonomy in the recruitment process.

Accordingly, it is obvious that there is very limited discretion for DG COMP in the recruitment process. DG COMP is aware of this situation. But we have not seen any further effort to change. The recruitment flexibility remains minimal for DG COMP. Therefore, **there is no independent recruitment for DG COMP to increase of its personnel capacity.** DG COMP's limited discretion in the recruitment is not strong enough to prove H3-2.

5.5 Conclusion: the Increase of Organisational Capacity and the Exercise of Personnel Capacity

This chapter investigates the organisational capacity and personnel capacity of DG COMP to justify its autonomy change. DG COMP has managed to take the opportunity of modernisation reform to construct the procedural changes and strengthen its institutional capacity. Despite indicators to suggest the increase of organisational capacity, DG COMP is restricted in what it can achieve in the area of personnel recruitment and as such has focused more on procedural changes. Therefore, DG COMP is more capable to exert its discretionary power in the procedural change through organisational changes and developments.

The analysis reveals that DG COMP has managed its organisational capacity pretty well in the organisational changes and the organisational developments. First, six types of re-organisation, accompanied by the organisational change at the Directorate level and the establishment of Cartel Units and Directorate, have been exercised after a long period of no organisational change to demonstrate the initial organisational capacity of DG

COMP. Second, the organisational development further identifies a strong organisational capacity exercised by DG COMP. Positive cases are seen in the progress from Cartel Units to a Cartel Directorate, the development of Deputy Directors-General, and the evolvement of Chief Competition Economist and Competition Economist Team. DG COMP has successfully exhibited its organisational capacity from the beginning of organisational change to the following adaptations of sectoral shifts. Therefore, the study of organisational changes and organisational developments indicates an increase of DG COMP's organisational capacity. DG COMP is capable of conducting the organisational changes as a result of the changes in the competition enforcement and the enactment of new Council Regulation 1/2003. (Peters, 2001; Yesilkagit, 2004)

The study on the personnel capacity of DG COMP reveals a rather different picture of development. Last chapter's discussion on the paradigm shift towards Chicago School is part of the changes in the bureaucratic culture of DG COMP. DG COMP further changed its bureaucratic culture through the exercise of its personnel capacity in the modernisation reform. First, two Directors-General have contributed largely to the initiation and implementation of modernisation reform. They are able to lead the institution with a clear direction (Cini, 1996) and to make necessary adaptations for the arrival of decentralised enforcement. The role of bureaucratic chiefs is further identified by their seniority, educational background, and civil service career. In particular, Philip Lowe's authority and expertise are satisfactory for the accomplishment of modernisation reform. Second, DG COMP has shown its effort to extend the personnel capacity through the training programmes for DG COMP and NCA officials, and national judges. Various and extensive training schemes are arranged to construct a DG COMP-led European competition regime. Third, the study of the mobility of DG COMP officials confirms that DG COMP is capable of maintaining a proportionate level of mobility and a steady development of staff. Senior officials of DG COMP are welcomed by other EU institutions. The prompt recomposition of DG COMP officials to the recent financial crisis is further evidence of DG COMP's

personnel capacity. Through these areas of activities, we have seen the appearance of a vivid administrative culture existent within DG COMP and a certain level of personnel capacity exercised in this regard, reflecting Cini's view of 'DG IV's distinctiveness vis-à-vis other Commission DGs' (Cini, 1995: 8).

However, the exploration on the availability of independent recruitment has revealed that DG COMP is yet to develop the advanced level of personnel capacity and bureaucratic autonomy. There is only very limited and non-exclusive discretion for DG COMP to select shortlisted candidates in the second phase of permanent staff selection and type (a) temporary staff. As a result, we may only argue that DG COMP has exercised its personnel capacity in the general areas of personnel change. Therefore, it is unconvincing to say that DG COMP has more *personnel capacity* in the modernised competition system, unable to prove the third hypothesis H3.

Chapter 6 – The Multiple Networks of Directorate-General for Competition

The modernisation reform can be analysed through an analysis of the substantive and procedural changes. Previous chapters have studied the paradigm shift of economic assessment for the increase of DG COMP's political differentiation and the procedural aspects of organisational change and development for the increase of its organisational capacity. This chapter continues to examine the procedural changes of network activities for the assessment of DG COMP's network relationship since the modernisation reform. According to the bureaucratic autonomy approach, the existence of multiple networks is an essential factor for the bureaucracy's sustainable autonomy. The development of multiple networks would be decisive to enhance the bureaucracy's political multiplicity and long-term autonomy. In other words, the bureaucracy's autonomy is premised on the networks that support it. (Carpenter, 2001) As an actor in the multi-dimensional network of governance system, the bureaucracy should be aware of the effect of mutual dependency and attempt to mobilise enough support from its horizontal and vertical alliances.

Earlier chapters have observed that the most important changes of modernisation reform are the decentralisation of competition enforcement and the corresponding establishment of European Competition Network (ECN). The decentralised application of Article 81 and 82 (now 101 and 102) results in the constellation of multiple enforcers in the competition regime and requires a consistent performance by all competent authorities. The ECN is the institutional response in this concern. Since DG COMP is the most experienced authority in the European competition regime, it has taken up the responsibility to coordinate and, to some extent, to supervise the members of ECN. Therefore, the role of DG COMP in the enforcement network is crucial in reflecting DG COMP's political multiplicity. The relationships among these competition authorities can be further described

as the emergence of multilevel governance in the competition enforcement regime.

Moreover, DG COMP has already engaged in the international context extensively before the modernisation reform. Being a key actor in several multilateral networks, DG COMP continues to urge strong bilateral links with major competition counterparts in the world. The bilateral and multilateral activities of DG COMP have guaranteed its multiple connections outside the EU territory and the room for political multiplicity. Last, the cooperation with other DGs within the Commission also indicates a minimal scale of political multiplicity for DG COMP.

Following the above context, it is now possible to put forward the fourth proposition of this research (P4) — **the modernisation of competition regime results in the further political multiplicity of DG COMP**. In fact, the modernisation reform provides the window of opportunity for DG COMP to develop its networks and to enhance its political multiplicity. Deriving from this proposition, some questions should be addressed: why is DG COMP actively engaged in these network activities? What is the effect of these network activities for DG COMP? How could we define the role of DG COMP in the newly established ECN? These questions are essential to the analysis of the fourth research question: **(Q4) does DG COMP have more *political multiplicity* since the modernisation reform?**

In practice, DG COMP's network activities have multiplied its horizontal and vertical relationships with other institutions and competition authorities. The horizontal cooperation with other DGs and the international participation provide DG COMP a certain degree of political multiplicity. Furthermore, DG COMP's involvement in the ECN would be the core study to answer the puzzles of modernisation reform on the role of DG COMP and the actual enforcement of new regime. The study of the regulatory framework of ECN, the enforcement records, and the development of ECN Model Leniency Programme, are decisive to test the leading role of DG COMP in the network

and the consequential multi-level governance. Therefore, it is reasonable to raise the fourth main hypothesis H4: **DG COMP has more *political multiplicity* in the modernisation process**, and followed by four sub-hypotheses to examine:

(H4-1) DG COMP's horizontal cooperation with other DGs in the Commission suggests an *increase* of its multiple networks;

(H4-2) the development of DG COMP's international bilateral and multilateral networks suggests an *increase* of its multiple networks;

(H4-3) the regulatory framework of ECN suggests an *increase* of DG COMP's political multiplicity; and

(H4-4) the implementation of ECN gives DG COMP a *leading* role in the modernised competition regime.

This chapter is organised by these four sub-hypotheses. It begins with the depiction of DG COMP's cooperation with other DGs in the Commission for a basic level of political multiplicity. It then analyses DG COMP's international cooperation with other competition authorities to justify whether the increase of its political multiplicity is seen. The second half of this chapter mainly focuses on the ECN. The regulatory framework of ECN indicates a very important role of DG COMP in the European competition regime. The enforcement and development of ECN should be taken into account for the advanced argument of the leading role of DG COMP in the regime. The conclusion is elaborated in the last section.

6.1 The Horizontal Cooperation with other Directorates-General

Many competition cases are involved with other policy sectors, which provide a legitimate ground for DG COMP to establish its horizontal cooperation with other DGs. As the Commission's competition authority, DG COMP is responsible for policy coordination regarding enforcement. In this regard, we should study and hypothesise DG COMP's cooperative activities within the Commission as:

(H4-1) DG COMP's horizontal cooperation with other DGs in the Commission suggests an *increase* of its multiple networks.

6.1.1 The Details of Horizontal Cooperation

There are three factors contributing to the examination of DG COMP's cooperation with other DGs. First, 'there is a culture of open communication in DG COMP which promotes and facilitates individual responsibility and internal control. Management systematically discusses developments at all levels, in weekly meetings of Directors, house meetings, unit meetings and meetings of Heads of Unit with the Director General, who also regularly addresses staff in notes and/or e-mails on issues of general concern.' (European Commission, 2006b: 27) In other words, DG COMP retains an open-minded culture to encourage effective coordination and regular contacts among the staff. '*There is only very limited restriction applied to our internal communication, [such as] the secrecy of sensitive cases. Other than that, we are virtually free to contact any colleague.*' (DG COMP Official, Interviewee 10, March 2010) Therefore, it is expected that this cooperative culture applies to DG COMP's horizontal connection with other DGs.

Second, the institutional design of European Commission provides another gateway of cooperation at the cross-DG level. For example, the "College of Commission" serves as a forum for the highest level of communication by the Commissioners. Contentious and unresolved issues involving multiple DGs would be decided here. '*I don't have the chance to attend the Commission level's meeting. But there are many bilateral, DG-to-DG meetings I have personally participated*', said by a senior DG COMP official. (DG COMP Official, Interviewee 10, March 2010). Therefore, bilateral and multilateral levels of coordinative meetings are frequent among different DGs. They are useful for DG COMP to extend its horizontal connection.

Another indirect way of cooperation is witnessed by the staff transfer within the Commission. Directorate G (Financial Services Policy and Financial

Markets) of DG MARKT is now (as of 2010) headed by Emil Paulis, a previous Head of ECN Unit, Director, and Deputy Director-General of DG COMP until 2007. After being the Director-General of DG COMP for eight years (2002-2010), Philip Lowe has become the Director-General of DG ENER (Energy)¹²⁵ in February 2010. Neelie Kroes, former competition Commissioner (2004-09), has been promoted as the Vice-President of the Barroso II Commission. There are more examples that officials from other DGs have transferred to DG COMP. In fact, the staff mobility is frequent and common, as discussed in Section 5.3.3. In this regard, it is not surprising that the departed officials still have good contacts with colleagues in DG COMP. Officials who have shifted to DG COMP also have contacts with colleagues in their previous DGs.

The above factors have constructed a friendly environment for DG COMP to cooperate with other DGs. In practice, several examples demonstrate that the horizontal cooperation with other DGs is frequent and effective. For instance, the operation of training programmes is coordinated by the Directorate A of DG COMP and the corresponding Unit in DG JLS (Justice, Freedom and Security). Other than that, effective case-handling is the primary motivation for constant cooperation and consultation. *'When there is a sectoral case, close contact with DG MARKT (Internal Market and Services) or DG TREN (Transport and Energy) is quite frequent.'* (DG COMP Official, Interviewee 03, June 2009) The case-handlers are able to assess their cases effectively. Another example is seen in the telecommunication sector. 'DG COMP together with DG INFSO prepared a revised Recommendation on markets susceptible to *ex ante* regulation, which significantly scales down regulation in this sector and alleviates the administrative burden for companies, regulators and the Commission' (European Commission, 2008b: 5). Moreover, the horizontal connection is not confined by the territorial scope of the EU. The International Relations Unit of DG COMP has frequent communications with other DGs regarding relevant international issues and requests for expertise and information. According to one interviewee from this

¹²⁵ In 2010, the Barroso II Commission decided to split DG TREN (Transport and Energy) into two separate DGs: DG ENER (Energy) and DG MOVE (Mobility and Transport).

Unit, *'we do contact with other DGs. For example, before the ICN working group meetings, we may contact DG TRADE (Trade) for some updated information or its professional ideas about the market'* (DG COMP Official, Interviewee 04, August 2009).

6.1.2 Conclusion: a Regular Horizontal Cooperation

The practice of horizontal cooperation by DG COMP suggests that there are always substantive needs to motivate the communication and coordination across different DGs. DG COMP officials are able to constantly get in touch with colleagues of other DGs under the grand Commission organisation. Cross-DG cooperation is ongoing through various policy domains. Therefore, a certain level of horizontal cooperation is seen.

Nevertheless, the horizontal cooperation of DG COMP since the modernisation reform is merely a reflection of the routine communication in the Commission. First, DG COMP shows no difference to other DGs in the Commission for the horizontal cooperation. There are neither institutional arrangements nor administrative rules for DG COMP. All DGs are administrative and organisational subordinates to the Commission. Second, most of the cooperative and coordinative activities are resulting from practical needs and the organisational design of Commission. DG COMP hardly has a unique and persistent strategy to enlarge its horizontal cooperation with other DGs. Third, there is no obvious increase of activities or other horizontal links since the modernisation reform. The horizontal cooperation is available prior to the modernisation reform. The activities of cooperation after the reform do not constitute a strong support for the increase of political multiplicity. Therefore, DG COMP's horizontal cooperation with other DGs in the Commission does not suggest an increase of its multiple networks.

6.2 The International Cooperation — Bilateral and Multilateral Networks

Multi-national corporations (MNCs) often conduct their business across national borders. Unilateral implementation of competition rules is no longer a viable method to maintain competitiveness in the market. (Gavil, 2007; Komninos, 2008) Thus, DG COMP is required to make contact and cooperation with other competition authorities on many cross-border cases. This has given DG COMP a credible basis to develop its external relationship ever since. Consequently, the study of DG COMP's international activities can be hypothesised as:

(H4-2) the development of DG COMP's international bilateral and multilateral networks suggests an *increase* of its political multiplicity.

In fact, DG COMP has already engaged in the international context before the modernisation reform. With the arrival of modernisation, DG COMP continues to work on its bilateral links with major competition authorities and becomes a key actor in several multilateral networks. The assessment of DG COMP's bilateral and multilateral activities in the international context would serve as an important justification for its political multiplicity and bureaucratic autonomy in the modernisation process.

6.2.1 The Enlargement Process

Before we get into the examination of DG COMP's bilateral and multilateral networks, it is necessary to study its activities in the enlargement process that would bridge the international dimension and the later study of ECN for a sound understanding of DG COMP's political multiplicity.

The enlargement constructs one of the main factors for the modernisation reform. Since 1995, DG COMP has adopted two strategies for the enlargement: the general enlargement approach and the competition-specific approach. First, for the compliance of Community standard, DG COMP

introduced a comprehensive PHARE programme¹²⁶ to give training and technical support on competition matters and set up the capacity for the enforcement¹²⁷. (European Commission, 1999a). For example, a four-week joint training programme was held in Brussels at an early stage of accession in 1995. The programmes continued until the finalisation of enlargement. In 2003, DG COMP still provided 12 training seminars on antitrust and state aid issues. Second, in the competition-specific approach, DG COMP initiated various programmes, conferences, working groups, seminars, and reports¹²⁸, to present the know-how of competition enforcement. In 1995-2002, eight 'annual conferences' were attended by DG COMP officials and the heads of national competition authorities¹²⁹ to share the expertise and experience of enforcement. 'The [Central and East European Countries] (CEECs) and DG COMP officials discussed specific competition problems of economies in transition and also the interaction of antitrust and state aid policies.' (European Commission, 1996: 98) Similarly, DG COMP introduced a 'twinning arrangement' for accession countries to obtain technical assistance in partnership with other member states. This pairing arrangement decreased the hierarchical antagonism towards DG COMP.

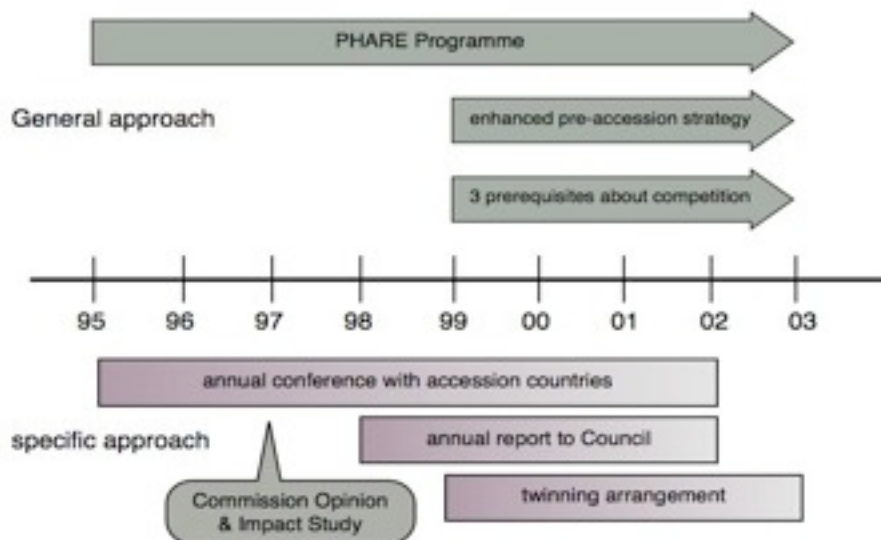
Figure 6.1 The Assistance to Accession Countries by DG COMP (1995-2003)

¹²⁶ The PHARE programme, along with ISPA (Instrument for Structural Policies for Pre-Accession) and SAPARD (Special Accession Programme for Agriculture & Rural Development), are three major pre-accession financial assistances to 10 accession countries of Central and Eastern Europe. For further details of PHARE, please look at: http://ec.europa.eu/bulgaria/finance_business/pre-accession/phare-programme_en.htm (accessed 4 October 2009)

¹²⁷ DG COMP has written down three requisites in the competition enforcement: (1) the necessary legislative framework for antitrust and State aid; (2) the administrative capacity in competition policy; and (3) the enforcement record of competition acquis, for the accession countries to satisfy and follow.

¹²⁸ Annual reports on the accession progress are submitted to the Council since 1998. In addition, DG COMP delivered two pivotal documents in July 1997 to reiterate DG COMP's stance. The 'Commission Opinion' was to monitor the convergence of accession countries' competition laws 'that most of the associated countries have ensured that their antitrust legislation meets convergence requirements' (European Commission, 1997a: 90) with some reservation on the state aid convergence. The 'Impact Study' was the first document revealing the Commission's concern about the administrative increase, the uniform application of community's competition law, and the adjustment of state aid.

¹²⁹ The details of annual conferences can be found in DG COMP's Annual Reports.



The above discussion indicates that DG COMP is well-prepared for the enlargement to assist the accession countries in following the conditions of *acquis communautaire*¹³⁰. The general and specific approaches lay out the grounding of necessary support, whilst the twinning programme provides an additional resource of assistance for the accession countries. Bounded by the original mandate as a subordinate department of the Commission, DG COMP is able to exert a certain level of network activities with accession countries. DG COMP is able to make the best use of its institutional position in the Commission.

However, there is limited evidence to support the increase of DG COMP's political multiplicity. DG COMP's two-way approach is effective but unlikely to enhance its network existence. In fact, the assistance for accession countries is obligatory for all DGs in the Commission, rather than an independent initiative by DG COMP. The link with accession countries is temporary and consultative in nature. The later formation of ECN is more substantive and persistent for the exertion of DG COMP's political networks.

¹³⁰ This top-down approach was concerned about the ability of these countries to meet the requirements of accession and later membership, and was based on conditions set by the EU. (Cseres, 2007: 471)

6.2.2 The Bilateral Networks of DG COMP

Bilateral networks hold the most important weight in assessing DG COMP's international participation. 'Cooperation with other competition agencies can be expected to bring significant benefits for the EU: direct benefits in terms of more effective/efficient enforcement of EU competition rules, but also indirect benefits, such as fair treatment of EU companies in non-EU markets, and the creation of a level-playing field between EU companies and foreign competitors.' (Lagares, 2010: 155) The strong ties with the U.S., Japan, Canada, and other major trading partners have made DG COMP an important actor in the international competition regime. For example, the EU-US relationship is the most consolidated partnership, whilst the development of EU-Japan relationship illustrates a more incremental approach. The insight from these various bilateral relationships reveals to what extent DG COMP has accomplished its political multiplicity.

6.2.2.1 The Bilateral Relationship with the U.S.

The U.S. has always been the single most important partner in many EU policy fields. The competition regime is no exception. The EU-US bilateral relationship is the pivotal pillar for the effectiveness and applicability of EU competition rules in many transnational cases. In fact, the EU-US relationship accounts for most of the EU's international competition matters.

In the regulatory development, the U.S. is the only country having two competition-specific agreements (and possibly another one soon) with the EU.¹³¹ 'Spurred by the adoption of the European Merger Regulation in 1989, the U.S. agencies and the EC recognised that they would have to work together more often and more closely because large, multinational mergers would commonly come under their simultaneous review.' (Brandenburger, 2011: 79)

¹³¹ Details of EU-US bilateral documents could be found on the international relations section of DG COMP website: <http://ec.europa.eu/competition/international/bilateral/usa.html> (accessed 30 January 2010)

Four regulatory milestones of EU-US relationship should be noted. First, the '1991 Cooperation Agreement' is the first competition agreement signed by the EU. It clarifies the mutual notification of cases, the traditional and positive comity principles¹³², and the cooperation and coordination of actions. Signed in 1991, this agreement only received the approval of the Council in April 1995. This may reflect the ups and downs of EU-US relationships and the suspicion of Member States. The biannual meetings among DG COMP, the U.S. FTC (Federal Trade Commission) and DoJ (Department of Justice) resumed in 1995 after a two-year's break. Since then, the bilateral relationship has gradually improved. Second, the '1998 EU-US Positive Comity Agreement' is the second competition agreement for the EU-US relationship. It has reinforced the positive comity procedure in Article V of 1991 Cooperation Agreement and excluded the merger cases for the sake of efficiency¹³³. Third, in late 1999, both authorities agreed to the principle of 'Administrative Arrangements on Attendance' (AAA) in individual hearings. Fourth, in October 2002, the Commission and the antitrust authorities of the U.S., the Antitrust Division of DoJ and the FTC, agreed to sign 'the EU-US best practices on cooperation in reviewing mergers'. Although the AAA and the EU-US best practices are non-binding in nature, they are helpful for the better coordination in sensitive cases.

In addition to the regulatory development, both authorities work closely for the effective enforcement and the share of information. 'Intergovernmental

¹³² A 'traditional comity' procedure suggests each party would 'take into account the important interests of the other party when it takes measures to enforce its competition rules' (Article VI); and a 'positive comity' procedure means that 'either party can invite the other party to take, on the basis of the latter legislation, appropriate measures regarding anticompetitive behaviour implemented on its territory and which affects the important interests of the requesting party' (Article V). (European Commission, 1996; 2003: 161)

¹³³ 'In contrast to the first agreement, this draft agreement does not cover mergers, given that neither Community law nor U.S. legislation would allow public proceedings to be deferred or suspended.' (European Commission, 1997a: 91) This exclusion allowed no deferral and suspension of action by any public legal proceedings. It also clarifies both 'the mechanics of the positive comity cooperation instrument, and the circumstances in which it can be availed of. In particular, it describes the conditions under which the requesting party should normally suspend its own enforcement actions and make a referral' (European Commission, 2003: 160).

contacts have continued at the highest levels between the Commission and the U.S. federal antitrust agencies. These include regular, formal EU-US bilateral consultations and a variety of other interactions.’ (Kovacic, 2008b: 13) For example, the *MCI Worldcom/Sprint* merger case marked the first time for a DG COMP official to ‘attend a ‘pitch meeting’ between the DoJ and the parties proposing to merge; such meetings are generally held shortly before the U.S. agencies decide whether or not to take action to block a proposed merger’ (European Commission, 2000a: 121). In 1999, both authorities decided to set up a ‘merger control working group’¹³⁴. Consequently, several working groups have contributed to the frequent and intensified communication between the two sides.¹³⁵ In 2003, the EU-US working group on mergers evolved as a regular forum to discuss merger remedies, to improve mutual understanding of practices, and to ensure the consistency in merger policy. (European Commission, 2001a; 2004a) ‘In recent years, the EU and U.S. competition authorities have expanded the work plan of the existing staff-level merger working group and have established new working groups dealing with such matters as antitrust/intellectual property issues. The frequency of staff-level meetings, by teleconference or face-to-face meetings, also has increased to address a variety of matters within and outside the context of the formal working groups.’ (Kovacic, 2008a: 17)

Table 6.1 gives the details of notification by both sides. Clearly, merger cases occupy the majority of notification. The gradual increase of notification from 1991 to 2000 may suggest the effect of globalisation and the steady cooperation, e.g. agreements, working groups, arrangements, etc. The volume of notification stabilises after 2000.

Table 6.1 The Number of Notifications by the U.S. and the EU

¹³⁴ The merger working group aims to study ‘(i) the scope for further convergence of analysis/ methodology in merger cases being treated in both jurisdictions, particularly regarding the respective EU and U.S. approaches towards oligopoly/collective dominance; and (ii) an in-depth study of the respective EU and U.S. approaches to the identification and implementation of remedies (in particular, divestitures), and to post-merger compliance-monitoring’ (European Commission, 1999a: 115).

¹³⁵ For example, the 1999 working group investigates the merger and oligopolistic dominance; another working group studies the intellectual property rights since 2002.

Year	From U.S.				From EU	
	FTC	DoJ	Merger case	Total	Merger case	Total
1991	10	2	9	12	3	5
1992	20	20	31	40	11	26
1993	22	18	28	40	20	44
1994	16	19	20	35	18	29
1995	14	21	18	35	31	42
1996	20	18	27	38	35	48
1997	12	24	20	36	30	42
1998	22	24	39	46	43	52
1999	26	23	39	49	59	70
2000	26	32	49	58	85	104
2001	n/a	n/a	25	37	71	84
2002	n/a	n/a	27	44	56	63
2003	n/a	n/a	n/a	46	n/a	56
2004	n/a	n/a	n/a	28	n/a	54
2005	n/a	n/a	n/a	27	n/a	82

(Source: DG COMP Annual Reports 1995~2007)

The development of regulatory cooperation and the incremental coordination of enforcement suggest that DG COMP has accomplished a strong bilateral relationship with the U.S. ‘Contact among high level EU and U.S. officials is also commonplace at conferences and in discussions about specific policy matters’ (Kovacic, 2008b: 13). Without any guidance or implicit order from other actors, DG COMP establishes its bilateral connection with the biggest competition partner in a smooth and reciprocal way. In return, the engagement with the U.S. assures DG COMP’s network multiplicity and indicates an increase of its bureaucratic autonomy.

6.2.2.2 The Bilateral Relationship with Canada

The cooperation with the Canadian competition authority is expected because of the entangled triangular EU-US-Canada relationship¹³⁶.

Table 6.2 The Number of Notification by Canada and the EU

	From Canada	From EU
Year	Total	Total
1999	3	4
2000	10	n/a
2001	10	8
2002	9	5
2003	6	7
2004	7	2
2005	1	8

(Source: DG COMP Annual Reports 1995-2007)

In the regulatory aspect, the EU-Canada relationship is based on the ‘1999 Competition Cooperation Agreement between the European Communities and the Canadian Government’.¹³⁷ The main features include the reciprocal notification of cases, the coordination of enforcement, the traditional and positive comity principles, and the exchange of information.¹³⁸ (European Commission, 1998a; 1999a) Therefore, the agreement with Canada is very similar to the agreements with the U.S. Likewise, DG COMP would give an annual report to the Council and the European Parliament about its activities with Canada. Table 6.2 shows the number of notified cases by both sides. The volume is rather minimal and difficult to interpret. Nevertheless, the

¹³⁶ For example, there are two trilateral meetings in 2001: the trilateral EU–US–Canadian teleconference about the *Dow Chemical/Union Carbide* case, and the trilateral EU–US–Canadian meeting about the *Alcoa/Reynolds* merger case.

¹³⁷ Following the authorisation from the Council, the Commission has started to negotiate with the Canadian competition authority in 1995. A drafted agreement was submitted in 1997 and consolidated in 1999.

¹³⁸ For example, the bilateral cooperation is seen in a staff exchange programme in 2002 that one official from DG COMP and one official from the Competition Bureau are exchanged to the other side.

context of EU-Canada bilateral development has similarities with the EU-US relationship. It is another network example for DG COMP.

6.2.2.3 The Bilateral Relationship with Japan

Japan is one of the earliest competition partners for DG COMP. In 1993, both sides started to initiate joint seminars and annual meetings. However, the conservative and protective attitude of the Japanese government delayed the development of the EU-Japan relationship. In response, DG COMP proposed a list of requests and recommendations on the deregulation and liberalisation of competition issues. First, the 1998 Proposal suggested that the Japanese Fair Trade Commission (JFTC) should review the existing administrative guidance and take stringent investigations and deterrent sanctions regarding anti-competitive conduct. Second, another Proposal was sent by DG COMP in 1999 to focus on the effective implementation of Anti-Monopoly Act (AMA), the reduction of exemptions, and the consistency of administrative procedures. Although the progress of bilateral relationship is slow, DG COMP issued 30 notifications and received 7 notifications from the JFTC during 1993~1998.

Since 1999, both sides had several negotiations¹³⁹ and reached a consensus to sign 'the 2003 Agreement between the European Communities and the Government of Japan'. Similar to the EU-US agreements, the content covers the traditional and positive comity, the reciprocal notification of cases, the exchange of information, and the enforcement coordination. The EU-Japan bilateral relationship has finally been consolidated. This incremental approach indicates another network connection for DG COMP.

6.2.2.4 The Bilateral Relationship with Korea

¹³⁹ There are two formal negotiation sessions plus several opinion exchanges before the grand EU-Japan summit in 2000. In the summit, both sides reached the consensus to have a 'mutual understanding agreement in the area of competition' and later became the 2003 Agreement.

Although the development of bilateral relationship with Japan is procrastinated, DG COMP's bilateral relationship with the other Asian Pacific country – Korea – goes well. This is partly due to the Korean government's exceptionally committed attitude towards the international engagement. Korea is one of the founding members for the International Competition Network (ICN). It tries to enhance the bilateral cooperation with the EU under the 1995 OECD Recommendation. First, the Competition Commissioner and the Korean Fair Trade Commission (KFTC) Chairman signed a Memorandum of Understanding (MoU) in 2004 with the priority of 'establishing a permanent forum for consultation, transparency and exchange of experiences and views between the European Commission and the Fair Trade Commission' (European Commission, 2004a: 191). Second, the annual bilateral meeting was introduced in 2005 to enhance the mutual communication. Finally, the '2009 EU-Korea Cooperation Agreement' on the anti-competitive activities was reached, after only two years of negotiation. The fruitful cooperation is resulted from the willingness of Korean government and the experienced DG COMP in the international context. DG COMP's political multiplicity is further seen in the development of EU-Korea relationship.

6.2.2.5 The Bilateral Relationship with China

The development of Chinese competition law could be traced back to 2003 when the Chinese government adopted 'rules on mergers involving foreign companies and the prevention of monopolistic price practices' (European Commission, 2003: 163). The first comprehensive Anti-Monopoly Law¹⁴⁰ was adopted in 2007. DG COMP has given various assistances in the formation of Chinese competition law since 2005.

The bilateral connection started in 2003 through some exploratory talks and visits. Later, both sides agreed to establish a permanent 'EU-China Competition Policy Dialogue' for the purpose of mutual consultation and

¹⁴⁰ The Anti-Monopoly Law includes provisions on merger control, abuse of a dominant position and restrictive agreements.

transparency. This arrangement aims to exchange different views on competition issues and to deliver the expertise and assistance of DG COMP to China. In May 2004, the bilateral relation further advanced with the signing of 'The Terms of Reference of a Structured Dialogue on Competition Policy between the European Union and China', which is the first ever competition dialogue for the Chinese government. Consequently, the bilateral relationship has been steadily developed.¹⁴¹

The EU-China bilateral relationship indicates that DG COMP is able to deliver its expertise and assistance not only to the European accession countries but also to other competition regimes. Former chairman of U.S. Federal Trade Commission William Kovacic recognises the efforts of DG COMP. 'The EU and the United States spend substantial resources on technical assistance for new competition policy systems and for countries considering the adoption of new competition laws.' (Kovacic, 2008b: 8) Thus, the EU-China bilateral development is able to suggest the exertion of political multiplicity by DG COMP.

6.2.2.6 The Bilateral Relationship with Other Countries

DG COMP has tried to build up further and wider bilateral relationship through various approaches. '*We have had some very good cases of cooperation and contact, for instance, Australia, South Africa, Switzerland. Even though we don't have any agreement with them.*' (DG COMP Official, Interviewee 04, August 2009) For example, DG COMP signed the MoU¹⁴² with Brazil in 2009 and Russia in 2011. Moreover, there are many general agreements containing competition provisions. For instance, the relationship with Mediterranean countries is based on the 'Euro-Mediterranean

¹⁴¹ For example, a workshop on merger control is attended by some delegates from the Ministry of Commerce and Legislative Affairs Office of the State Council in Brussels 2007.

¹⁴² An MoU is a classic and efficient means of articulating cooperation between competition authorities. It was not DG Competition's instrument of choice in the past. It is, however, a flexible instrument to articulate cooperation, which can be put in place in a relatively short period of time, provided the Commission remains within the limits of its competences. (Lagares, 2010: 156)

Partnership and Single Market' Communication; the relationship with Latin American countries is based upon the competition section in the general Free Trade Agreements (FTA) and some technical assistance programmes; the relationship with Russia, Ukraine and former Soviet States are based on the 'Partnership and Cooperation Agreement' (PCA) with a section regarding competition matters. *'For instance, the one with Mexico, the decision in 2000, which laid down very detailed framework for cooperation, which can certainly comparable to the agreements with Canada and the U.S. It is a little bit shorter but the principles are the same.'* (DG COMP Official, Interviewee 04, August 2009)

Likewise, DG COMP shares its expertise and technical assistance to other young competition regimes, e.g. the drafting of Russian anti-monopoly law in 2005. *'It is more on the technical assistance. They are clearly in the position as demanders. And they may contact us to have some expertise, to have our views, to have some seminars, etc. Nevertheless, we have to turn them down sometimes because we simply do not have enough resources.'* (DG COMP Official, Interviewee 04, August 2009) All these efforts suggest that DG COMP takes the international engagement seriously. The international participation indicates DG COMP's network existence and political multiplicity.

6.2.3 The Multilateral Networks of DG COMP

The multilateral networks are the other field for DG COMP to exert its network relationship and political multiplicity. DG COMP embraces 'the idea of a global competition initiative as an opportunity to bring the benefits of increased cooperation to a multilateral context' (Brandenburger, 2011: 79). The complexity of multilateral networks requires the stronger capacity of network members to manoeuvre. DG COMP has participated in the competition sector of Organisation for Economic Cooperation and Development (OECD) and related competition programmes of World Trade Organisation (WTO). It is also one of the founding members for the International Competition Network (ICN). The activities of DG COMP in these

multilateral organisations would justify whether it can establish firm connections at the international level.

6.2.3.1 General International Organisations: OCED and WTO

The participation in Organisation for Economic Cooperation and Development (OECD) has been a primary objective of DG COMP. Since the mid-90s, DG COMP has actively engaged in many OECD sessions, e.g. the Committee of Competition Law and Policy; the annual Global Forum of Competition¹⁴³; the International Cartel Workshop¹⁴⁴; and other joint seminars of competition issues. (European Commission, 1998a; 1999a; 2000a; OECD website) In these sessions, DG COMP has submitted its written documents to committees, round tables and seminars on the competition-related topics.¹⁴⁵ The submissions include the issues on information exchange, regulative coordination, experience sharing, procedural fairness, merger remedies, efficiency evaluation, consumer protection, etc. Most of them are related to the competition rules in other policy domains. In addition, the Commission is the peer review examiner for several countries' competition policy under the OECD platform, namely Hungary, Russia, Mexico, Japan, Turkey, and Switzerland. Being a peer review examiner is a positive indicator of DG COMP's experience and assistance capacity.

DG COMP's involvement in the World Trade Organisation (WTO) is apparent. In 1994, DG COMP led a working group to conclude a dual approach to strengthen the international cooperation: the deepening of bilateral relationship and the elaboration of pluralistic cooperation framework. This dual approach had been elaborated in the 1996 WTO Singapore conference to explore the options for further extensive cooperation. DG

¹⁴³ Since 2001, the annual Global Forum of Competition (GFC) brings together more than 50 countries (including non-OECD countries) to discuss competition issues.

¹⁴⁴ Since 1999, the International Cartel Workshop has been set up for the purpose of sharing expertise on investigation, prosecution and cooperation.

¹⁴⁵ The Commission submitted 7 written documents in 2003, 11 submissions in 2004, 8 submissions in 2005. Topics are various and focusing upon the public policies related to competition. (European Commission, 2003; 2004a; 2005a)

COMP has been at the forefront in pledging the pluralistic relationship. 'The EU was the first to put concrete substantive proposals on the table.' (European Commission, 2001a: 153)

However, the Seattle round was a failure for the prospect of a future competition framework under WTO. There is no agreement between WTO members¹⁴⁶ and 'no actual negotiations are taking place at this point in time regarding trade and competition' (European Commission, 1999a: 119). '*What really killed the WTO was the real opposition from certain countries, e.g. India and some developing and less developed countries, which opposed to these rules in any straightjacket on competition policy that may be imposed by international rules. Because they believed, for instance, they may want to have competition rules in their way, some of them didn't even have one competition law. And they didn't want to have straightjacket, they wanted to be relax on competition laws to foster industrial objectives. So that is the real obstacle.*' (DG COMP Official, Interviewee 04, August 2009)

DG COMP is disappointed with the compromised results. First, the binding effect on competition rules is too lax. '*Within the WTO, the project was to have very basic obligations, e.g. cartel rules, law on dominant position, etc. It is very easy for countries to be in line with the obligations.*' (DG COMP Official, Interviewee 04, August 2009) Second, the implementation gap is too large to harmonise. '*The main issue is the actual application of competition rules and that has not been subject to any WTO regulations. Antitrust committees do not want to have their decisions subject to international regulation and the mechanism of WTO. So, the real problem, which is the actual implementation of competition law, has not been so far subject to WTO rules.*' (DG COMP Official, Interviewee 04, August 2009) Thus, competition issues are merely a modest part of trade negotiations in WTO. An

¹⁴⁶ Nevertheless, a shallow advancement is reached through the general trade policy in the Doha round declaration that 'a multilateral framework is needed today to enhance the contribution of competition policy to international trade and development' (European Commission, 2001a: 152).

independent competition framework is hindered. Despite the failure of WTO, this case shows that DG COMP knows what the problems are.

6.2.3.2 Special Purpose Organisation: ICN

The attempt to have a separate, independent structure of competition rules under the WTO framework has failed. DG COMP and 13 competition authorities¹⁴⁷ started to formulate a new organisation outside the WTO, which later became the International Competition Network (ICN) in 2001 — ‘the first international body devoted exclusively to international antitrust issues’ (Brandenburger, 2011: 80). The failure of WTO let the founders of ICN, notably the U.S. antitrust authorities, ensure that the ICN should be ‘a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure’ (European Commission, 2001a: 156). Hence, the ICN is literally a virtual network with no budgetary problem. The authority hosting the ICN Annual Conference¹⁴⁸ would be responsible for the administrative cost of the year.

While the initiative for ICN was not originated from DG COMP, DG COMP continues to engage in the ICN operation extensively. ‘The ICN does not exercise any rule-making functions. However, when best practices are being defined, the voice of DG COMP is one of considerable importance.’ (Baudenbacher, 2010: 169) The insight is expressed by a DG COMP official. *‘DG COMP, from the right in the beginning, has been very much involved in the ICN. It is true that the initiation comes from the U.S. From the reports carried down the initiatives by the Department of Justice,*

¹⁴⁷ The major initiators included the International Bar Association, the U.S. International Competition Policy Advisory Committee (ICPAC), and the European Commission.

¹⁴⁸ The annual ICN conferences are held in the following countries: Italy (2002); Mexico (2003); Korea (2004); Germany (2005); South Africa (2006); Russia (2007); Japan (2008); and Switzerland (2009).

which was called ICPAC, recommended the creation of virtual organisation different to the WTO. It was taken on immediately in line with the European Commission, which was totally involved in the settings of ICN, the Ditchley Park Conference. It is right from the beginning that the ICN is not contradictory to the WTO project. At the same time, the Commission also had strong pressure and putting its weight behind the establishment of competition law at the WTO level. It was active on both role, dual track.' (DG COMP Official, Interviewee 04, August 2009)

DG COMP's involvement in the formation of ICN indicates that DG COMP is willing to support any initiative of multilateral network. 'The EC Commissioner for Competition, the DG Comp Director General, DOJ's Assistant Attorney-General for Antitrust, and the FTC's Chairman played pivotal roles in the formation of the International Competition Network (ICN) in 2001 and have cooperated extensively in the past six years in the design and implementation of ICN work plans.' (Kovacic, 2008b: 13) DG COMP also believes that the function of ICN is useful. '*We believe that this issue, the actual implementation of competition law by competition agencies by national rules, is better addressed by peer reviews, discussions, seminars, best practices, etc. All these works are carrying down by the ICN.'*' (DG COMP Official, Interviewee 04, August 2009)

Until now, DG COMP hosts several workshops on merger control and co-chairs the cartel working group, an assistance project for developing and transitional countries. It is a member of the steering group. Nonetheless, due to budgetary limits, DG COMP is yet to host the annual conference and to bear the collateral annual administrative expense of ICN. As discussed in Section 7.1, the discretionary use of budget would be the area of improvement for further bureaucratic autonomy in the future. Therefore, to host the annual conference of ICN may be a starting point for DG COMP to expand the scope of regular budget and the likelihood of financial independence, as well as to deepen its multiple networks.

6.2.4 Conclusion: the Successful Bilateral and Multilateral Relationship

DG COMP's bilateral and multilateral activities have guaranteed its multiple connections outside the EU system and extended its political multiplicity effectively. In this section, three areas of DG COMP's network relationship are investigated: the relationship with accession countries, the development of bilateral relationship, and the multilateral relationship in the global context. The study reveals that the relationship with accession countries seems unable to sustain the political multiplicity of DG COMP. The core justification rests upon the bilateral and multilateral relations of DG COMP.

In the bilateral dimension, DG COMP has demonstrated its capacity to exert further political multiplicity and network relationships. As the Commission's competition authority, it has made five competition agreements with the U.S. (1991, 1998), Canada (1999), Japan (2003) and Korea (2009). It has further reached three Memoranda of Understanding (MoU) respectively with Korea (2004), Brazil (2009), Russia (2011) and one Terms of Reference with China (2003). Moreover, the general agreements containing competition provisions have connected 27 countries and 2 regional organisations with the European competition regime.¹⁴⁹ Many of them are consolidated since the enforcement of modernisation reform. It is fair to say that DG COMP has generally established its bilateral links worldwide. Countries yet to have bilateral link with the EU are mainly without a competition or anti-monopoly law. However, the Southeast Asia, in particular the ASEAN countries, may be the next area for DG COMP to explore.

The aforesaid development of bilateral relations demonstrates DG COMP's effort in exerting its political multiplicity. First, the development of bilateral relationship is seen since the early 1990s, affirming that a certain degree of political multiplicity is available for DG COMP prior to the modernisation

¹⁴⁹ The information can be found via DG COMP website on international bilateral relations section: <http://ec.europa.eu/competition/international/bilateral/index.html> (accessed 30 January 2010). The 27 countries include Korea, Brazil, and Russia, who later have made individual competition arrangements with the EU.

reform. This corresponds to the literature review of Chapter 2 that the bureaucratic autonomy of DG COMP exists before the modernisation reform. Second, the extensive development of bilateral networks in the last decade indicates an increase of political multiplicity for DG COMP since the arrival of modernisation reform and the interdependence of competition authorities¹⁵⁰ in the international context. In fact, six bilateral arrangements with six countries have been established in the last decade, compared to only three arrangements with two countries in the 1990s. Third, DG COMP is capable of conducting international cooperation in different circumstances and expanding its bilateral networks in all possibilities. The flexible approach of DG COMP is shown in the case of Japan with a patient negotiation process on the one hand, in the case of China with its advanced role to provide regulative expertise on the other hand. This approach is helpful for DG COMP to establish various bilateral networks with different competition authorities. Fourth, different stages of bilateral relationships co-exist in DG COMP's external network. From the consolidated relationships with four major countries to the preliminary communication stage, DG COMP secures its representative role in the international context. The complexity and consolidation of many bilateral relationships would prevent any attempt to change it. Its engagement further recognises that 'networks can be viable sources of support and persuasion even if they are secondary' (Crowe, 2007: 84). Therefore, the bilateral networks of DG COMP are well-constructed and indicate an increase of DG COMP's political multiplicity. A DG COMP official in the International Relationship Unit delivers his view of the bilateral relationship.

From a legal point of view, we don't need a bilateral agreement for cooperation to take place. We could do all that we do with the U.S. even with the absence of bilateral agreement. If you read the provision of the agreement with the U.S., it says this agreement is subject to the laws of the U.S. and the EC. So the agreement did

¹⁵⁰ Despite our research focuses on the role of DG COMP in the modernisation reform, it is also worth noting that 'there is a high and increasing degree of interdependence between the regulatory regimes of individual jurisdictions' (Kovacic, 2008b: 8)

not change anything at all in our law, so we can do all these without the agreement. The interest of the bilateral agreement, especially the 1991 Agreement, when this sort of agreement was very rare and this is the very first one in this format of agreement worldwide, is that it creates a framework for contact to take place. So we have this [cooperation] institutionalised, meetings at high level, for instance the Commissioner meets with the Assistant Attorney General or the President of Federal Commission. In case dealing, we have the case handlers and the investigation team contact each other. They called each other, shared their view in cases, subject to the waivers of cases and the conditions of bipartisan and investigation and so on. On this, because you have all these personal contacts, all the officials in the sectoral units in DG COMP are likely to know their counterparts on a personal basis. It create some trust and framework for cooperation for contact and so on, this is the way it works. (DG COMP Official, Interviewee 04, August 2009)

In the multilateral dimension, DG COMP's participation in the multilateral networks is consistent with the mainstream international development – from general international organisations including competition characteristics to the competition-specific ICN.¹⁵¹ (Ewing, 2003) Apparently, the aim of DG COMP is to 'keep intellectual leadership on competition issues, through constant participation to conferences and seminars involving, beyond the business community, the academic world' (European Commission, 2007b: 12). Likewise, DG COMP's unspoken purpose is to establish its external networks through these organisations to uphold its unique representativeness and leading role in the competition epistemic community. DG COMP has tried various approaches to promote the competition value in the global context, to share its expertise and experience with other younger authorities, and gradually to be a competition policy promoter internationally. In the practical

¹⁵¹ In the *Competition Rules for the 21st Century: Principles from American's Experience*, Ewing (2003) studies the international development with special focus on the ICN and OECD in promoting the convergence and cooperation.

aspect, the multilateral involvement has helped to establish a smooth and credible contact with other members. *'We have all sorts of contact take place in other fora and network, for example the ICN and OECD. All the officials at the high level of ICN and OECD are meeting each other. They all know each other by name. So, if they need to have some contact, they can do so by contacting each other, even with the absence of bilateral agreements.'* (DG COMP Official, Interviewee 04, August 2009)

Nevertheless, DG COMP's achievement in the multilateral organisations is less prominent than its bilateral relationship. Most of the time, DG COMP has been cautious in pursuing multilateral relationships. Its advocacy for a competition platform in the WTO failed, whilst the initiation of ICN was not originated by DG COMP. Its multilateral involvement is merely an average standard for a mature competition regime. To make an acute judgement, the fluctuant performance of DG COMP in the multilateral networks suggests two things. First, the multilateral networks are complex for DG COMP to exert its preference and to consolidate its autonomy unilaterally. To some extent, DG COMP has to compete with its U.S. counterparts, the Antitrust Division of DoJ and the FTC, for the leading role in the international context. *'The EU and U.S. competition agencies cooperate extensively, yet they also compete for influence and recognition. The drive to be seen as the global leader in competition policy is an underlying source of tension that can sharpen the edge of disagreement about specific matters or larger policy issues.'* (Kovacic, 2008b: 17)

Second, the deepening of DG COMP's multilateral networks depends upon the commitment of further investment from DG COMP and the spill-over assistance of its achievement in the bilateral relationship. The recomposition and relocation of DG COMP's scarce human and budgetary resources would be a difficult task for the bureaucratic chief and staff. Therefore, the study above cannot strongly indicate a clear direction of increase for the multilateral relationship of DG COMP since the modernisation reform.

To conclude, DG COMP has an outstanding achievement in its bilateral engagement and a rather good performance in the multilateral organisations. Therefore, we may find a convincing argument that **DG COMP has successfully increased its political multiplicity, in the bilateral networks in particular.**

6.3 The Cooperation with NCAs — the European Competition Network

As mentioned in Section 1.1, one of the most important developments in the modernisation reform was the creation of European Competition Network (ECN), a quasi-binding forum ‘for discussion about the common policy and for coordination about cases and issues of common interest’ (Monti, 2001: 7). In other words, ‘this network will be an arena for exchanging information between national authorities, as well as for allocating cases to the best placed authority’ (Støle, 2006: 92). It has a strong impact on the competition epistemic community and the collateral change of the relationships among all enforcement authorities. It is further argued that ‘the Commission will remain at the centre of the network and will play a leading role in defining policy and ensuring consistent application’ (Monti, 2001: 7; Schaub, 2001: 255). In this regard, DG COMP’s involvement in the ECN is able to provide the most important evidence to justify DG COMP’s political multiplicity and its role in the network.

Prior to the modernisation reform, there was no similar network or other arrangement in the European competition regime. As a result, the political multiplicity of DG COMP can be studied by looking into the regulatory context and the operation of ECN. To scrutinise the network relationship and autonomy change of DG COMP, three fundamental areas are studied: the regulatory basis of ECN; the organisational changes in the ECN, DG COMP, and NCAs; the role of DG COMP in the network reflected by the operation of ECN. Meanwhile, some relevant questions are discussed: how much autonomy is exercised by DG COMP in the formation of ECN? What is the role of DG COMP in the ECN? A non-exhaustive examination on the details

of legal groundings can clarify the relationship between DG COMP and other competition regimes and the competence of DG COMP in the ECN. The regulatory framework of ECN would be firstly contested as the sub-hypothesis H4-3 for DG COMP's political multiplicity.

(H4-3) The regulatory framework of ECN suggests an *increase of DG COMP's political multiplicity.*

The regulatory settings of ECN have contributed to the first phase of analysis on the political multiplicity of DG COMP. The legal foundation of ECN is mainly based upon a triangular set of rules: Council Regulation 1/2003, the Joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities, and the Commission Notice on Cooperation within the Network of Competition Authorities. The Regulation sets out the core principles; the Joint Statement provides a political contribution of all Member States; and the Network Notice sketches out the details in the operation of network.

6.3.1 The Regulatory Exploration I — The ECN Essence in Council
Regulation 1/2003

Strictly speaking, there is no Article in Council Regulation 1/2003 which directly mentioned or explicitly referred to the ECN or any relevant network. Nonetheless, Council Regulation 1/2003 indeed takes the network idea into consideration. Strong proofs are found in the Preamble and Chapter IV on cooperation.

In the Preamble, Paragraph 15 stresses the necessity of having a network for all enforcement authorities. 'The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up necessary arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close

cooperation with the Member States.’ (Paragraph 15 of Preamble, Council Regulation 1/2003) In Paragraph 16, it notes that the purpose of competition network is to serve as the venue for information exchange and multilateral communication. Moreover, Council Regulation 1/2003 raises the attention to the consistent enforcement. In this regard, DG COMP, the Commission’s competition authority, is given a predominant role in the decentralised regime. ‘The Member States are automatically relieved of their competence if the Commission initiates its own proceedings.’ (excerpt from Paragraph 17 of Preamble, Council Regulation 1/2003) These are the legal groundings for the ECN in the Preamble of Council Regulation 1/2003. The Commission was given the responsibility for establishing the ECN.

In the main text, the legal foundation of ECN is identified in Chapter IV and Article 11. Chapter IV focuses on the cooperation of competition authorities and Article 11 emphasises the cooperation between the Commission and NCAs. Whilst there is no explicit wording about the ECN or network, Article 11 substantially outlines the details of cooperation and the dependent relationship between the Commission and NCAs. Article 11(1) stresses the need for close cooperation. Article 11(3) requires NCAs to inform the Commission about the initiation of cases without any delay. Article 11(4) clearly sets out a 30-day condition to inform the Commission if there is any decision made by NCAs. Article 11(6), one of the most important paragraphs in Council Regulation 1/2003, gives the Commission the priority of case proceedings. This confirms the leading role of DG COMP in the decentralised enforcement system. Article 11(6) states that ‘the initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty’ (Article 11(6), Council Regulation 1/2003). In addition, Article 16(2) emphasises on the uniform application of competition law by the Commission and NCAs and highlights the supremacy of Commission decision. ‘When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they

cannot take decisions which would run counter to the decision adopted by the Commission' (Article 16(2), Council Regulation 1/2003).

Therefore, the legal basis of the ECN is evidently found in the Preamble and Chapter IV of Council Regulation 1/2003. DG COMP's distinctive competence has been confirmed in the new Council Regulation 1/2003. First, DG COMP is given the responsibility for creating the ECN, which is an opportunity for DG COMP to exert its preferences in the network. Second, Council Regulation 1/2003 confirms the supremacy of DG COMP's initiation and decision powers. The initiations or decisions of NCAs cannot run contrary to DG COMP's. This principle ensures the consistent application of competition rules and consolidates the superior role of DG COMP. To this end, it is fair to say DG COMP has increased its political multiplicity in the creation of ECN.

6.3.2 The Regulatory Exploration II — The Joint Statement on the Functioning of the Network of Competition Authorities

Compared to Council Regulation 1/2003, the Joint Statement on the Functioning of the Network of Competition Authorities, known as the Joint Statement¹⁵², is 'political in nature and does therefore not create any legal rights or obligations' (Paragraph 3 of the Joint Statement). The disclaimer on the legal effect is commonly seen in many official documents. Nonetheless, the Joint Statement delivers the detailed explanation and guidance on the cooperation and coordination within the network. It reiterates that information exchange and effective enforcement are the main purposes of ECN. It also stresses that the network does not jeopardise the independence of NCA or the mutual recognition on different competition rules.

¹⁵² Council of the European Union (2002) 'Joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities', Interinstitutional File: 2000/0243 (CNS), 15435/02 ADD1: 1-8.

Regarding DG COMP's network relationship and autonomy, the Joint Statement provides clear evidence in two areas: the effective allocation of cases and the supreme power of DG COMP to initiate proceedings. First, the case allocation should be completed within three months. Depending on the scope of case, 'cases will be dealt with by a single competition authority as often as possible' (Paragraph 16 of Joint Statement). 'The principal aim of case allocation regime is to attribute each individual investigation, to the possible extent, to a single "well placed authority" based on the link between the geographical market in question and the territory of the competition authority involved.' (Cengiz, 2010: 666) In addition, 'the Commission will be particularly well placed to deal with a case if more than three Member States are substantially affected by an agreement or practice' (Paragraph 19 of Joint Statement). The clear demarcation would reduce potential controversies and maintain the independence of NCA. Along with the principle of effectiveness in case allocation, DG COMP is given a superior role to deal with complex and advanced cases. This arrangement not only recognises the capacity of DG COMP in the case handling but also relieves its massive workloads for better use of resources.

Second, the reduction of DG COMP's administrative burden is one of the main purposes in the modernisation reform. Consequently, DG COMP would not get involved in cases that have been dealt by NCAs. Nonetheless, DG COMP is still assigned with the 'ultimate but not the sole responsibility for developing policy and safeguarding efficiency and consistency' (Paragraph 9 of the Joint Statement). Paragraph 21 depicts five conditions for DG COMP to intervene and open its proceedings. For example, when a NCA's decision is obviously in conflict with existing case law, DG COMP would step in to correct the errors. Moreover, DG COMP is responsible for drawing upon precedent cases when 'there is a need to adopt a Commission decision to develop Community competition policy' (Paragraph 21(d) of Joint Statement). Such rules explicitly confirm the supremacy of DG COMP in the network. DG COMP's *ad hoc* competence ensures the consistent enforcement and increases its autonomy in the network.

The Joint Statement is a political confirmation of the leading role of DG COMP. It outlines the conditions when DG COMP holds the superior competence to intervene. It also indicates the conditions for a case to be handled by DG COMP. 'The Commission itself, represented by DG Competition, is conceived to be the node in this network, with a main responsibility for coordinating the network.' (Støle, 2006: 92) There is no doubt that DG COMP's role in the ECN is of central importance.

6.3.3 The Regulatory Exploration III — The Commission Notice on Cooperation within the Network of Competition Authorities

The Commission Notice on Cooperation within the Network (hereafter the Network Notice¹⁵³) is the enforcement rule of the ECN. Based upon Council Regulation 1/2003 and the Joint Statement, it highlights the general principles set out in Council Regulation 1/2003 and the consensus reached in the Joint Statement into concrete regulatory contents. 'The Council Regulation together with the Joint Statement of the Council and the Commission on the functioning of the European Competition Network sets out the main principles of the functioning of the network. This notice presents the details of the system.' (Paragraph 3 of the Commission Notice 2004/C 101/03) Therefore, DG COMP is given the responsibility for setting out the detailed rules of ECN. It is a recognition for DG COMP's expertise and bureaucratic capacity. Inevitably, DG COMP would take this opportunity to pursue its preferences in the formation and enforcement of the ECN.

The independence of NCAs and the purpose of ECN have been confirmed in the Network Notice. 'Consultations and exchanges within the network are matters between public enforcers and do not alter any rights or obligations arising from Community or national law for companies. Each competition

¹⁵³ European Commission (2004e) 'Commission Notice on cooperation within the Network of Competition Authorities (Text with EEA relevance)', Official Journal of the European Union, C 101/03(27.4.2004): 43-53.

authority remains fully responsible for ensuring due process in the cases it deals with.’ (Paragraph 4 of the Commission Notice 2004/C 101/03) *‘To some extent, the arrival of ECN constructs a level playing field for all competition authorities to have a better coordination and communication with each other. At the same time, individual competition authority still remains independent.’* (NCA Official, Interviewee 08, December 2009)

Likewise, the purpose of ECN, as mentioned in the Joint Statement, is confirmed. ‘The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. [It] is the basis for the creation and maintenance of a common competition culture in Europe.’ (Paragraph 1 of the Commission Notice 2004/C 101/03) Furthermore, ‘the network formed by the competition authorities should ensure both an efficient division of work and an effective and consistent application of EC competition rules.’ (Paragraph 3 of the Commission Notice 2004/C 101/03) In general, the Network Notice emphasised that the information exchange and the efficient and consistent application of competition rules are the main objectives of ECN. ‘The ECN itself is a mechanism for authorities to exchange information and re-allocate cases. A more effective and efficient enforcement regime is thus created, and one which accords more closely with the principle of subsidiarity.’ (Marsden, 2009: 26)

On the issue of DG COMP’s role in the ECN and the increase of its autonomy, we have seen a great deal of evidence in the Network Notice. First, regarding the allocation of cases, very clear explanations for different conditions are written in Section 2.1 of the Network Notice. Some ‘examples’ are written in the Network Notice for the better understanding of case allocation. This is very special in any Commission Notice. It reflects DG COMP’s effort to minimise any potential controversy in the future.¹⁵⁴ Given such clear explanation, DG COMP upgrades its competence to deal with

¹⁵⁴ ‘The underlying rationale of work allocation regime is to minimise the number of authorities involved in each investigation and thereby to prevent emergence of conflict and inconsistency in enforcement to the possible extent.’ (Cengiz, 2010: 666)

complex cases or cases involving more than three countries¹⁵⁵. ‘ [DG COMP] reserving the right to take back some multi-State cases of particular importance, as has happened in the energy and telecoms sectors.’ (Marsden, 2009: 26) Second, regarding consistent enforcement, the Network Notice reaffirms Article 11(4) and 11(5) of Council Regulation 1/2003. Similar to the Joint Statement, the Network Notice emphasises that ‘the Commission, as the guardian of the Treaty, has the ultimate but not the sole responsibility for developing policy and safeguarding consistency when it comes to the application of EC competition law’ (Paragraph 43 of the Commission Notice). The 30-day notification for cases is also written in Paragraph 44 to minimise any administrative delay. Third, on the initiation of proceedings, the Network Notice reiterates Article 11(6) of Council Regulation 1/2003 that ‘once the Commission has opened proceedings, NCAs cannot act under the same legal basis against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market’ (Paragraph 51 of the Commission Notice). Therefore, DG COMP would be able to initiate its own proceeding for the adoption of a decision at any time and effectively put an end to the proceeding of NCA. Nonetheless, such intervention is bounded with five conditional clauses, as announced in the Joint Statement. This competence clearly defines the higher role of DG COMP in the network.

In short, the Commission Notice constitutes soft law. It needs all parties, which are the competent NCAs in this case, to sign their consent to make the Notice legally binding. This Network Notice obtains the favourable commitment from all NCAs. Consequently, DG COMP’s prominent role in the network is recognised by all NCAs. ‘The Commission is enabled to play a leading role in the enforcement and is not prevented from handling cases raising important policy issues independent of their geographical scope.’ (Dekeyser and Polverino, 2010: 508) DG COMP would be in charge

¹⁵⁵ ‘The Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets).’ (Paragraph 14 of the Commission Notice)

of complex cases and initiate its proceedings as the *ad hoc* mechanism to guarantee the consistent application of Council Regulation 1/2003.

6.3.4 Conclusion: a Multi-level Framework of ECN

‘The Commission has been able to utilise its legal monopoly over secondary legislative proposals, together with great influence as an ‘agenda-setter’ at the centre of many European networks.’ (Thatcher, 2005: 315) The regulatory development of ECN verifies this point. In this section, we examine the details of three legal documents of the ECN to show the salience of ECN and the evidence of autonomy change for DG COMP. Council Regulation 1/2003 consolidates the framework and confirms the basic principles of ECN. DG COMP has been designated as the responsible authority to set up the network. The supremacy of Commission decision and initiation is written in the articles. The Joint Statement is a political pledge for the ECN. With the consent of all Member States, it highlights the independence of NCAs and focuses on the case allocation and the conditions for DG COMP’s initiative competence. The Network Notice concludes the phrases and general guidelines into a detailed and explanatory legal document. The favourable commitment from all NCAs make this Network Notice legally binding. For example, Philip Lowe (2002: 1) explains that ‘the Commission must concentrate on really serious breaches of the competition rules that affect the EU Internal Market as a whole. This means in most cases that it should be dealing with the effects of agreements or practices on competition which go beyond the territory of any one Member State.’ The analysis of the three legal documents reveals that DG COMP has successfully achieved and legitimated this objective.

Since there is no similar network available in the European competition before the modernisation reform, the rationale for DG COMP’s political multiplicity is decided by whether the content of regulatory framework of ECN provides a favourable outcome for DG COMP to exert its predominant role and preference in the ECN. In fact, the purpose of ECN, the clear allocation

of cases, DG COMP's supremacy in initiation and proceedings, are the common grounds in all three documents. 'European Competition Network (ECN) provides a focus for regular contact and consultation on enforcement policy, and the Commission has a central role in the network in order to ensure to consistent application of the rules.' (Cseres, 2007: 469) The role of DG COMP is multiple. It is the promoter of ECN, the *ad hoc* decision-maker of complex and special cases, and the superior initiator of proceedings in five special conditions. Overall, there is no challenge or objection for DG COMP to have higher status in the network and the enforcement regime. '*The Commission is the guardian of the European Union; DG COMP is also the 'father' of the network.*' (NCA Official, Interviewee 08, December 2009) Consequently, these three legal documents collectively construct the general principles of ECN, the competence of NCAs and DG COMP. They confirm the important and central role of DG COMP in the ECN and encourage **a multi-level framework in the European competition regime**, an unintended consequence of modernisation reform. Therefore, **the regulatory framework of ECN suggests an increase of DG COMP's political multiplicity**, proving the sub-hypothesis H4-3.

6.4 The Enforcement of ECN — the Leading Role of DG COMP

In the last Section, the study of the regulatory framework of ECN suggests the central role of DG COMP in the decentralised competition regime. Accordingly, the operation of ECN is able to identify how DG COMP exerts its political multiplicity and network relationship since the modernisation reform. Therefore, the enforcement and development of ECN should be taken into account for the advanced argument of the leading role of DG COMP in the regime. In addition, some organisational changes by the ECN members may indirectly sustain the network relationship of DG COMP. Therefore, the enforcement aspect of ECN should be the other sub-hypothesis for the assessment of DG COMP's political multiplicity.

(H4-4) The implementation of ECN gives DG COMP a *leading* role in the modernised competition regime.

In the second phase analysis of DG COMP's political multiplicity in the ECN, the corresponding organisational changes in DG COMP and NCAs are studied to find out their impact upon DG COMP's network relationship and political multiplicity. In addition, the legal development contributed by the ECN is examined, in particular the recent ECN Model Leniency Programme. It may provide definitive evidence to the functioning of ECN and the leading role of DG COMP. Lastly, the fundamental enforcement of ECN should be extensively analysed to have an affirmative answer to the leading role of DG COMP.

6.4.1 The Organisational Change of DG COMP — the ECN Unit

Based upon the three legal documents, DG COMP is responsible for the creation of ECN. In this regard, having a special Unit to deal with network issues is a rational choice for DG COMP. Following the arrival of the decentralisation of enforcement, the ECN Unit is the first organisational response of DG COMP for communication and coordination with NCAs. *'The ECN Unit was not always called the ECN Unit of course. It is originated in September 2003, with the entry into force of [Council] Regulation 1/2003. This Council Regulation was drafted in this unit, at the time it was called 'Policy Unit — Antitrust Policy and Strategy'. So, with the entry into force of European Competition Network created, the unit changed its nomination to become the ECN Unit.'* (DG COMP Official, Interviewee 02, June 2009) Therefore, the ECN Unit is established as 'a new unit with existing and experienced staff'. The front-line initiators for the ECN Unit are then the incumbent staff. This arrangement reduces the administrative cost to a minimal level.¹⁵⁶

¹⁵⁶ *'I think the creation of new units is just administrative re-arrangement. In fact, they didn't need to create a new office or build something. I would say technically it only incurs some staff alteration. So, the cost is rather minimal.'* (DG COMP Official, Interviewee 02, June 2009)

In 2011, the number of staff in the ECN Unit is 10, including 7 administrators (AD) and 3 assistants (AST). This is an average size in the unit level of the Commission. Considering the competent workload, the ECN Unit does not hold a large number of staff.

Until 2011, only three officials have served as the 'Head of Unit' for the ECN Unit. Kris Dekeyser was the first Head of Unit in September 2003, when the ECN Unit was established. Prior to be the Head of ECN Unit, he was the Deputy for the same unit when it is called 'Policy Unit — Antitrust Policy and Strategy'¹⁵⁷, where he was responsible for the internal co-ordination of individual cases in the field of mergers and antitrust. Kris has been in this post for a rather long time until Aleš Musil succeeded in 2009. Aleš has a different path of career. He served in private law firms before joining the Commission. In the Barosso II Commission, there are many personnel alterations in DG COMP and Aleš Musil was relocated as the Head of Unit for consumer liaison. Hence, this very recent change allows Ewoud Sackers, a veteran serving in DG COMP since 1997, to be the newest Head of Unit. While there is no official explanation for the recent change of the Head of Unit, it is likely that the ECN Unit still requires an experienced veteran to be the Head of Unit, who is capable of coordinating and communicating with other network members. Likewise, the officials in this Unit are senior and unaltered, namely the network organiser and policy officers. This also explains the need for seniority to communicate with NCAs.

The duty of ECN Unit is mainly about the coordination and communication within the ECN. For instance, the ECN Unit is responsible for providing the training courses to NCA officials. The staff exchange programme is also coordinated by the ECN Unit. In addition, the ECN Unit has an official as the 'network organiser' and another official in charge of 'formulation and

¹⁵⁷ During 2000-03, Emil Paulis was the Head of Unit and Kris Dekeyser was the Deputy Head for the 'policy unit — antitrust policy and strategy'. When the ECN Unit was created and succeeded the policy unit, Kris Dekeyser also succeeded as the new Head of Unit at the same time.

coordination of competition policy and enforcement'. Thus, the ECN Unit is indeed the gateway of DG COMP for NCAs.

From the history of ECN Unit and the analysis on the staff orientation, we understand that DG COMP prefers to have the ECN Unit with senior and well-experienced staff. This arrangement ensures the qualitative and authoritative performance delivered by the ECN Unit. In addition, the organisational position of ECN Unit in DG COMP has not been relocated, which may suggest another recognition of its importance. Such salience indirectly contributes to the leading role of DG COMP in the network and consolidates the political multiplicity and bureaucratic autonomy of DG COMP.

6.4.2 The Organisational Change in Member States — NCA

The creation of ECN has had a strong impact on Member States in two ways: the completion of institutionalisation of NCAs, and the organisational resemblance between DG COMP and the NCAs.

First, the decentralised application of European competition rules requires all Member States to institutionalise an enforcement authority. 'Under Article 35 [Council] Regulation 1/2003 each Member State had a clear obligation to draw up national competition law and designate a competition authority.' (Cseres, 2007: 477) Most of them are called the National Competition Authority (NCA) in various form of government structure. This requirement is an obvious top-down approach requiring Member States to establish an institution in charge of competition issues. In fact, some Member States already had their NCAs for years to deal with competition issues, whilst others start to institutionalise the competition authority and to have national competition rules as a result of accession. Germany and France have NCAs almost as old as DG COMP. Later, some EU-15 countries and newly accession countries, namely Poland, Czech Republic, Hungary, and so on, have started to institutionalise their NCAs in the late 80s or early 90s.

This can be regarded as the second wave of NCA institutionalisation. The other accession countries begin to institutionalise their NCAs in the initiating stage of modernisation, for example, the Estonian Competition Authority in the late 90s; the Romanian Competition Council in 1996; the Competition Council of Latvia in 1998, etc. Therefore, the institutionalisation of NCA has three waves in time; and the modernisation compels all Member States to institutionalise their NCAs.

Second, NCAs are now responsible for applying national competition law as well as the enforcement of Article 81 and 82 (now Article 101 and 102). With the decentralised application of competition law, many NCAs establish individual sectors in charge of EC competition law and recruit in-house economists. 'National competition agencies will need to replicate the experience of the EC. They will have to expand their capacity for economic analysis, which probably will mean increased financial and human resources committed to economic analysis. The EC's Office of the Chief Economist will be an important model for national enforcers to consider.' (Gavil, 2007: 198) In fact, Hungary is one of the earliest CEECs to appoint a chief economist in its competition authority. (Cseres, 2007) Therefore, the institutional structure of NCAs is similar to the organisational structure of DG COMP. The resemblance is witnessed in many NCAs, including the new and senior ones. For example, The Bulgarian NCA, Commission on Protection of Competition (CPC), is organised with a 'competition policy unit' and several directorates. The NCA of Netherlands, Nederlandse Mededingingsautoriteit (NMa), has the 'Office of the Chief Economist'; the NCA of Spain, Comisión Nacional de la Competencia (CNC), also has the 'Chief Economist Unit'. 'The national competition authorities in Europe increasingly add (part-time and/or temporary) academic economists to their advisory boards and staff.' (Schinkel, 2007: 20) These similarities help to increase the homogeneity of the European competition regime and the smooth operation of ECN. The development of NCAs is thus an intended consequence of decentralisation and an unintended modelling of DG COMP's structure.

Therefore, the bureaucratic autonomy of DG COMP is achieved partly by getting other competition authorities to think and act similarly.

6.4.3 The Enforcement of ECN — The Zero Application of Article 11(6): Achievement or Incapability?

Article 11(6) of Council Regulation 1/2003 gives DG COMP a superior role to stop and correct any misleading decisions by NCAs.¹⁵⁸ DG COMP may initiate its own proceedings to ensure the consistent application of competition rules. This is a “safety clause” in Council Regulation 1/2003¹⁵⁹ and DG COMP is entrusted with this arrangement because of the least cost incurred for the system.

Since the decentralisation of enforcement in 2004, there is no use of Article 11(6) by DG COMP. ‘So far it has taken a soft approach, ringing authorities, writing letters, or submitting amicus briefs to try to ensure that decisions are broadly consistent with EU standards.’ (Marsden, 2009: 26) DG COMP does not use this ultimate competence to intervene and relieve any NCA proceedings in this conduct. Two contrasting arguments may explain this circumstance. Either the operation of ECN and the frequent communication between DG COMP and NCAs are satisfactory and DG COMP does not need to initiate this competence, or DG COMP is incapable and even afraid of using Article 11(6).

First, in the official publications, we have found that the ‘number of proceedings initiated under Article 11(6) with a view to ensuring consistent application of competition rules’ remains at zero is an important objective in the Annual Management Plan for DG COMP. (European Commission, 2007c) ‘Zero level of this indicator implies that the coherent application of EC

¹⁵⁸ ‘Modernisation Regulation preserves one of the central pillars of previous centralised enforcement regime by requiring the NCAs to close their proceedings when the same matter is being investigated by the Commission.’ (Cengiz, 2010: 664)

¹⁵⁹ ‘The prerogative of the Commission to bring national investigations to an end by opening its own proceedings was described as the “safety valve” of the entire network design.’ (Cengiz, 2010: 664)

competition law through the ECN network will allow the Commission to abstain from taking over cases on which a competition authority of a Member State is already acting.’ (European Commission, 2007c: 21 and 2008c: 24) It is obvious that DG COMP perceives its Article 11(6) competence as a last resort and prefers to keep this zero record in the future.¹⁶⁰ Therefore, the zero record is a positive indicator of the function of ECN¹⁶¹ and the understanding of new enforcement rules by NCAs.

Second, in the practical aspect, DG COMP is determined to use any given competence to ensure consistent enforcement. For example, DG COMP has achieved the introduction of ECN Model Leniency Programme to diminish any forum-shopping. The tremendous periodic penalty payments of Article 24(1) decisions also confirm the resolution of DG COMP. Hence, DG COMP should not be afraid to use its Article 11(6) competence.

Third, according to Dekeyser and Polverino (2010: 511), ‘informal contacts and comments have proven to be very effective in drawing the national authority's attention on the most relevant aspects of a case and the willingness of the national authorities to engage in these dialogues and to take due account of the suggestions made has turned this more voluntary cooperation instrument into a useful complementary tool to the formal powers given to the Commission. In this respect, the powers granted by Article 11(6) remains as an *extrema ratio* in the array of Commission's enforcement tools.’ This interpretation is also convinced by the epistemic community. ‘*The reserved use of Article 11(6) shows a certain degree of coordination between the authorities. DG COMP is well aware of the use of it would be the last measure.*’ (Academic, Interviewee 16, February 2012)

¹⁶⁰ ‘At the inception of Modernisation, the Commission was expected to use this power only under extraordinary circumstances, such as parochial and hostile enforcement of arts 101 and 102 TFEU by the NCAs to protect their national economies, as redundant utilisation of such a drastic power would bruise the trust-based relations between the Commission and the NCAs and, consequently, could destroy the enthusiasm of the NCAs to participate in policy enforcement.’ (Cengiz, 2010: 664)

¹⁶¹ ‘The smooth functioning of the European Competition Network (ECN) is illustrated by the absence of use by the Commission of proceedings initiated under Article 11(6) of [Council] Regulation 1/2003, which allow the Commission to take over cases being brought by national competition authorities.’ (European Commission, 2008b: 21 and 2009b: 17)

To this end, it is fair to say DG COMP is very cautious with its Article 11(6) competence. The zero record of Article 11(6) case is definitely a desirable outcome for DG COMP, rather than an incompetent result. *'[DG COMP] prefers to emphasise the role of national competition authorities in the early days of decentralised enforcement. A immediate use of Article 11(6) may have negative some negative effect to the national authorities. [DG COMP] have to give some space to NCAs to develop their own national policies and methods of implementation..... But I think possibly in the near future, once we have made a clear idea of certain type of practices, and DG COMP has more practices. Then DG COMP might be incline to use it more. We have to see this in the future.'* (Academic, Interviewee 13, March 2011) Usually, the justification of performance would look at the number of cases proceeded. But this zero application is a contrasting example to see DG COMP's strong determination to retain this competence as a last resort. In addition, DG COMP does not rule out its use in the future. It gives DG COMP more room to manoeuvre and an esteemed role in the network.

6.4.4 The Development of ECN — The ECN Model Leniency Programme

'Leniency programmes can destabilise cartels by dramatically reducing the costs of deviation from the cartel agreement.' (Damgaard, Ramada, Conlon and Godel, 2011: 413) The ECN Model of Leniency Programme is the most important legal achievement of the ECN. As aforesaid, the legal advancement is not a primary objective for the ECN. However, the function of ECN can go beyond its original design of expertise sharing and information exchange.

As of 2010, there are 19 national leniency programmes running parallel in the Member States, whilst the other Member States are yet to establish their

leniency rules. The enforcement of leniency is largely disarrayed.¹⁶² ‘A logical consequence of such a system is that leniency programmes may apply in parallel and the applicant may need to file an application in more than one authority.’ (Point 1, ECN Model Leniency Programme¹⁶³) The possibility of forum-shopping¹⁶⁴ would be high in the decentralised competition regime. This potential problem is acknowledged by DG COMP.

‘What the Commission concerns is the effectiveness of enforcement in the EU in the cartel detection, and the difference between different national competition laws. There are also a lot of input from economists, especially the lack of effectiveness in the leniency.’ (Academic Interviewee 12, March 2011) This redundancy precludes a favourable environment for undertakings to lodge their applications. Therefore, DG COMP has announced ‘the need to reflect on one stop shop options for the handling of leniency within the ECN’ in February 2005. (European Commission Press, 2006, MEMO/06/356¹⁶⁵) Later in September 2006, the ECN Model Leniency Programme was adopted by all ECN members ‘as a convergence model, as well as with simplified forms for short applications (in the case of cartels involving more than three Member States)’ (Caruso, 2010: 456). ‘The majority of member states have since adopted leniency programs on the national level, modeled on the

¹⁶² For example, compared with the extensive use of leniency by the UK and Germany, ‘the Czech Office for the Protection of Competition applied its leniency programme for the first time in 2004 with regard to a cartel agreement in the energy drinks market; Poland had its first leniency case in a cartel agreement in 2006, and in Hungary leniency was applied for in a few cartel cases, but only one of these cases was closed by the decision of the Competition Council’ (Cseres, 2007: 493).

¹⁶³ For further details of the ‘ECN Model Leniency Programme: Report on the Assessment of the State of Convergence’, please see http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf (accessed 22 February 2010)

¹⁶⁴ ‘*Stricto sensu*, ‘forum shopping’ refers to complaints searching for the NCA that is most likely to act on their complaint and offer them the most attractive remedy. It could alternatively mean that parties to a restrictive agreement will try to have their agreement somehow blessed in such a forum.’ (Bourgeois, 2001: 329)

¹⁶⁵ European Commission Press (2006) ‘Competition: the European Competition Network launches a Model Leniency Programme – frequently asked questions’, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/356&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 22 February 2010)

Commission's leniency notice, and now on the European Competition Network's (ECN) Model Leniency Programme.' (Stephan, 2008: 539)

As with the Network Notice, the ECN Model Leniency Programme is not a legally binding document. Nonetheless, it is endorsed by all NCAs to make it a pivotal tool for the legal harmonisation between different NCAs. 'The authorities made a political commitment to use their best efforts to align their leniency programmes with the Model Programme or, in case of absence, to introduce aligned programmes.' (Point 4, ECN Model Leniency Programme: Report on Assessment of the State of Convergence) This non-binding characteristic is a common feature in many EU agreements. It also retains the independence of NCAs.

The ECN Model Leniency Programme is a guidance document, rather than a detailed directive to regulate the practical conduct. It does not impose 'the adoption of a given leniency model on NCAs, but provides a focal point for the alignment of existing and forthcoming leniency programmes' (Dekeyser and Polverino, 2010: 515). Applicants cannot lodge their applications to this Programme. The objective has been written clearly in Paragraph 2 of the ECN Model Leniency Programme: 'to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN'. In addition, it would 'alleviate the burden of multiple filings in cases where the Commission is "particularly well placed" to deal with a case through the introduction of the uniform summary application system' (Point 3, ECN Model Leniency Programme: Report on Assessment of the State of Convergence). In regards to the role of DG COMP, three points should be noted.

First, the ECN Model Leniency Programme has an innovative procedure of 'summary application system' for cases involving more than three Member States. This introduction reduces the administrative redundancy for undertakings. 'Rather than requiring full and complete applications with each authority that could, under the work-sharing criteria of the ECN, be

considered “well placed” to act on a case, national competition authorities can agree that applicants need to file only a short description of specified information concerning a cartel that has been reported to the Commission.’ (European Commission Press, 2009, MEMO/09/456¹⁶⁶) Through the regulatory harmonisation of different leniency programmes, the role of DG COMP in the ECN has elevated as both the venue and case-handler of such leniency applications.

Second, ‘the ECN Model Leniency Programme is prepared by DG COMP’ (European Commission, 2007b: 10). DG COMP has been aware of this discrepancy issue since the creation of ECN. It announces the need for a ECN Model Leniency Programme in 2005. *‘DG COMP has seen some of the national competition authorities’ leniency programmes and how they work. There were problems concerning the terms used because there are different types and solutions to the leniency. Somehow they affect the European Model Leniency Programme. That is why DG COMP is trying to harmonise it through this Model Leniency Programme.’* (Academic, Interviewee 16, February 2012) This is further evidence of DG COMP’s prominence and capacity in the network.

Third, the ECN Model Leniency Programme could be described as ‘the most striking example of what could be referred to as the new era of ECN cooperation’ (European Commission, 2007b: 4). *‘The ECN Model Leniency Programme is useful and should be encouraged. Any uniform system and convergence in this area is the right way to go.’* (Lawyer, Interviewee 18, February 2012) As the ECN is not originally designated to facilitate legal convergence, this ECN Model Leniency Programme is the positive example of the emergence of more economic thinking in the ECN as driven by DG COMP.

¹⁶⁶ European Commission Press (2009) ‘Antitrust: European Competition Network publishes report on leniency convergence’, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/456&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 22 February 2010)

In short, the quasi-binding ECN is not designed for further legal advancement. The ECN Model Leniency Programme, to some extent, is an unintended and positive consequence. It sets out the standard for leniency applications throughout the Member States. 'The development of the 'ECN Model Leniency Programme' against hard core cartels constitutes the most prominent example of how the sharing of experiences within the ECN can influence national policy consideration and streamline national procedure.' (Kekelekis, 2006: 8) Initiated by DG COMP, The ECN Model Leniency Programme illustrates 'how the ECN is able to combine its forces and jointly develop new instruments to address real and perceived deficits in the current system'. (European Commission Press, 2006, MEMO/06/356) Such division of labour guarantees the uniform application and reduces the forum-shopping behaviour. It is a positive development for a common competition culture in the network, in which DG COMP is the leading authority.

6.4.5 Conclusion: the Leading Role of DG COMP in the ECN

Since there is no ECN or similar organisation in the European competition regime before the modernisation reform, the political multiplicity of DG COMP is revealed by the details of enforcement activities since the introduction of ECN. In Section 6.4, we have explored the follow-up organisational changes in DG COMP and NCAs, the enforcement of ECN, and the unintended regulatory development of ECN Model Leniency Programme. With a non-exhaustive analysis, the study indicates that **the implementation of ECN gives DG COMP a leading role in the modernised competition regime**, proving sub-hypothesis H4-4. The salience of ECN and the role of DG COMP are best described below.

'The ECN is not a decision-making body, but rather a forum for discussion, cooperation and information exchange. Far from invading and eroding the competences and the prerogatives single NCAs, the ECN is an efficiency-enhancing structure (in terms of

both resources and information available) facilitating an incisive antitrust enforcement. In this scenario, the European Commission maintains a crucial and leading role, in particular by ensuring a coherent application of antitrust principles and policy in all Member States. The Commission may also, thanks to the ECN, focus its attention on the most urgent priorities, such as pan-European infringements.’ (Dekeyser and Polverino, 2010: 517)

The corresponding establishment of ECN Unit by DG COMP is a strategic move to sustain its management of political multiplicity. The seniority and experience of ECN Unit staff allows DG COMP to provide guidance and to share expertise with other ECN members. In fact, DG COMP has made some alterations in the ECN Unit to maintain its seniority and leadership to other NCAs. A brotherhood relationship between DG COMP and NCAs is further consolidated by the completion of the institutionalisation of national competition authority. As one senior official of NCA replied, *‘I have to admit the leading role of DG COMP is confirmed. for big countries, they are like 30-year-old children; for small and CEEC, they are like 5-year-old children. And DG COMP of the Commission is the eldest brother.’* (NCA Official, Interviewee 11, March 2011) DG COMP is itself a progressive institution urging new organisational changes and keeping up with the development of competition concepts. The organisational resemblance between DG COMP and NCAs certainly provides for better coordination and the emergence of a common competition culture in the European competition regime, led by DG COMP. The sampling of some organisational designs of DG COMP by NCAs also shows the advanced perception of DG COMP in the competition epistemic community. All of these changes contribute to the consistent enforcement of competition rules and the leading role of DG COMP.

Furthermore, DG COMP is trying hard to keep its leading role through the enforcement of ECN. The maintenance of a zero record of Article 11(6) case is seen as a strategy of DG COMP. Rather than frequently using this competence, DG COMP prefers a reserved use as a last resort. In this

regard, the communication with NCAs and the arrangement for case allocation and coordination are effective for a smooth operation of ECN and the consistent enforcement of competition rules. DG COMP is able to maintain the uniform application of decentralised competition rules without the use of Article 11(6) competence.

Likewise, the ECN Model Leniency Programme is the most important legal development of ECN. Recognising the disparities and potential problems of inconsistent leniency programmes among NCAs, DG COMP actively facilitates this Programme as the standard guidance for NCAs. Forum-shopping has been effectively stopped. The innovation of the summary of leniency application gives DG COMP a supreme role in complex leniency applications. The manoeuvre of DG COMP in this legal development is a strong case for its leading role in the modernised competition regime. Therefore, DG COMP has successfully consolidated its network relationship with NCAs and increased its political multiplicity.

6.5 Conclusion: The Network Relationship of DG COMP and its Leading Role in the ECN

In Chapter 6, four units of analysis have been examined to identify to what extent DG COMP increases its political multiplicity: the horizontal cooperation with other DGs in the Commission, the international bilateral and multilateral networks of DG COMP, the regulatory framework of ECN, and the enforcement and development of ECN.

The study of DG COMP's cooperation with other DGs reveals a frequent and effective communication at the horizontal level. But it lacks any administrative or structural development to sustain a strong political multiplicity for DG COMP. Likewise, DG COMP's two-way approach with accession countries is merely a responsive move that hardly increases of its network relationship.

By contrast, the study of DG COMP's international participation reveals a more convincing outcome. In the bilateral relationship, DG COMP demonstrates its flexible capacity and strategic approach to establish strong links with major competition authorities via competition agreements, MoU, and general agreements containing competition provisions. DG COMP successfully represents the European competition regime in the global context. In the multilateral dimension, DG COMP attempts to keep its intellectual leadership on competition issues in both comprehensive international organisations, such as WTO and OCED, and the competition-specific network, ICN. While the effect of DG COMP's multiple engagement is less prominent, DG COMP still maintains a certain level of political multiplicity through these multiple connections outside the Union.

The regulatory analysis of three legal documents for ECN identifies that the general principles of ECN, the clear allocation of cases, and the supremacy of DG COMP in the initiation and proceedings, are the common grounds for DG COMP to be the leading authority in the network. The superior and multiple role of DG COMP in the ECN is further consolidated by the enforcement of ECN and the development of ECN Model Leniency Programme. The effective performance of ECN Unit and the organisational resemblance between DG COMP and NCAs have created a common competition culture in the European competition regime, led by DG COMP. The successful non-use of Article 11(6) competence gives DG COMP sufficient room for manoeuvre. The legal development of ECN Model Leniency Programme is largely attributive to the continuous effort and facilitation of DG COMP. All these changes are helpful for the consistent enforcement of competition rules and the leading role of DG COMP in the ECN.

In the epilogue of this chapter, it is also necessary to address the development of ECN with a comparative view of the operation of other regulatory networks, in particular European Regulatory Networks (ERNs). Based on the functional purposes, ERNs are 'designed to respond to the

multiplication of regulators and their uneven development by co-ordinating implementation of regulation by member states' (Coen and Thatcher, 2008: 50). A key function of ERNs is 'developing standards and guidelines of 'best practices' to be approved at the network level and adopted by member national authorities on a voluntary basis' (Maggetti and Gilardi, 2011: 831). They are sometimes regarded as 'incorporated transgovernmental actors', who 'oversee the harmonisation process and guide further integration' (Eberlein and Newman, 2008: 26) in a number of policy sectors, such as banking, securities, insurance, electricity, gas, telecommunications, etc. The salience of ERNs is thus described as 'the linkage of actors from different institutional levels', 'a shift of power from previously well-established levels to organisations or individuals whose main role is linking and co-ordinating actors', 'a change in the mode of governance, away from hierarchy and towards consultation, negotiation and soft law' (Coen and Thatcher, 2008: 50), and the 'knowledge-based arenas that promote the exchange of ideas and information' (Maggetti and Gilardi, 2011: 833).

In this regard, it is necessary to address one common feature and three differences between the ECN and ERNs. The common feature is a logical one. The ECN shares some common characteristics of the network functions, such as informal communication, horizontal cooperation, expertise-sharing, consultation, etc. (Coen and Thatcher, 2008; Kassim and Wright, 2010; Yesilkagit and Danielsen, 2011) Similar to ERNs, the ECN is perceived by its members as 'a partnership of equals' (Kassim and Wright, 2010: 17).

On the other hand, there are three main differences to address here. First, the ECN has a stronger background of governing rules than ERNs. Whilst ERNs are flexible and sometimes informal in their regulatory designs and organisational settings, the establishment of ECN is based on three sets of laws, the Council Regulation 1/2003, the Joint Statement, and the Network Notice, which all together give the ECN a formalised role in the competition enforcement. Compared with a more circumscribed mandate for the ERNs (Eberlein and Newman, 2008), the ECN appears to be 'a highly different

network design with its strong juridified structure, its cooperation mechanisms predetermined in hard law (the Modernisation Regulation) and soft law (various Commission Notices) and the special managerial position of the Commission with enforcement powers not shared with and monitoring powers over the NCAs' (Cengiz, 2010: 662). Compared with the ERNs, the ECN has rather organised arrangements for Directors-General meetings¹⁶⁷, plenary meetings¹⁶⁸ and working groups. (Kassim and Wright, 2010)

Second, 'the ECN stands on a hierarchical structure, where the Commission enjoys a clearly distinguished managerial position with certain powers not shared with the NCAs' (Cengiz, 2010: 664). For example, as discussed in Section 6.4.3, the Article 11(6) competence empowers DG COMP to intervene NCA's proceedings through the ECN. Without a real practice so far, this provision is still rarely seen in ERNs, in which 'all actors enjoy equal positions and powers' (Cengiz, 2010: 662). In addition, DG COMP is responsible for the agenda of Directors-General and plenary meetings. (Kassim and Wright, 2010) Therefore, the role of DG COMP in the ECN is stronger than the role of Commission in other ERNs.

Third, whilst ERNs are bounded with its limited formal powers of informal coordination and consultative purpose, the ECN is showing its capacity to initiate and to evolve. The ECN Model of Leniency Programme, as discussed in Section 6.4.4, is one of the examples that the ECN is capable of urging the regulatory development. In a rather optimistic expression, 'the ECN has begun to formulate policy rather than simply to implement it' (Dekeyser and Jaspers, quoted in Kassim and Wright, 2010: 20). Consequently, it is reasonable to expect a spill-over effect in the trajectory of ECN that the ECN may evolve as a network holding both regulatory and enforcement functions,

¹⁶⁷ 'The Directors-General meeting is the most senior formation and deals with strategic issues, high-level policy, and the future agenda. It is the venue where new policy or operational guidelines, such as the Commission discussion paper on Article 82, are discussed.' (Kassim and Wright, 2010: 13)

¹⁶⁸ 'The ECN plenary, meanwhile, is a formal arena for all heads of ECN divisions from the NCAs. It meets every three months. It receives reports on projects from sectoral and horizontal groups, decides whether to create new sub-groups, and determines which issues are delegated to which working group.' (Kassim and Wright, 2010: 13)

and go beyond its original design as a forum for cooperation and the purpose of better allocation of cases.

In this chapter, we have successfully verified the political multiplicity of DG COMP in its international activities and its comprehensive involvement in the ECN. Moreover, three elaborations should be mentioned in the end. First, the operation of ECN is best explained by the multi-level governance (MLG). (Hooghe and Marks, 2001; Cseres, 2007; Coen and Thatcher, 2008) The emergence of multi-level framework is seen in the decentralised european competition regime. (NCA Official, Interviewee 08, December 2009; Academic, Interviewee 15; April 2011) Second, the leading role of DG COMP in the regime is confirmed through the enforcement of ECN and the implementation of modernised competition rules. DG COMP would continue to be the leader of competition epistemic community in the Community. Third, the creation of ECN allows a direct influence towards NCAs from DG COMP; and it ends the exclusive relationship between the national governments and NCAs.

Chapter 7 — The Financial Autonomy and Legal Autonomy of Directorate-General for Competition

To study the bureaucratic autonomy of DG COMP in the modernisation reform, it is necessary to examine the changes to budgets and legal rules. First, budgetary independence is another advanced aspect of bureaucratic autonomy. ‘Success in getting money is one means for agencies to demonstrate their political clout and their importance to the remainder of the political system.’ (Peters, 2001: 262) With financial independence, agents are able to reduce their dependency upon the principals. Accordingly, bureaucratic institutions are keen on developing various financial resources to release themselves from the central budgetary constraints. Second, the rules defining the competence of bureaucracy are the legal basis and the origin of substantive change for institutions to exercise the bureaucratic autonomy. The changes in laws and the adoption of new rules provide the legitimacy for the bureaucracy to enforce the competence and to tacitly advance its autonomy through the law-making process. Therefore, the financial autonomy and legal autonomy of DG COMP will be studied in the following sections.

The budgetary aspect seems not to be a priority in the modernisation reform. ‘*It seems that DG COMP does not have any budgetary independence before the reform, or even after.*’ (Academic, Interviewee 14, April 2011) Still, this research explores the incremental changes in budgetary arrangements to identify whether any financial autonomy is exerted by DG COMP. The fifth proposition of the research is developed (P5) — **the modernisation of competition regime results in the change of DG COMP’s budgetary arrangement.** The availability of own resources and the discretionary use of regular budget are the units of analysis to answer the fifth main research question Q5: **does DG COMP have more financial autonomy in the modernisation reform?** Therefore, the main hypothesis for financial autonomy and the collateral sub-hypotheses are developed.

H5 DG COMP has more *financial autonomy* in the modernised competition system.

(H5-1) DG COMP has established its own financial resources in the modernisation process.

(H5-2) DG COMP has increased its discretionary use of regular budget in the modernisation process.

The legal perspective of modernisation reform is simply the replacement of Council Regulation 17/62 by new Council Regulation 1/2003, which gives a comparative nature for analysis. Such a change of competition enforcement is drafted by the Commission's competition authority, DG COMP, which is inherently given a predominant role in the new decentralised enforcement regime. In addition, Council Regulation 1/2003 allows DG COMP to tackle the most serious infringements and relieves its regular administration with NCAs to reduce backlogs. The exercise of bureaucratic autonomy by DG COMP is obvious in the regulatory changes and the implementation of new rules. Thus, the sixth proposition of the research is (P6) — **the modernisation of competition regime results in the change of DG COMP's legal autonomy**. And the sixth main research question is developed Q6: **does DG COMP have more legal autonomy in the modernisation reform?** Consequently, the comparative study of regulatory changes, the analysis of regulatory development, and the examination of enforcement would be able to argue whether **DG COMP has more *legal autonomy* in the modernised competition system**, known as the sixth main hypothesis H6. And the sub-hypotheses are constructed as followed:

(H6-1) The comparative study of Council Regulation 17/62 and Council Regulation 1/2003 suggests an increase of DG COMP's legal autonomy.

(H6-2) The legislative process of Council Regulation 1/2003 suggests an increase of DG COMP's legal autonomy.

(H6-3) The essential competition laws suggest the increase of DG COMP's legal autonomy.

(H6-4) The implementation of Council Regulation 1/2003 suggests DG COMP is capable to exercise the changed competence.

This chapter begins with an exploration of the financial autonomy of DG COMP. It then focuses on the legal changes and examines the relevant legal documents, e.g., Council Regulation 1/2003, Council Regulation 17/62, the White Paper, the Commission Proposal, and other legal documents. The last part studies the implementation of new Council Regulation 1/2003.

7.1 The Financial Autonomy of DG COMP: still unlikely

Having own resources and budgetary discretion would be very important to the financial autonomy of institutions, particularly in the recent retrenchment of governmental expenditure. Financial resources are essential to the effectiveness of enforcement by competition authorities. (Buccirossi, Ciari, Duso, Spagnolo and Vitale, 2011) ‘The bureaucracy seeks money and the autonomy to spend it, while the political institutions seek control of their funds and also seek to ensure accountability as to how it will be spent.’ (Peters, 2001: 237) A strong financial autonomy may result in the establishment of an independent regulatory agency (IRA). (Peters, 2001; Pollack, 2003) Therefore, financial autonomy is the other advanced field of bureaucratic autonomy for many institutions.¹⁶⁹

In regards to the case of DG COMP, two points should be noted. First, the financial autonomy is not the primary objective of the modernisation reform. An interviewee explains the budgetary process in the Commission. *‘All DGs are personally responsible for the spending of budget, which is allocated to their DGs. And they have to report on this, which is called the ‘Annual Activity Report’. Every year, the Director-General signed off the annual activity*

¹⁶⁹ For example, Arts Council England has its own financial resources from the lottery funds and other contributions, which allows Arts Council England to execute its preferred policies independent of the principal, the Department for Culture, Media and Sports (DCMS). Likewise, British’s National School of Government (NSG) provides various charged training programmes for foreign civil servants and other interested parties that give NSG enough financial means under a limited governmental budget.

reports and took the responsibility for the efficient spending of the money for the past year. This responsibility is exercised at the DG level. This is then checked by the Court of Auditor and DG Budget and so on.' (DG COMP Official, Interviewee 03, June 2009) Therefore, DG COMP only has a limited discretion in the spending dimension of budget, which is subject to *ad hoc* external controls and auditing. This discretion is granted to all DGs in the Commission. Since the modernisation reform, there is still no exclusive discretion for DG COMP in the financial aspect. It is fair to say that **DG COMP is unable to increase its discretionary use of regular budget in the modernisation process**, disproving sub-hypothesis H5-2.

Second, since the implementation of Council Regulation 1/2003, DG COMP has successfully issued a lot of fines for breaching the competition rules, notably the cartel fines. In public policy studies, agencies aim to enlarge its discretion over the 'inputs' of resources, such as the autonomy of internal budgetary allocation (Caughey, Chatfield and Cohon, 2009) or the claim to use a portion of the penalty as its administrative bonus. (Peters, 2000; Yesilkagit and van Thiel, 2008) However, this is not the case for DG COMP. *'The fines imposed and collected, goes into the central EU budget.'* (DG COMP Official, Interviewee 03, June 2009) With the contribution of huge fines to the EU revenue, DG COMP still has no competence to acquire any part of the fine as its own resources. This acknowledgment reflects the fact that the Commission is a very centralised organisation in terms of financial settings. Therefore, **DG COMP still has no own financial resource since the modernisation reform**, rejecting the sub-hypothesis H5-1.

The weak evidence of financial autonomy for DG COMP probably results from its central position in the Commission. DG COMP is one of the core departments in the Commission. It would be difficult to treat DG COMP as a separate agency and isolate it from the Commission. There would be problems to study the budgetary autonomy of DG COMP without considering its hierarchical relation within the Commission. That may explain why the financial autonomy is not entirely applicable here to the study of DG COMP's

autonomy in the modernisation reform. Consequently, **DG COMP has no financial autonomy, either before or after the modernisation**, giving a negative answer to the fifth main hypothesis H5.

7.2 The Qualitative Analysis I – Council Regulation 17/62 versus Council Regulation 1/2003

The qualitative analysis of regulatory change includes two dimensions of study: the analysis of the core regulatory changes, including the comparative study of Council Regulation 17/62 and Council Regulation 1/2003 and the law-making process of Council Regulation 1/2003; and the study on the enforcement of new competition law.

In this section, the analysis focuses on the comparative analysis between the previous Council Regulation 17/62 and the new Council Regulation 1/2003. The comparison would reveal the distinctive differences between the Regulations and the competence change for DG COMP. It may further reveal the essential regulatory changes, e.g. the enhanced investigation power, the fine and penalty competence, and the cooperation with NCAs and national courts. The study aims to answer the sub-hypothesis H6-1.

(H6-1) The comparative study of Council Regulation 17/62 and Council Regulation 1/2003 suggests an increase of DG COMP's legal autonomy.

Six areas of competence will be compared: the power of the Commission, the investigation power, the fine and penalty, the professional secrecy and hearing, the judicial review, and new regulatory fields. The power of investigation intrigues the most important competence change. DG COMP has successfully upgraded its investigatory power in the modernised regime and extended its legal competence in the new regime.

7.2.1 The Rationale of Council Regulation 17/62 and Council Regulation 1/2003

Before the contextual analysis of the Regulations, it is necessary to understand their different approaches to the competition enforcement. Council Regulation 17/62 adopts the system of notification and the centralised administration by DG COMP, whilst new Council Regulation 1/2003 changes to a 'directly applicable exception system' and authorises National Competition Authorities (NCAs) to enforce EC competition rules to construct the multi-level administration.

Council Regulation 17/62 is the first enforcement rule applying Article 81 and 82 (now 101 and 102). As one interviewee says, *'it did the job for 40 years, and it was written in the fact very succinct by size and easy to understand. You don't have to totally reread and understand some of the phrases and its meaning'* (Lawyer, Interviewee 07, November 2009). There are 13 Recitals in the Preamble and 24 Articles. Considering the scope of competition policy, Council Regulation 17/62 is indeed a concise regulation that has successfully lasted for four decades. Without any chapter style category, it is still clear to understand the Articles systematically. The first part is mainly about the regulatory basis. Articles 1-5 lay down the fundamental ideas of competition and the notification system; Articles 6-8 depict the making of decisions, provisions pursuant to Article 81(3) EC. The second part regulates the institutional power and the role of actors in the competition regime. Articles 9-10 give the guidance on the power of the Commission and Member States; Articles 11-14 discuss the inquiry and investigation competence; Articles 15-16 define the fine and penalty payment; and Article 17 exclusively gives the review jurisdiction to the ECJ. Article 18 is about the unit of account and Articles 19-21 protect the right to hear and the secrecy and the transparency of publication; Articles 22-24 are the provisions to accommodate the fluent application of competition rules in the beginning of Council Regulation 17/62 regime.

Council Regulation 1/2003, on the other hand, has a rather extensive size. It has 38 Recitals in the Preamble and 45 Articles with 11 Chapters. Chapter 1 describes the principle of decentralised application of competition rules; and Chapter 2 regulates the power of the Commission and Member States. Chapter 3 focuses on the types of decision by the Commission. New Chapter 4 is about the details of cooperative relationship between DG COMP and NCAs. Chapter 5 and 6 regulate the power of investigation and the penalty issue. Chapter 7 concerns with the penalty issue. Chapter 8 ensures the right to be heard and the protection of secrecy. New Chapter 9 provides the legal guidance on the withdrawal of individual cases. Chapter 10 and 11 are about the provisions and transitional arrangements.

Compared to Council Regulation 17/62, new Council Regulation 1/2003 regulates new competences in the relationship between the Commission and NCAs, the Commission decisions and the exemption criteria, along with the necessary provisions to ensure a consistent implementation without interruptions. In particular, there are six sections appeared in both Council Regulation 17/62 and Council Regulation 1/2003: the power of the Commission, the power of investigation, the penalty and payment, the review of ECJ, the hearing and professional secrecy, and the publication of decisions. Therefore, these sections must be the most important fields of competition enforcement.

7.2.2 The Power of the Commission

The power of the Commission in Council Regulation 17/62 is strong. In Article 9(1), it gives the Commission 'the sole power to declare Article 81(1) inapplicable pursuant to Article 81(3) of the Treaty' (Article 9(1), Council Regulation 17/62); it further gives the Commission the competence to apply Article 81(1) and Article 82. In addition, Article 9(3) prioritises the Commission's procedural competence over the Member States' competence that it bestows the Member States can pursue cases if the Commission has

not initiated. It is clear that the Commission enjoys the dominant role in the Council Regulation 17/62 regime.

Rather than having a clearly defined competence, Council Regulation 1/2003 adopts a broad provision for the Commission to 'have the powers provided by this regulation' (Article 5, Council Regulation 1/2003). Such arrangement has two possible interpretations. First, DG COMP may use the obscurity to extend its authority in the new regime, because the Commission would be the most suitable actor to interpret the unclear parts in Council Regulation 1/2003, either by administrative directives or communications. Second, DG COMP may be contained by this ambiguity and cannot exercise a full level of competence with clear legality. This may be the case for the new regime because DG COMP prefers a cooperative approach with other actors.

7.2.3 The Power of Investigation

The power of investigation enhances the role of DG COMP in its administrative application of competition rules. DG COMP may conduct necessary, proactive inspections for the disclosure of unlawful cases. Council Regulation 17/62 concisely regulates the power of investigation by four Articles: Article 11 on the request for information, Article 12 on the sectoral inquiry, Article 13 on the Member State's inspection, and Article 14 on the Commission's inspection.

After forty years of application, new Council Regulation 1/2003 successfully updates the areas of investigation to fix the loopholes and deficits. Among the six categories of investigation, Council Regulation 1/2003 clearly specifies the sectoral inquiry, request for information, the Member State and Commission's inspection power. There are also innovative fields on the 'inspection on other premises' and the 'power to take statement'.

It is important to broaden the legal competence to investigate the premises other than the business premise, because the most important documents are often kept in private locations. 'The experience of the national competition authorities and the Commission shows that incriminating documents are ever more frequently kept and discovered in private homes.' (Commission, 2001a: 31) Article 21(1) of Council Regulation 1/2003 explains the rationale for inspection of other premises by the Commission¹⁷⁰, whilst Article 21(2) details the conditions for such action at a reasonable level, requiring the Commission to give substantive reasons and to consult the relevant NCAs. In addition, Article 21(3) adds a prerequisite that 'a decision adopted pursuant to Paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned' (Article 21(3), Council Regulation 1/2003). This compulsory arrangement prevents the Commission from exaggerating its use of investigation powers.

Accompanied by the extension of investigation power, Article 19 also provides the ground for the Commission to take any necessary statement during the investigation.¹⁷¹ It gives the Commission sufficient tools for the necessary information. In general, the Commission's new competence increases its investigatory power and therefore DG COMP's legal autonomy.

Apart from these two new arrangements, four substantive issues are kept in the new Regulation. They provide the opportunity to see whether the competence change increases the power of the Commission. On the request for information, 'the Commission may obtain all necessary information for the Governments and competent authorities of the Member States and from undertakings and associations of undertakings' (Article 21(3), Council

¹⁷⁰ 'If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.' (Article 21(1), Council Regulation 1/2003)

¹⁷¹ 'The Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.' (Article 19, Council Regulation 1/2003)

Regulation 17/62). This competence is kept in Council Regulation 1/2003. There are six Paragraphs in Article 18 to explain the procedural details of how to request information by the Commission. Paragraph 1 and 6 retain the spirit of Council Regulation 17/62 that the Commission may require information from undertakings, associations of undertakings, and the Member State governments. The other four Paragraphs minutely detail the collateral procedural requirements. Comparatively speaking, Article 18 of Council Regulation 1/2003 is one of the most similar Articles to Council Regulation 17/62. It provides a consistent guidance for DG COMP. DG COMP thus enjoys a very similar competence regarding the request for information.

On the sectoral inquiry, Article 12 of Council Regulation 17/62 lists two types of sectoral inquiry: the general sectoral inquiry, and the inquiry to specific undertakings with certain conditions. The general sectoral inquiry helps DG COMP to understand the market better, whilst the specific inquiry aims to identify the behaviour of a specific company in terms of anti-competitive conduct. The sectoral inquiry may not always cause the defensive attitude from the stakeholders in the market. 'It is important to underline that a sector inquiry does not aim at identifying any wrongdoing of individual companies and/or providing competition law guidance. This must be left to individual cases and/or general policy documents.' (Schnichels and Sule, 2010: 94) The specific inquiry allows DG COMP to have the correct and up-to-date information from the enterprises. After forty years of implementation in this section, Article 17 of Council Regulation 1/2003 retains this sectoral inquiry competence with a publishable option for the result of inquiry.¹⁷² Therefore, the competence of DG COMP regarding the sectoral inquiry remains the same.

The investigation power of Member State is slightly changed as a result of the decentralised application of competition rules. Council Regulation 17/62 creates a sequential precondition for Member States to conduct the

¹⁷² The European Commission is empowered to carry out an inquiry into a particular sector of the economy, namely where circumstances suggest that competition may be restricted or distorted within the common market. (Schnichels and Sule, 2010: 94)

investigation. 'At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary' (Article 13, Council Regulation 17/62). In addition, Article 13(2) allows the Commission officials to participate in the investigation at the assistance level. The power of investigation for Member States has been expanded in Council Regulation 1/2003. The competent NCA would be able to conduct investigations at its own discretion without a prior request by the Commission. One NCA can even represent another NCA for the necessary inspection to investigate the infringement. Nevertheless, Article 22(2) of Council Regulation 1/2003 copies the whole context of Article 13 of Council Regulation 17/62 that still allows the Commission to request NCAs to conduct the necessary investigation.

The investigation competence of the Commission remains unchanged. For example, the Commission can still request NCAs to carry out the investigation or to participate in a joint investigation. On the other hand, the competence of NCAs has been extensively increased without the binding request condition. The only condition upon NCAs to manage such investigations is to act pursuant to its national law and the Treaty. As aforesaid in Section 6.3, the decentralisation of investigation competence to NCAs is one of the most important competence changes to the operation of ECN. This change mainly follows the principle of decentralisation and the objective of a better and consistent application of competition rules. It also maintains the original competence of the Commission in requesting NCAs to conduct the investigations. With the same investigation competence, DG COMP is still the primary actor in the decentralised European competition regime.

The discussion of the investigation power of Member States helps to understand the collateral change on the Commission's investigation competence. Looking at the contextual changes in the new Regulation reveals the actual change of the Commission's investigation power. In particular, Article 14 of Council Regulation 17/62 explains the permitted

investigation conducted by the Commission: 'the Commission may undertake all necessary investigations into undertakings and associations of undertakings' (Article 14(1), Council Regulation 17/62). It further provides the details of investigation power, e.g. dawn raids, allowing the Commission officials to examine books and records, to take copies of books and records, to ask for oral explanations on the spot, to enter any premises of undertakings, etc. According to Article 14(3), the Commission should make a decision specifying the subject and purpose of the investigation, the proposed date of investigation and penalties if there is no cooperation, and send it to the affected undertakings before the date of execution. Article 14(2) and Article 14(4) also require the Commission to notify and consult the related Member State before the conduct of investigation. In addition, Article 14(5) and Article 14(6) regulate the necessary assistance by the Member State officials. Generally speaking, these measures ensure the smooth operation of investigation, define the scope of competence, and highlight the dominant and coercive power of the Commission. The investigation powers of the Commission indicate a pretty high level of autonomy in Council Regulation 17/62.

In Council Regulation 1/2003, the basic elements of investigation and the conditions of dawn raid have been amended with additional conditions. Whilst retaining the paragraphs of entering any premises, examining and copying books and records, Article 14(2) adds the competence that the Commission may 'seal any business premises and books or records for the period and to the extent necessary for the inspection' (Article 14(2)(d), Council Regulation 1/2003); and revise the oral explanation into a detailed version that can be recorded. The inspection decision made by the Commission should consist of the subject matter, the purpose of inspection, the date beginning the inspection, the penalties if not fully cooperating, and the right of judicial review. Moreover, Article 14(5), Article 14(6), and Article 14(7) give the sufficient arrangement for the Commission to conduct the inspection with possible assistance by the Member States, e.g. providing police or enforcement authority to enable the inspection. It is fair to say that such

detailed arrangements in Article 14 are an improvement from previous application of Council Regulation 17/62. Council Regulation 1/2003 reserves the essential elements of inspection competence, improves the procedural weakness, reduces the possible loopholes, and enhances the judicial review to ensure the lawfulness. DG COMP therefore enjoys a better version of investigation power in the new competition enforcement regime.

To summarise, DG COMP retains and continues to enforce its competence in the request for information and the sectoral inquiry¹⁷³. On the investigation power, DG COMP loses its exclusiveness to share with NCAs, which is the original idea of modernisation reform. But DG COMP enjoys an improved version of investigation competence and two new fields of competence, the inspection on other premises, and the power to take statements.

7.2.4 The Fine and Periodic Penalty Payment

The penalty issue is another tangible area to test whether the Commission displays its discretion in applying the fines to undertakings. In Council Regulation 17/62, two Articles regulate the penalty issue. Article 15 requires that ‘the Commission may by decision impose on undertakings or associations of undertakings of fines’ (Article 15(1), Council Regulation 17/62) in the equivalent ECU currency from 1000 to 5000 units, if the undertakings do not cooperate in certain conditions. In addition, Article 15(2) further sets up the range of fine from 1000 to 1000000 ECU currency units or ‘a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement (Article 15(2), Council Regulation 17/62), if the undertakings infringe Article 81 or 82. To compel the undertakings to comply, the Commission is able to impose a ‘periodic penalty payment’ from 50 to 1000 ECU currency units per day if the undertakings still violate the competition rules or do not cooperate. (Article 16, Council Regulation 17/62) Such dual

¹⁷³ For example, DG COMP has managed to conduct sectoral inquiries in the field of pharmaceuticals, energy, retail banking, and so on since the enforcement of Council Regulation 1/2003. (Scholz and Purps, 2010; Baudenbacher, 2010)

arrangements seem to provide the Commission sufficient tools of deterrence in the beginning of competition enforcement. Nevertheless, the punishment effect is gradually diminished.

In response, the context of Council Regulation 1/2003 has modified the amount of fine to the percentage scale of total turnover, instead of a fixed range of fine. First, Article 23(1), compared to the previous Article 15(1), defines the fines at 1% turnover if the undertakings do not cooperate in five different conditions. Article 23(2), compared to the previous Article 15(2), again defines the fines 'shall not exceed 10% of its total turnover in the preceding business year' (Article 23(2), Council Regulation 1/2003). Second, the percentage method has been applied to the periodic penalty payment too. Article 24 regulates that the threshold for periodic penalty payment should 'not exceed 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision' (Article 24, Council Regulation 1/2003).

Two points should be noticed here: first, the fine has been changed from a fixed level of amount (e.g. 1000 ECU currency) to a percentage scale of undertaking's total turnover. Second, the periodic payment has been changed from 50 to 1000 ECU currency to 5% of daily turnover. The percentage method helps to increase the punitive effect, since a fixed amount of fine may not be big enough to intimidate the undertakings. The increased 5% daily turnover of the periodic penalty payment successfully gives the Commission instant and continuing weapons to impel the undertakings to compromise. Therefore, the Commission has successfully updated its power of penalties in the new regime and practically enforced it in the Microsoft case¹⁷⁴ in 2006. (Diaz and Garcia, 2007)

¹⁷⁴ '2006 was the first year when the Commission had to use its powers to fix a periodic penalty payment, under Article 2(2) of Council Regulation 1/2003, in order to compel an undertaking to comply with a decision ordering it to bring an infringement of Article 81 or 82 EC to an end. It imposed on Microsoft a definitive penalty payment of EUR 280.5 million for non-compliance with certain of its obligations under the decision of 2004, which found an infringement of Article 82 EC.' (European Commission, 2007a: 16)

Nevertheless, the enhanced punishment weapons of the Commission are also bound by some new limitations. Chapter 7 of Council Regulation 1/2003 includes new regulations to restrict the time effect of the penalties. On the imposition of fines, Article 25 gives a three-year limitation regarding 'the cases of infringement of provisions concerning requests for information or the conduct of inspections' (Article 25, Council Regulation 1/2003) and a five-year limitation to all other cases. It also provides the relevant details such as the calculation of dates and the interruption conditions. A similar structure is found in Article 26 to require a five-year period for the enforcement of fine and to give the conditions of interruption and the calculation of date. At its face value, the time limitation constrains the Commission to exaggerate its penalty power. But on the other hand, it propels the Commission to take actions on the serious infringement cases in a timely way. In this regard, the Commission has increased its competence to impose fines.

7.2.5 The Judicial Review of ECJ

The ECJ's review competence is another important factor in assessing the autonomy change. Comparing Article 17 of Council Regulation 17/62 and Article 31 of Council Regulation 1/2003, there are only contextual differences that the former one clearly states the review competence of ECJ comes from Article 172 of the Treaty, whilst the new regulation does not have this part. Nevertheless, such contextual difference would not incur any competence change and the ECJ enjoys the same, unchanged jurisdiction to review any Commission's decision on the fine and penalty payment.

7.2.6 Professional Secrecy and Hearing

Professional secrecy and the right to be heard are required in the Regulation to protect the interest of undertakings and to prevent the malevolent disclosure of information. On the issue of professional secrecy, Council Regulation 17/62 has three Paragraphs in Article 20 to give the restriction of information usage, the guidance for officials on the protection of

information, and the exemption of general information. In Council Regulation 1/2003, such provisions have been retained and modified to incorporate the multiple actors in the implementation aspect. The main contextual amendment is to extend the restriction of information disclosure to 'all representatives and experts of Member States attending meetings of the Advisory Committee' (Article 28(2), Council Regulation 1/2003). In the hearing issue, Article 19 of Council Regulation 17/62 has three Paragraphs to regulate the right to be heard of the undertakings, the third party (by natural or legal persons), and the transparency of decision made by the Commission. As in the information secrecy section, Council Regulation 1/2003 preserves these three Paragraphs and advances the right of hearing in detail. 'The right of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets.' (Article 27(2), Council Regulation 1/2003)

Based on the forty-year experience, the new regime is able to provide better information secrecy and the right to be heard. In addition, both regulations have the same context about the publication of decisions that guarantees the level of transparency and provides necessary information to the public. Since the minor changes are mostly related to third parties and other competition authorities, the discretionary power of DG COMP here has been retained with clearer guidance to follow.

7.2.7 New Regulatory Fields

In Council Regulation 1/2003, there are five chapters with different contents compared to the previous Council Regulation 17/62. Chapter 3 on Commission decisions provides the detail on the finding and termination of infringements, the interim measures, the binding effect of undertaking's commitment, and the finding of inapplicability on own initiatives. By putting these operational measures into Articles, DG COMP normalises its procedural authority and strengthens its decision-making power in the

antitrust area. Chapter 4 is a new chapter with six Articles on the issues between ECN members. It gives guidance on the cooperation between DG COMP and NCAs, the exchange of information, the suspension or termination of parallel proceedings, the advisory committee, and the cooperation with national courts. This is a very important chapter for the new regime to ensure the uniform application of EU competition law, as mentioned in Article 16. As with the EU law's superiority to national laws, the Commission's decisions have the supremacy that any decision made by other competition authorities or national courts should not be contrary or otherwise be void automatically. Chapter 7 on the limitation period of penalty and fine has been discussed earlier. Chapter 9 provides the legitimacy for the withdrawal of individual cases pursuant to the exemption regulations. The Commission can act 'on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81(3) of the Treaty' (Article 29, Council Regulation 1/2003). This withdrawal Article serves as the insurance mechanism to prevent undertakings using the exemption as the loophole for actual violation of competition rules and enhancing the authority of Commission in carrying out own-initiative cases. Chapter 11 gives the legal status for the transitional period to the new decentralised regime. All these Articles enhance the legal certainty for DG COMP to execute its authority.

7.2.8 Conclusion: Council Regulation 17/62 versus Council Regulation 1/2003

Based on the above analysis, it is clear that DG COMP has successfully preserved its autonomy in the new competition system. DG COMP's autonomy has been increased in the fine and penalty competence and new areas of competence, e.g., the withdrawal capacity in exempted area of business. Other fields, such as the professional secrecy and judicial review,

are less relevant to DG COMP's competence change and thus have limited impact on its legal autonomy change.

In fact, the power of investigation and the power of the Commission have the strongest impact towards the change of DG COMP's autonomy. Without the exclusivity of investigation competence in the decentralised system, DG COMP has successfully retained its competence in other areas. DG COMP reaffirms its importance with the new competence of inspection on other premises and the power to take statement. The following table gives a summary on the above discussions, reflecting the changes and the variations of DG COMP's legal autonomy. With the thorough comparison, we would be able to confirm H6-1 that **the comparative study of Council Regulation 17/62 and Council Regulation 1/2003 suggests an increase of DG COMP's legal autonomy.**

Table 7.1 The Summary of Legislative Change in Council Regulation 1/2003

Content of analysis	Substantive change	Autonomy of DG COMP
Power of Commission	- from clear to obscure interpretation	- limited increase on autonomy - possible containment from Member States
Investigation Power	- extensive improvement of existing four sectors - new competence introduced in two sectors	- better legitimacy - enhanced investigation power - exclusiveness being decentralised
Fines and Penalty	- substantively increased - time limitation added	- increased competence - efficiency is required
Review of ECJ	- contextual modification	- unchanged
Professional Secrecy, Hearing, and Publication	- better protection	- limited change

Content of analysis	Substantive change	Autonomy of DG COMP
New Competence	<ul style="list-style-type: none"> - better legal basis on procedures - legal basis for decentralised application - withdrawal condition 	<ul style="list-style-type: none"> - normalisation of procedural competence - holding the supremacy in decisions - enhanced flexibility in own-initiatives

7.3 The Qualitative Analysis II – from Commission Proposal to Council Regulation

It is important to incorporate the law-making process to understand the actual changes and the difference between the drafted proposal and the final regulation. In the European competition regime, the analysis allows us to understand the intention of DG COMP, the challenges made by the Council of Ministers, and the negotiated outcome. Therefore, the examination of the legislative process of Council Regulation 1/2003 improves the understanding of the nuance of different stages in the legislative process and the autonomy change of DG COMP. The sub-hypothesis for the legislative process is below.

(H6-2) The legislative process of Council Regulation 1/2003 suggests an increase of DG COMP’s legal autonomy.

From the Commission Proposal to the consolidated Council Regulation 1/2003, the analysis reveals the record of negotiation and the manoeuvres of different legislative actors. There are two types of change in the Preamble and main Articles: the deletion or addition of Recitals or Articles, and the contextual modification in Recitals, Articles and Paragraphs. They show the different focus of the Commission and the Council and explain the impact of the legislative process towards the legal autonomy of DG COMP. In this context, the following sections analyse the modifications on the Preamble and Articles, and eleven substantive changes in main Articles and Paragraphs.

7.3.1 Modifications on the Preamble

Prior to the analysis of the main Articles, the study of the Preamble gives a good sense of the change between the Proposal and Regulation. There are thirty-one Recitals in the Commission Proposal, compared to thirty-eight Recitals in the final Council Regulation. From the Proposal to the Regulation, eight Recitals have been added into the Council Regulation; two have been deleted; one has been expanded into two Recitals in the final Regulation; and fourteen Recitals have been amended substantively. Apparently, more than two thirds of the Recitals have been modified. The Council has substantively reviewed the Commission Proposal and drafted this final Regulation with carefulness.

The modification of the Preamble consists of three parts. First, in the Proposal, Recital 10 on the expedient arrangement for the phase out of notification and Recital 31 on the repeal of minor council regulations have been deleted, whilst the relevant Articles are kept in the main body. The Council recognises the issue of a smooth transition but does not view it as a high priority to be raised in the Preamble.

Second, the Council adds eight Recitals. Recital 9 in Council Regulation 1/2003 states that the Member State can implement its territorial laws as long as it is compatible to the Community method. Recital 12 highlights that 'this Regulation should make explicit provision for the the Commission's power to impose any remedy' (Recital 12, Council Regulation 1/2003), including behavioural and structural remedy, to overcome the distortion of market. Recital 16 raises the concern for the exchange, use, confidentiality and collection of information in the ECN. Recital 20 explains the composition of the advisory committee to incorporate delegates from the Member States. Recital 30 highlights the effective recovery and payment of fines that allows the Commission to require payments from related associations. Recital 35 focuses on the NCAs' legitimacy that Member States should empower the

authorities to apply Article 81 and 82, and hereafter recognises the various forms of enforcement bodies in the Member States. It also mentions the applicability of Article 11(6) to all competition authorities, including the prosecuting bodies. Recital 37 reiterates the importance of fundamental rights in the competition field. And Recital 38 ends with the contribution of legal certainty reformed here to the innovation and investment. These new Recitals give a simple explanation that the Council has its focus on the relationship between the Commission and Member States, and the consistent enforcement of EU competition law.

Third, the contextual changes made by the Council reflect the concerns and manoeuvres of the Council and the Commission. Recital 20 in the Proposal has been expanded into two Recitals in Council Regulation 1/2003 to discuss the collection of information on the prohibition and abuse of dominant position cases, the compliance of undertakings in enquiries, and the power of inspection of the Commission. Moreover, among the fourteen modified Recitals, two Recitals have been rewritten with major changes. Recital 8 of Council Regulation 1/2003 has been expanded to emphasise the importance of national competition authorities and courts' obligation to apply Article 81 and 82, and the associated level-playing field issue. It also pays attention to the relationship between Community law and national law, and iterates its consent to any stricter national laws in applying competition concept unilaterally. Recital 27 about the scope of control by national judicial authorities has been deliberately refined to express the concern with the procedural and the consultative process. In addition, it 'confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures' (Recital 27, Council Regulation 1/2003). The remaining twelve modified Recitals in Preamble include the following issues: the burden of proof, block exemptions, undertaking commitments, new types of agreement, the cooperation in the ECN, the obtaining of information, the consistent application of competition rules, the power of investigation and the inspection on any premise, the central role of Commission, etc.

Most of the modifications are closely related to national competition authorities, in particular, the relationship between the Commission and national authorities, and the consistent application of competition rules. The rest focuses on the Commission's role in the new regime. These amendments reflect the core issue of modernisation reform and the competence change of enforcement institutions. Although the Council has been able to make modifications to most Recitals, the Commission retains its central role in the new regime as discussed.

7.3.2 Modifications of the main Articles and Paragraphs

In a numerical, non-exhaustive way, there are forty-two Articles in the Commission Proposal and forty-five Articles in the consolidated Council Regulation.

In fact, there is only one new Article added to the new Regulation (Article 44 on the report of application of the present Regulation). Other new Articles are actually derived from the Paragraphs in the Proposal. For example, Article 21 (inspection of other premises) is derived from Article 20(2)(b) in the Proposal; Article 40, 41, and 42 are modified into independent Articles from the repealed Articles in the Proposal.

Similarly, only three Articles have been deleted completely: Article 28 (adoption of block exemption regulations); Article 30 (regulations ending the application of a block exemption); and Article 40 (amendment of Regulation 3975/87). The rest of deleted Articles have been merged into other Articles in the Council Regulation.

The basic analysis acknowledges the spirit of decentralisation and the acceptance of main context in the Commission Proposal. The Council has made some minor deletions to the block exemptions and added the condition for periodic reports. Thus, the Commission is still capable of exerting its

preference through the agenda-setting process and the initiative competence. (Pollack, 2003)

7.3.3 Substantive Changes in eleven Articles

Apart from the deletion or addition of Articles, the content of proposed Articles has been substantively changed. Only a handful of Articles are without textual changes from the Commission Proposal to the Council Regulation. It reflects the competence and capacity of Council to review and modify the context thoroughly. Eleven Articles have significant, extensive modifications rather than the contextual paraphrase, and twenty-three Articles have moderate changes or some addition or deletion of Paragraphs.

Article 3 on the relationship between the Article 81 and 82 and national competition laws has been enlarged to three Paragraphs, including the explanation on the prohibition decisions *a priori*, and the exclusion of merger and non-81 or non-82 cases. The change shows the importance of Member State's application on Article 81 and 82 that the Council has decided to rewrite it with clearer and detailed context.

There are also fundamental changes in Article 11 on the cooperation between the Commission and NCAs. Article 11(2) is amended to include the request competence of national competition authorities for important documents from the Commission. Likewise, the revised Article 11(3) requires that NCAs should inform their cases to the Commission in writing before or without delays after commencing the first formal investigative measure'. Article 11(4) on the summary of decisions made by NCA has been changed to be available to other NCAs and thereafter available for exchange of information between themselves. The modified Article 11(6) requires the Commission to consult the competent NCAs when initiating proceedings for a decision. In short, these changes, compared to the original draft in the Proposal, reveal the concern of the Council that further constraints and limitations have been added onto the Commission for better cooperation,

which gives NCAs a rather equivalent role in enforcement. The competence of Commission remains, but the exclusive competence of competition enforcement has been removed. In practice, until 2006 ‘the Commission has not made use of the possibility of relieving a NCA of its competence with a view to ensuring consistent application of competition rules by initiating proceedings under Article 11(6) of [Council] Regulation 1/2003’ (European Commission, 2007a: 33). The zero record of Article 11(6) case is one example.

Article 12 includes another modification regulating the exchange of information between the enforcement authorities. Paragraph 2 regulates that ‘information exchanged under this Article may also be used for the application of national competition law’ (Article 12(2), Council Regulation 1/2003). In addition, a new Paragraph 3 has been added to give the condition that the information should ‘only be used in evidence to impose sanctions on natural persons’ (Article 12(3), Council Regulation 1/2003). The changes again emphasise the role of national competition authorities and the uniform application of competition rules in Member States. It modifies the rule on the exchange of information rather than the role of Commission.

Article 14 sets up the standards on the function and composition of the advisory committee. Paragraph 2 is amended on the appointment of members in the committee; Paragraph 3 gives further details on the commencement of consultation meetings. In addition, two new Paragraphs are added: Paragraph 5 requires the Commission to report how much the committee’s opinion has been taken into account; Paragraph 7 requires the Commission to provide the agenda of advisory committee to concerned NCAs and the advisory committee to issue only general opinions. The modifications in this Article can be explained similar as above, whereas the uniform application of competition law and the role of NCAs are the main concern. Additional responsibilities have been added to the Commission to ensure the smooth operation of the advisory committee.

The changes to Article 16 are important. It regulates the fundamental consistent application of EU competition law. The original text has been modified into two analogical Paragraphs. Paragraph 1 states that the decisions ruled by national court cannot run counter to the decisions adopted by the Commission; Paragraph 2 sets similar conditions that NCAs' decisions cannot be incompatible with the Commission decisions. Both Paragraphs ensure the primacy of Commission decisions in the judicial process and require NCAs and national courts to make consistent judgments. It reflects the stringent need for consistent enforcement. That DG COMP holds the best position for such purpose and therefore retains its superior role in the modernised regime.

On the request for information, Article 18 has been expanded from four to six Paragraphs. For example, Paragraph 3 has been rewritten on the conditions of request for information. The Commission should 'state the legal basis and the purpose of request, specify what information is required and fix the time-limit within which it is to be provided' (Article 18(3), Council Regulation 1/2003). Paragraph 5 and Paragraph 6 oblige the Commission to forward a copy of request to the affected NCAs and allow the Commission to request information from Member State governments and NCAs if necessary. These new Paragraphs ensure that the request is made with comity and the information can be collected by all means. Again, the Commission is given the central role in the request and distribution of information, notwithstanding the Commission's competence to request for information from Member States in Paragraph 6.

If Chapter XI (Article 34-45 on the transitional, amending and final provisions) is not taken into consideration, the Council has modified the structure of Article 20 on the inspection competence of the Commission to the largest extent. Referenced to Article 22(2) of Council Regulation 659/1999, it gives the Commission officials the authorisation 'to enter any premises and land of the undertaking concerned; to ask for oral explanation on the spot; to examine books and other business records and take, or demand,

copies' (Article 22(2), Council Regulation 659/1999), the newly drafted 'inspection of other premises' competence is important in the modernisation reform that the Council has singled out the proposed Article 20(2)(b) and Article 20(7) into an independent Article 21 in Council Regulation 1/2003. As a new Article, it consists of four Paragraphs to define what are 'other premises' and the conditions for inspection of other premises. For example, after consulting the affected NCAs, a Commission decision is required to proceed investigations; and the inspections are subject to ECJ reviews. This gives the legal basis for DG COMP to conduct its investigation and find evidence of infringement in full scale. Article 20(8) has been rewritten on the conditions for judicial review on the Commission decisions by national courts. The change made to the proposed Article 20 is a positive move to enhance the competence of DG COMP, namely the inspection leverage. Consequently, Chapter V (powers of investigation) holds the most changes from the Proposal to Regulation.

Article 23 is about the fines. Article 23(1)(d) has a totally revised text with clear circumstances for misleading responses to questions asked in accordance to Article 20(2)(e) on the Commission inspections of any staff or representative of undertakings. Article 23(2) is slightly modified on the 10% turnover fine. And Article 23(4) is amended to include the details and conditions for the payment of fine. These modifications are able to provide clear provisions of fine. Nevertheless, the Commission should follow the contextual terms to impose fines, which is less obvious to see any competence change.

Article 35 on the designation of national competition authority is another major modification in the context. It is simple and general in the Proposal. In the Regulation, it becomes an Article with four Paragraphs. Paragraph 1, based on the original text, provides the main source of law for the establishment of national competition authorities. Three new Paragraphs added respectively: Paragraph 2 further regulates the demarcation between national administrative and judicial authorities in the competition field;

Paragraph 3 assures the effect of Article 11(6) on these designated national institutions; Paragraph 4 gives further details on the propriety of legal proceedings. The modification here is a good example highlighting the bigger impact of modernisation reform in the legal aspect. The Council focuses on the changes affected to Member States, the national competition authorities, and the associated legal certainty, i.e., the uniform enforcement of Community law. That leaves the Commission to extend its competence incrementally through the contextual modifications. And it is thus not surprising to see an extensive modification on the designation of national competition authorities.

As a new Article in Council Regulation 1/2003, Article 44 proclaims the necessity to have 'the report of application of the present Regulation' for all parties to understand the implementation circumstance. It requests the Commission to 'report to the European Parliament and the Council on the functioning of this Regulation, in particular on the application of Article 11(6) and Article 17' (Article 44, Council Regulation 1/2003), and reserves a safety measure for the Commission to propose another reform if it deems necessary. This new arrangement has a straightforward meaning: it reflects that a certain level of worry from different actors has been considered and the Council has decided to reserve this Article for future amendments.

The remaining amended Articles are either of contextual rearrangements, changing of Paragraphs, or giving a different interpretation that are thus prominent to the autonomy change of DG COMP. The detailed examination from Proposal to Regulation suggests the importance of modernisation and the concern with competence changes. The above analysis suggests that DG COMP's intentions on the content of Articles are mostly retained in the final Regulation. DG COMP tacitly increases its legal autonomy.

7.3.4 Conclusion: the Preference of DG COMP

In this section, we have made a thorough examination from the Preamble to the main Articles and Paragraphs to unveil the legislative process. The modernised Council Regulation 1/2003 has been substantively reviewed by the Council. Changes are made throughout the Proposal. Nonetheless, DG COMP increases its legal competence in many areas, such as the relationship with NCAs, the request for information, the fine and penalty, etc. In these fields, the Council made some changes but the Commission's preferences are mostly reserved, unintentionally or irrevocably. The following chart outlines the changes from the Commission Proposal to the Council Regulation. Therefore, the sub-hypothesis H6-2 is confirmed that **the legislative process of Council Regulation 1/2003 suggests an increase of DG COMP's legal autonomy.**

Table 7.2 Major Competence Changes from the Proposal to the Regulation

content of analysis	key changes from Proposal to Regulation	affected Commission competence
Article 3: relationship between 81 and 82 and national competition laws	<ul style="list-style-type: none"> - structurally changed to 3 Paragraphs - distinctive explanation on applying Article 81 and 82 	- unchanged
Article 11: cooperation between the Commission and national competition authorities	<ul style="list-style-type: none"> - Article 11(2): NCAs can request for documents from Commission - Article 11(4): cases should be available for ECN members - Article 11(6): Commission should consult NCAs before initiating cases 	<ul style="list-style-type: none"> - restrictions on the proceeding of cases - transparency and share of information as requirement - no more exclusiveness
Article 12: exchange of information	<ul style="list-style-type: none"> - Article 12(2): the use of information under national law - Article 12(3): conditions for imposing sanction on natural persons 	- limited change

content of analysis	key changes from Proposal to Regulation	affected Commission competence
Article 14: advisory committee	<ul style="list-style-type: none"> - Article 14(2): the appointment of committee members - Article 14(3): the commencement of consultation - Article 14(7): publicising the agenda of advisory committee and restricting the committee should only issue general opinions 	<ul style="list-style-type: none"> - take the advisory committee's opinion into account - new responsibility for publishing agenda
Article 16: uniform application of Community competition law	<ul style="list-style-type: none"> - structurally modified into two analogical Paragraphs - national count(s) and NCA decisions cannot run counter to Commission decisions 	<ul style="list-style-type: none"> - reassuring the primacy of Commission decision - still the primary actor
Article 18: requests for information	<ul style="list-style-type: none"> - from 4 to 6 Paragraphs - Article 18(5): Commission should forward a copy of its request from enterprises to NCAs - Article 18(6): Commission can request information from Member States 	<ul style="list-style-type: none"> - can request information from MS - central role of information request
Article 20: the Commission's powers of inspection	<ul style="list-style-type: none"> - Article 20(8): the judicial review on Commission decisions by national courts - a large volume of text regulating the inspection 	<ul style="list-style-type: none"> - enhanced power to conduct inspection
Article 21: inspection of other premises	<ul style="list-style-type: none"> - as an independent Article derived from Article 20(2)(b) and Article 20(7) in the Proposal - after consulting affected NCA(s), a Commission decision is needed to proceed inspections - subject to ECJ review 	<ul style="list-style-type: none"> - limited change

content of analysis	key changes from Proposal to Regulation	affected Commission competence
Article 23: fines	<ul style="list-style-type: none"> - Article 23(1)(d): regulating misleading responses to inspection questionings - Article 23(2): slightly modified on the 10% turnover fine situation - Article 23(4): including conditions for the payment of fine 	- limited change
Article 35: designation of national competition authorities	<ul style="list-style-type: none"> - Article 35(1) as the main legal resource for the establishment of NCAs - Article 35(3) assures the effect of Article 11(6) on these designated national institutions; - Article 35(4): giving the details on the propriety of legal proceedings 	- limited change
Article 44: report on the application of present Regulation	<ul style="list-style-type: none"> - newly added Article to reserve flexibility for future reform - Commission as initiator 	- responsible for the assessment of new regime

7.4 The Qualitative Analysis III – Essential Competition Laws

As mentioned in Section 7.2, the qualitative study of the legislation is determined by two parts: the core analysis on the modernisation regulations, and the study on essential laws. Hence, it is necessary to study the essential laws here to have a complete grasp of whether the competence of DG COMP has been changed.

The selection of essential laws is based on two directions. First, sectoral related laws are not taken into consideration in the first instance because the sectoral laws could only provide partial evidence of the legal autonomy of DG COMP. Second, as there are only one regulation, four major notices and two

guidelines in the modernisation package¹⁷⁵, we should carefully examine their core value in the modernisation assessment. In addition, some selective laws are also included for their strong evidence to the research questions. Therefore, the sub-hypothesis for the essential competition laws is below.

(H6-3) The essential competition laws suggest the increase of DG COMP's legal autonomy.

7.4.1 Commission Regulation 773/2004

This regulation is the first follow-up regulation issued by the Commission to regulate the specific competence given by Council Regulation 1/2003. It focuses on several areas of implementation: the initiation of proceedings, the investigation by the Commission, the handling of complaints, the hearing issue, and the access to and confidentiality of information.

First, in the initiation competence, DG COMP is only bound by the time limit and able to make such initiation public, after informing concerned parties. It certainly enjoys a wide range of discretion in the initiation. Second, regarding the inspection, this regulation emphasises on the Commission's power to take the statement and oral questioning. Paragraph 1 and Paragraph 2 clearly outline the procedural settings to take statements and DG COMP can conduct the interview 'by any means including by telephone or electronic means' (Article 3, Commission Regulation 773/2004). Third, in the hearing arrangement, DG COMP can 'invite any other person to express its views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed' (Article 13, Commission Regulation 773/2004). Therefore, the findings support that DG COMP enjoys a certain level of autonomy in the enforcement system from Commission Regulation 773/2004.

¹⁷⁵ The Commission has compiled and published a bundle set of documents named 'Modernisation of EC antitrust enforcement rules: Council Regulation (EC) No 1/2003 and the modernisation package' in 2004.

7.4.2 Commission Notice on Cooperation within the Network of Competition Authorities

The Notice on the functioning of ECN explains the operational conditions of the network, in particular, the efficient division of work and the consistent application of European competition laws. It provides several clear examples for enforcers to understand the cooperation mechanism, including the allocation of cases, the share and protection of information, and the primary role of DG COMP in the decentralised competition regime.

The superior status of DG COMP is mainly based upon the consistent application of Community rules, since the Commission serves as the guardian of the Union¹⁷⁶. First, 'it can adopt individual decisions under Article 81 and 82 of the Treaty at any time' (Paragraph 50, Commission Notice 2004/C 101/03). Second, 'once the Commission has opened proceedings, NCAs cannot act under the same legal basis against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market' (Paragraph 51, Commission Notice 2004/C 101/03). Third, when having parallel proceedings, the Notice presents clear guidance on those circumstances where the Commission holds the primacy and NCAs should withdraw from cases. Moreover, it also confirms the flexibility of regulatory arrangements. 'Beside regulations, the Commission may also adopt notices and guidelines. These more flexible tools are very useful for explaining and announcing the Commission's policy, and for explaining its interpretation of the competition rules.' (Paragraph 64, Commission Notice 2004/C 101/03) The Notice reassures the leading role of DG COMP in the ECN.

7.4.3 Commission Notice on the Cooperation between the Commission and National Court

¹⁷⁶ 'The Commission, as the guardian of the Treaty, has the ultimate but not the sole responsibility for developing policy and safeguarding consistency when it comes to the application of competition law.' (Paragraph 43, Commission Notice 2004/C 101/03)

First of all, this Notice replaces the previous equivalent Notice issued in 1993. Therefore, the cooperation between the Commission and national courts is nothing new to the decentralised regime. In regards to the Commission's competence, a section has been written in the Notice to regulate two circumstances for the national court to make judgements: when a national court comes to make a decision before the Commission does, and when the Commission reaches a decision in a particular case before the national court has. In either situation, the same instruction remains that the court decisions cannot run against to the Commission decision(s). 'The court may, for reasons of legal certainty, also consider staying its proceedings until the Commission has reached a decision.' (Paragraph 12, Commission Notice 2004/C 101/04) 'If a national court intends to take a decision that runs counter to that of the Commission, it must refer a question to the Court of Justice for a preliminary ruling (Article 234 of EC Treaty).' (Paragraph 13, Commission Notice 2004/C 101/04)

Apart from the primacy of Commission decision, the Notice also provides the legal basis for mutual cooperation.¹⁷⁷ Three tasks have been given to the Commission as *amicus curiae*: to provide necessary information to the court; to response to the 'request for an opinion' from national courts; and to submit observations on an own initiative. The first two are non-binding to the court's judgement, but the last one is discussible. The submission of observation, based on the uniform application concern in Article 15(3) of Council Regulation 1/2003, is an important mechanism given to the Commission as the supervisor for the coherent enforcement. Although there is no procedural provision on the submission of observation, national courts should highly value any such submission. Because it is dealing with the legal certainty and the cooperation with national courts, it is not surprising to see DG COMP's careful delivery of the submission of observation.

¹⁷⁷ The duty of the court is to provide their judgements regarding to Article 81 and 82 to the Commission and to grant permission and assistance to the Commission inspection on business premises and non-business premises. But it is less relevant to the competence of the Commission.

In conclusion, the primacy of Commission decision and the submission of observation are two unique competences issued to DG COMP and thus ensure DG COMP's legal autonomy.

7.4.4 Commission Notice on the Handling of Complaints

There are some conditions related to the competence of DG COMP. According to ECJ rulings¹⁷⁸, DG COMP is entitled to give different degrees of priority to complaints and may refer to the Community interest presented by a case as a criterion of priority. DG COMP may reject a complaint when it considers that the case does not display a sufficient Community interest to justify further investigation. (Paragraph 28, Commission Notice 2004/C 101/05) It is DG COMP's discretion to decide the content of community interest. Due to its designation, DG COMP cannot take all individual complaints into consideration like national courts.¹⁷⁹ DG COMP literally enjoys a dictatorship in the complaint process.

7.4.5 Commission Notice on the Informal Guidance Letter

This Notice mainly serves as a precautionary measure for DG COMP to provide non-binding legal clarifications to undertakings in assessing whether their action is compatible with the competition rules. Usually, when there is no block exemption, notice, guideline, or precedent cases available, the undertakings may ask DG COMP for an informal guidance letter regarding the compatibility of their case with Article 81 and 82. DG COMP can issue the letter based on the information provided by undertakings without any fact-finding or investigation; and such letter does not constitute any binding effect as the ongoing business behaviour may be varied and violating the rules in

¹⁷⁸ ECJ rulings that verified the priority of complaints can be seen in the following cases: Case C-344/98, *Masterfoods v HB Ice Cream*, [2000] ECR I-11369, para 46; Case C-119/97 P, *Union française de l'express (Ufex) and Others v Commission of the European Communities*, [1999] ECR I-1341, para 88; Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paras 73-77.

¹⁷⁹ It is an inherent feature of the Commission's task as public enforcer that it has a margin of discretion to set priorities in its enforcement activity. (Paragraph 27, Commission Notice 2004/C 101/05)

the end. Therefore, the guidance letter can be regarded as the informal and frequent means for DG COMP to communicate with the undertakings. DG COMP, in addition to binding enforcement tools, can regulate the competition regime with non-binding instruments.

7.4.6 Guidelines in the Modernisation Package and other Laws

The two Guidelines provided in the modernisation package, on the effect on trade concept contained in Article 81 and 82, and on the application of Article 81(3), are explanatory documents for the interpretation of any cases encountered with competition aspects. In the Guideline on the trading effect, DG COMP gives a systematic series of definitions on various types of trading circumstance. And in the Guideline on the application of Article 81(3), the prohibition rules of Article 81(1) and four conditions for exception rules in Article 81(3) are discussed. Although there are few Paragraphs discussing the competence of DG COMP, the guidelines here already reflect the prominent role of DG COMP as the guardian and the enforcement regulator of the competition regime. Similar cases can be found in many Commission Notices and Guidelines in defining competition relevant issues.¹⁸⁰

7.4.7 Other Legal Documents

The strength of DG COMP's administrative and supervisory power is also apparent in other legal documents. As the designated policy initiator and guardian, DG COMP has extended its competence in different types of laws. For example, in the 'Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty', DG COMP upholds the

¹⁸⁰ There are many notice and guidelines reflecting the defining and dominant of Commission. For example, Commission notice on the definition of relevant market for the purposes of Community competition law (1997/C 372/03); Commission notice — guidelines on the applicability of Article 81 to horizontal cooperation agreements (2001/C 3/02) ; Commission notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07); etc.

exclusiveness on the own-initiative competence¹⁸¹ and the primacy of Commission decisions¹⁸².

Moreover, DG COMP is able to set up the requirement for immunity and reduction of fines in accordance with the revised 2006 Leniency Notice¹⁸³. In the 2006 Fining Guideline for setting fines¹⁸⁴, 'the Commission enjoys a wide margin of discretion within the limits set by [Council] Regulation 1/2003. First, DG COMP has regarded both the gravity and the duration of the infringement. In addition, the enforcement of 2006 Fining Guidelines shows DG COMP's approach to setting fines, in particular, the repeated infringements. 'In general one previous infringement has led to a 50 per cent increase, two previous infringements have led to a 60 per cent increase and three infringements have led to a 90 per cent increases.' (de La Serre and Winckler, 2010: 336) Second, the fine imposed may not exceed the limits specified in Article 23(2), second and third sub-paragraphs, of [Council] Regulation 1/2003' (Paragraph 2, Commission Guideline 2006/C 210/02). This is another positive evidence to the increase of DG COMP's legal autonomy.

While the research focuses on the effect of modernisation reform, it is still worth looking at the merger regime development. Replacing Council Regulation 4064/89, the new Merger Regulation, Council Regulation 139/2004, is very similar to Council Regulation 1/2003. For instance, on the power of investigation, it is the most similar part to Council Regulation

¹⁸¹ Cases dealt with by the Commission have three possible origins: own-initiative proceedings, notifications and complaints. By their very nature, own-initiative proceedings do not lend themselves to decentralised proceeding by national competition authorities. (Paragraph 37, Commission Notice 1997/C 313/03)

¹⁸² Where an infringement of Article 81 or 82 is established by Commission decision, that decision precludes the application of a domestic legal provision authorising what the Commission has prohibited. (Paragraph 18, Commission Notice 1997/C 313/03)

¹⁸³ Commission Notice on Immunity from fines and reduction of fines in cartel cases (Commission Notice 2006/C 298/11)

¹⁸⁴ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Commission Guideline 2006/C 210/02)

1/2003. Article 13(2) gives the full competence for the Commission officials to conduct the inspection and,

‘(a) to enter any premises, land and means of transport of undertakings and associations of undertakings; (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored; (c) to take or obtain in any form copies of or extracts from such books or records; (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers’ (Article 13(2), Council Regulation 139/2004).

This is strong evidence that the Commission enjoys the dominant role in the merger regime too. Another example is in 1998 when we have seen ‘the first imposition by the Commission of a financial penalty on an enterprise for failure to notify a concentration in time’¹⁸⁵ (European Commission, 1999a: 62). Therefore, the fine and periodic penalty payment section is almost written in the same way, e.g. the 1% threshold of turnover for incorrect information and the 10% threshold for failing compliance. Paragraph 38 and 39 on the request for information and the power of investigation are the evidence of similar structure to the antitrust regime and therefore reaffirm the primacy role of the Commission.¹⁸⁶

7.4.8 Conclusion: the Study of Essential Competition Laws

In this section, we have studied the essential competition laws with strong relevance to the modernisation and the change of DG COMP’s legal autonomy. They are mostly ‘soft’ laws and initiated by the Commission. The

¹⁸⁵ Case No IV/M.920, Samsung/Ast.

¹⁸⁶ For further discussions on the merger reform, please see Ilzkovitz, F. & Meiklejohn, R. (Eds.) *European Merger Control: Do We Need an Efficiency Defence?*

Notices on cooperation with national courts, NCAs, and handling complaints are largely consistent with the argument that DG COMP increases its legal autonomy in these selective laws. In addition, the guidelines and the competences in the Leniency Notice also suggest DG COMP's prominent role in the decentralised regime. The analysis of the new Merger Regulation also provides a parallel confirmation on DG COMP's extended competence. Therefore, **the essential competition laws indirectly suggest the increase of DG COMP's legal autonomy.**

7.5 The Implementation of Council Regulation 1/2003 regarding DG COMP's Legal Autonomy

'Competition laws are designed to secure two primary goals: deterrence of anticompetitive behavior and compensation for injuries suffered by victims of competition law violations.' (Gavil, 2007: 180) The regulatory analysis in previous sections has confirmed the increase of competence for DG COMP in the law-making process of Council Regulation 1/2003 and the comparison of core competition regulations. In this section, this research examines whether DG COMP is capable of exercising its competent role and achieving the competition objectives of effective deterrence. Consequently, the sub-hypothesis regarding the enforcement of Council Regulation 1/2003 is able to identify the legal autonomy change of DG COMP.

(H6-4) The implementation of Council Regulation 1/2003 suggests DG COMP is capable of exercising the changed competence.

To practically examine the enforcement of Council Regulation 1/2003 by DG COMP, a simple way is to look at the Commission decisions since 2004, in particular, those with fines and periodic penalty payments. The quantitative analysis on the overall amount of fine and the periodic penalty payment since the implementation of Council Regulation 1/2003 reveals the determination of DG COMP to enforce new competences. The qualitative analysis of the prominent cases of new competences further indicates DG COMP's exercise of its discretionary power, in particular the Article 24(2) competence of cartel

finer, the Article 23(2) competence of applying turnover threshold, and the Article 23(1) competence of imposing fines for breaking the seals, etc.

7.5.1 An Overview of Antitrust Fines

Imposing antitrust fines is a legitimate administrative tool¹⁸⁷ for the competition authority to prevent misleading or misbehaved anti-competitive activities. In fact, 'fines are the only instrument the Commission possesses to sanction and deter infringements of EC competition law. They are thus of greater importance than in other jurisdictions, such as the US, where competition law enforcement agencies have a range of weapons at their disposal, including criminal sanctions, to combat anti-competitive practices' (Geradin and Henry, 2005: 472). There is no criminal punishment, such as the imprisonment for individuals or the competence to detain any suspects, in the EC jurisdiction for competition cases. Thus, the imposition of fine is the primary way to reflect the institution's expertise and determination to combat anti-competitive activities. For the purpose of remediation, frequent and huge fines would have a strong deterrent effect for potential violations. (Gavil, 2007) Since the decisions are subject to judicial challenges, the decision-making authority should have sufficient evidence and unbiased reasons to carefully issue the decisions. Among the various fines issued by DG COMP, cartel fines form the largest proportion to attract the public's attention and court appeals. 'Cartels are deliberate infringements which companies often try to conceal and which count, by their very object, amongst the most serious infringements of Article 81 EC.' (Mehta and

¹⁸⁷ 'The European Court of Justice (ECJ) indicated in *Musique Diffusion France (Pioneer)* that the underlying rationale for the imposition of fines is to ensure the implementation of Community competition policy.' (Geradin and Henry, 2005: 401)

Centella, 2008: 12) Therefore, our study focuses on the cartel fines. The following table shows the cartel fines since 1998.¹⁸⁸

Table 7.3 The Cartel Fines 1998-2010 (not adjusted for Court Judgments)

Year	Type of Fine	Total Amount	Number of cases
1998	Cartel	280,110,000	5
1999	Cartel	111,544,000	2
2000	Cartel	202,607,000	6
2001	Cartel	1,811,553,000	11
2002	Cartel	1,128,341,000	10
2003	Cartel	540,108,000	7
2004	Cartel	390,000,000	21
2005	Cartel	683,000,000	37
2006	cartel	1,846,000,000	N/A
2007	Cartel	3,300,000,000	41
2008	Cartel	2,264,343,900	N/A
2009	Cartel	1,540,651,400	N/A
2010	Cartel	2,868,676,432	N/A

(source: The Annual Activity Report 1998-2010; Cartel Statistics¹⁸⁹)

Derived from Table 7.3, Figure 7.1 gives a visual understanding of the cartel fines since 1998. A gradual growth of cartel fines is seen, notably since the enforcement of Council Regulation 1/2003. Also, there is an upward trend in

¹⁸⁸ Due to a shortage of administrative directive, DG COMP has a rather obscured and limited exercise to impose significant cartel fines before 1998. Therefore, the 1998 'Commission Guidelines on the method of setting fines imposed pursuant to Art 15(2) of Regulation No 17 and Art 65(5) of the ECSC Treaty' is launched by the Commission itself to provide clear guidance for the imposition of fine. Our study therefore only focus on the cartel fines since 1998. In addition, a new 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003' is enforced to update the guidance on the new Council Regulation 1/2003.

¹⁸⁹ European Commission (2012) 'Cartel Statistics', available at: <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (accessed 30 March 2012)

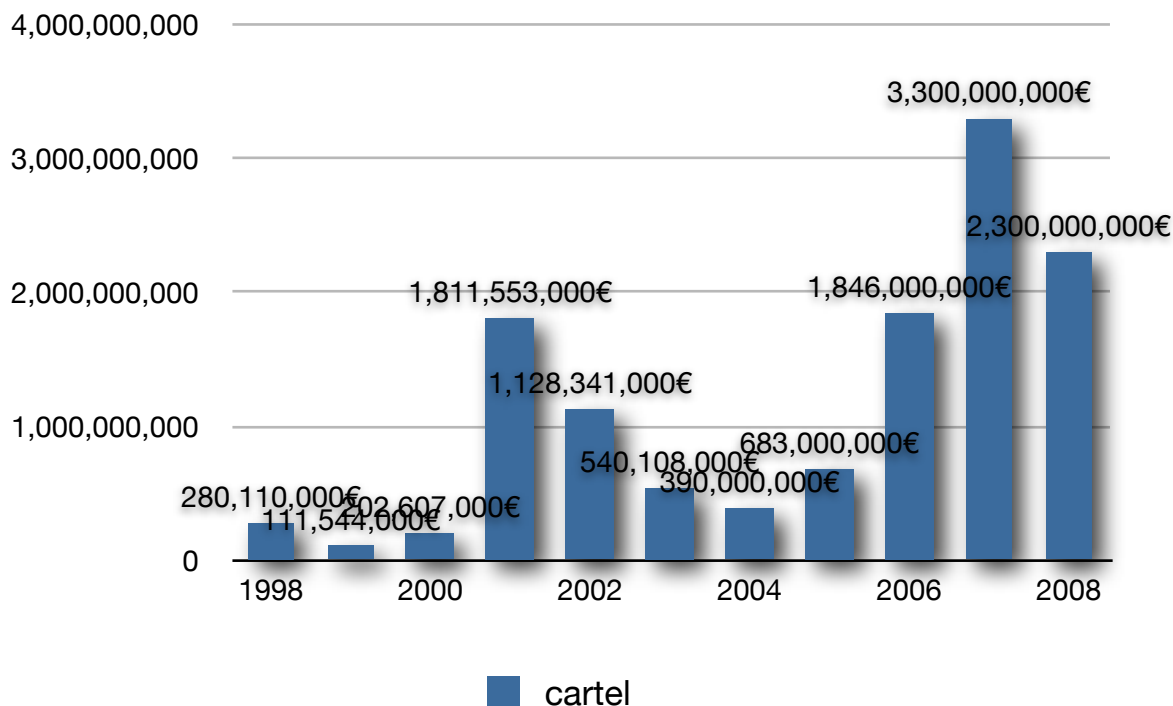
the cartel fines in individual cases. (Geradin and Henry, 2005) In 2005, ‘the [cartel] fines imposed totalled 683,029,000 Euros ‘(European Commission, 2006b: 5), which is around 50% more than the 2004 cartel fines (€390 million). ‘These fines reflect the Commission policy of deterrence, taking into account several elements amongst which the impact on the market. The fines reflect to some extent the cost to consumers of a cartel going unsanctioned.’ (European Commission, 2006b: 7) In 2006, the trend of growth reached a historical record high of € 2.1 billion. It is the first time to reach a ‘billion’ level of cartel fines in any year since the enforcement of the Treaty, and the total amount of fine is three time more than the 2005 record. ‘In 2007, the detection and dismantling of cartels continued to be a high priority. Fines on firms involved in cartels hit a record high of € 3.3 billion.’ (European Commission, 2008b: 4) This is another high record in history. The fines in 2008 finally moderate into a steady ‘billion’ level at € 2.3 billion. The statistics in 2009 and 2010 also reveal the amount of of cartel fines at the billion level. In short, the cartel fines are growing dramatically since the imposition of modernisation reform. DG COMP further introduces the 2006 Fining Guidelines¹⁹⁰ to clarify the procedures of fining. Huge fines have become a workable administrative measure in the cartel enforcement regime. DG COMP’s decisions establish the prominent example for NCAs to follow and for undertakings to notice.

The quantitative analysis of cartel fines identifies the considerable growth of fine with two record-breaking peaks in 2006 and 2007. ‘Although the fines sizes are certainly influenced by various parameters—such as changes in the way to calculate fines or increases in cartel size—there is no significant doubt among commentators that the recent EU cartel policy has been a key explanatory variable of the identified increase in the number of detected cartels.’ (Huschelrath, 2010: 522) In other words, DG COMP has fully endorsed its competent role since the modernisation reform and used its

¹⁹⁰ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (text with EEA relevance) (Commission Guideline 2006/C 210/02) ‘The 2006 Guidelines are based on a two-step methodology: (A) the Commission determines a basic amount for each undertaking; and (B) then adjusts it upwards or downwards according to the specificities of the case.’ (de La Serre and Winckler, 2010: 330)

competence to impose cartel fines as a major administrative tool to tackle infringements.¹⁹¹

Figure 7.1 Cartel Fine between 2004-08



7.5.2 The Qualitative Analysis on the Important Antitrust Cases

Apart from examining the total amount of antitrust fines, it is also worth mentioning some prominent cases that provide further qualitative evidence to support the argument that DG COMP is competent to enforce the new competition rules. Since the modernisation reform and the arrival of the 2006 Fining Guidelines, there are several cases with unprecedented, gigantic fines to reveal DG COMP's determination and confidence¹⁹² in fighting cartels and

¹⁹¹ 'Fines have considerably lower social costs than prison terms and can be increased at no cost compared with increases in the probability of detection.' (Damgaard, Ramada, Conlon and Godel, 2011: 406)

¹⁹² In a 2007 Court of First Instance ruling, it said that 'as a matter of principle, the Commission could be held financially liable for damages caused by an annulled decision in the area of competition' (European Commission, 2009b: 24). Therefore, the imposition of unprecedented fines is based upon DG COMP's determination and sufficient evidence.

non-cartel antitrust cases. They are able to show that the fining approach by DG COMP is mature and effective. (de La Serre and Winckler, 2010)

7.5.2.1 The Microsoft Case

This is the most important landmark case by DG COMP in history. ‘The case originated with a December 1998 complaint from Sun Microsystems alleging that Microsoft was refusing to supply it with interoperability information necessary to interoperate with Microsoft’s dominant PC operating system. In February 2000, following information obtained from the market, the Commission broadened the scope of its investigation to examine Microsoft’s conduct with regard to its Windows Media Player product.’ (DG COMP website, 2010)¹⁹³ Consequently, DG COMP has issued five ‘statement of objection’ and six ‘commission decision’ to Microsoft for its illegal tying behaviour.¹⁹⁴ Along with the requirement of remedies, there are three decisions involving fines and penalties.

The first fine comes along with the Commission’s 2004 Decision. ‘The initial amount of the fine to be imposed on Microsoft to reflect the gravity of the infringement should be, in light of the above circumstances, EUR 165,732,101. Given Microsoft’s significant economic capacity, in order to ensure a sufficient deterrent effect on Microsoft, this figure is adjusted upwards by a factor of two to EUR 331,464,203. Finally, the basic amount of the fine is increased by 50 % to take account of the duration of the infringement (five and a half years). The basic amount of the fine is therefore

¹⁹³ For the complete information of the Microsoft case, please see <http://ec.europa.eu/competition/antitrust/cases/microsoft> (accessed 10 March 2010)

¹⁹⁴ ‘The Commission decision in the Microsoft case, one of the most controversial in the history of EU competition law, constitutes a landmark development in the law of tying. In addition to a significant fine, the Commission imposed on Microsoft a remedy package including an obligation to offer a version of Windows with no media player installed, leaving to PC manufacturers and consumers the choice of media player(s) they wish to use. (Diaz and Garcia, 2007: 14)

set at EUR 497,196,304.’ (European Commission, 2007d: 28)¹⁹⁵ ‘The final fine of €497 million is the highest fine ever imposed on an individual undertaking.’ (Geradin and Henry, 2005: 436) It was the highest fine at that time. The decisions and the fine are immediately challenged by Microsoft to the Court of First Instance (CFI). In 2007, the CFI’s ruling confirms the Commission decision that the amount of fine (€ 497 million) is maintained.¹⁹⁶

According to Article 24(2) of Council Regulation 1/2003, DG COMP is empowered to issue a binding ‘periodic penalty payment’ for any malign incompliance. In 2006, DG COMP has used this competence for the first time and authorised a first ever Article 24(2) decision. The penalty payment is counted by € 1.5 million per day scale and totaled € 280.5 million to Microsoft. Later in 2008, DG COMP again has issued another periodic penalty payment with the same condition of per day scale to reach a total amount of € 899 million, the highest periodic penalty payment ever.

Table 7.4 The Fines and Decisions in the Microsoft Case

Date	Amount of Fine (€)	Decision	Key points
24 Mar 2004	€ 497,196,304	2004 Commission Decision	
12 July 2006	€280.5 million (€ 1.5m per day, 16 Dec 2005 ~ 20 Jun 2006)	2006 Commission Decision	- first ever decision under Art. 24(2) of Reg. 1/2003 - periodic penalty payment

¹⁹⁵ European Commission (2007d) ‘Commission Decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792 – Microsoft) (notified under document number C(2004) 900)’, *Official Journal of the European Union*, L 32, p. 23-28. To understand the details of the Commission’s 2004 Decision on Microsoft case, please see both the full non-confidential version of the decision at <http://ec.europa.eu/competition/antitrust/cases/decisions/37792/en.pdf> (accessed 10 March 2010) and a concise summary of decision at the *Official Journal of the European Union*, 2007 L 32, p. 23-28.

¹⁹⁶ ‘[CFI] has never increased a fine imposed by the Commission. Indeed, the worst that undertakings can expect at the moment is that the CFI will reaffirm a Commission fine.’ (Geradin and Henry, 2005: 472) Therefore, it is not surprising to see undertakings to lodge their appeals to the CFI.

Date	Amount of Fine (€)	Decision	Key points
27 Feb 2008	€ 899 million (€ 1.5m per day, 21 Jun 2006 ~ 21 Oct 2007)	2008 Commission Decision	- second Art. 24(2) decision - periodic penalty payment

DG COMP's judgement in the Microsoft case suggests three things. First, DG COMP is capable of imposing an extraordinary fine to a single company. The € 497 million fine is the highest ever fine at that time. This record is later exceeded by another DG COMP's cartel decision in the 2008 Car Glass case. The huge amount of cartel fines reflects that DG COMP has built up its authority and is confident of its investigations and judgements. Second, DG COMP's 2004 Decision is justified by the CFI's ruling, except for the settlement on the cost of trustee. This is a victory for DG COMP to strengthen its enforcement capacity. It encourages DG COMP to continuously implement this given competence. Third, DG COMP is willing to impose the periodic penalty payment, a new competence by Article 24(2) of Council Regulation 1/2003. The 2006 Decision of € 280.5 million fine and the 2008 Decision of € 899 million fine are two strong proofs that DG COMP is a credible and competent authority to apply any given administrative competence. With the above discussions, we can conclude that the legal autonomy of DG COMP is increased in its implementation of new competition rules.

7.5.2.2 The Car Glass Case

The Car Glass case is a self-initiated case by DG COMP, involving four major car glass provider groups. They have collectively committed anti-competitive behaviour, namely the price setting, the illegal exchange of commercially sensitive information, etc. DG COMP has conducted two rounds of investigation and accepted ASAP/AGC group's leniency application. Finally, a 'statement of objection' is sent in 2007 and followed by the Commission Decision in 2008. 'These are the highest cartel fines Commission has ever imposed, both for an individual company

(€896,000,000 on Saint Gobain) and for a cartel as a whole [€1,383,896,000].’ (European Commission Press, 2008a, IP/08/1685)¹⁹⁷

Table 7.5 The Fines in the Car Glass Case

Company	Fine (€)	N.B.
Saint-Gobain (France)	€ 896,000,000	- increase by 60% for its third time repeating infringement
Asahi/AGC Flat Glass (Japan)	€ 113,500,000	- 50% Reduction under the Leniency Notice
Pilkington (UK)	€ 370,000,000	
Soliver (Belgium)	€ 4,396,000	- 10% turnover limit applied (Art.23(2) of Reg 1/2003)
TOTAL	€ 1,383,896,000	

This case is important for four reasons. First, DG COMP has issued a record-high cartel fine to a single undertaking in history, which breaks the fine record of 2004 Microsoft decision. DG COMP further adds a punitive aggravation of fine (60% extra fine) on St Gobain for its repeating violation.¹⁹⁸ Such action suggests that DG COMP is undoubtedly capable of using all measures to tackle future infringements in cartels.

Second, this case involves the use of 2002 Leniency Notice and grants the ASAP/AGC group a 50% reduction of fine. A case that holds the highest single cartel fine and the application of leniency on fine reduction indicates that the supervisor of the European competition regime, DG COMP, is

¹⁹⁷ European Commission Press (2008a) ‘Antitrust: Commission fines car glass producers over €1.3 billion for market sharing cartel’, IP/08/1685, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1685&guiLanguage=en> (accessed 16 March 2010)

¹⁹⁸ ‘The Commission increased the fines for St Gobain by 60% because it was a repeat offender, having already been fined for cartel activities in previous Commission decisions in 1988 for Flat Glass Benelux (see [IP/88/784](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/88/784)) and 1984 for Flat Glass Italy.’ (European Commission Press, 2008a, IP/08/1685) According to Paragraph 28 of the 2006 Fining Guidelines, ‘the basic amount of the fine may be increased where the Commission finds aggravating circumstances such as recidivism, non-cooperation, and playing the role of leader/instigator’. (de La Serre and Winckler, 2010: 336)

capable of using the ‘carrot and stick’ approach towards undertakings to ensure the effective competition in the market.

Third, the application for leniency by ASAP/AGC group immediately after the first round of investigation¹⁹⁹ means the inspection conducted by DG COMP is feasible and deterrent. With the help of leniency, DG COMP would be able to work with cooperating undertakings to solve the case effectively and correctly.

Fourth, DG COMP starts this cartel investigation on its ‘own initiative’ and ‘on the basis of reliable information provided by an anonymous informant’ (European Commission Press, 2008a, IP/08/1685). This case verifies the pledge for better allocation of resources in the modernisation proposal that DG COMP has successfully extended the *ex officio* competence.

There is no doubt on the increase of legal autonomy by DG COMP’s performance in the Car Glass case. The strength of investigation, the flexibility of carrot-and-stick approach, the own initiative opening of case, and the imposition of record-high fine are the best evidence for sub-hypothesis H6-4 that the implementation of Council Regulation 1/2003 suggests DG COMP is capable of exercising the changed competence.

7.5.2.3 The E.ON Electricity Case

In the same year of imposing upon Microsoft a € 899 million periodic penalty payment, DG COMP also issues a fine of € 38 million to E.ON Electricity for ‘the breach of Commission seals during an inspection’ (European Commission, 2009b: 5). ‘The E.ON case is one of several cases reflecting the EC’s efforts to stop behaviour that may

¹⁹⁹ After the inspections, the Japanese Asahi Glass Co. and its European subsidiary AGC Flat Glass Europe (formerly ‘Glaverbel’) filed an application under the 2002 Leniency Notice. Asahi/Glaverbel cooperated fully with the Commission and provided additional information to help to expose the infringement and its fine was reduced by 50%. (European Commission Press, 2008a, IP/08/1685)

jeopardise its investigations under the EU competition rules.’ (Blanco and Jorgens, 2011: 564) The legal origin is that DG COMP is ‘empowered to seal any business premises and books or records for the period and to the extent necessary for the inspection’ (Article 20(2)(d), Council Regulation 1/2003). E.ON Electricity has contested it and resulted in this punishment.

It is an unannounced inspection conducted by DG COMP and Germany’s *Bundeskartellamt* in 2006. The seal is broken after the first day of inspection. After two years of careful works, DG COMP concludes a fine on the breaching of seal. As former Competition Commissioner Neelie Kroes said, ‘the Commission cannot and will not tolerate attempts by companies to undermine the Commission’s fight against cartels and other anti-competitive practices by threatening the integrity and effectiveness of our investigations. Companies know very well that high fines are at stake in competition cases, and some may consider illegal measures to obstruct an inquiry and so avoid a fine. This decision sends a clear message to all companies that it does not pay off to obstruct the Commission’s investigations.’ (European Commission Press, 2008b, IP/08/108)²⁰⁰

According to Article 23(1)(e)²⁰¹ of Council Regulation 1/2003, the fine of breaching seals can be up to 1% of the total turnover in the preceding business year. Nevertheless, ‘the level of the imposed fine which corresponds to approximately 0.14% of EE’s turnover²⁰² is determined by the seriousness of the infringement of the EC procedural rules in competition cases and by the particular circumstances of the case. In the light of all the

²⁰⁰ European Commission Press (2008b) ‘Antitrust: Commission imposes € 38 million fine on E.ON for breach of a seal during an inspection’, IP/08/108, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/108&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 17 March 2010)

²⁰¹ The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently, seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken. (Article 23(1)(e) Council Regulation 1/2003)

²⁰² E.ON Energie AG(EE) is a wholly-owned subsidiary of E.ON and based in Munich. Since the breaching of seal happened in the premise of EE, the imposition of fine should calculate under the EE’s turnover, rather than the E.ON’s.

relevant factors described, the fine is set at EUR 38,000,000' (European Commission, 2008d: 38)²⁰³. DG COMP did not impose the full amount of fine in its first 23(1)(e) decision.

In regards to DG COMP's implementation of new competence, four factors are identified. First, it is the first time a seal has been broken and the first time DG COMP enforces the Article 23(1)(e) competence to issue a punitive fine in this occasion. Although the amount of fine is not phenomenal, it certainly shows DG COMP's zero tolerance on any possible interference to its case proceedings. Second, DG COMP has spent two years to reach this decision. In other words, DG COMP is carefully carrying out its first-ever Article 23(1)(e) decision for the breaching of seals. The decision is widely accepted in the epistemic community. Third, the decision does not result in the maximum amount of 1% turnover fine. It leaves more room for manoeuvre in the future. 'In this case, the Commission has not opted for a higher fine, *inter alia* because it was the first case ever in which the Commission imposed a fine for breaking a Commission seal.' (European Commission Press, 2008c, MEMO/08/61)²⁰⁴ Fourth, in December 2010, the General Court (formerly the CFI) confirms the Commission Decision²⁰⁵ to impose a €38m fine on the German energy company. In spite of a possible appeal to the ECJ, DG COMP has successfully implemented its first use of Article 23(1)(e) competence. In short, DG COMP has shown its determination, patience and expertise in its first Article 23(1)(e) decision. It also delivers a strong message: 'the Commission will severely sanction procedural violations' (de La Serre and Winckler, 2010: 343).

²⁰³ European Commission (2008d) 'Commission Decision of 30/01/2008 relating to a fine pursuant to Article 23 paragraph 1 lit. e) of Council Regulation (EC) No 1/2003 for breach of a seal Case, COMP/B-1/39.326 – E.ON Energie AG', available at <http://ec.europa.eu/competition/antitrust/cases/decisions/39326/en.pdf> (accessed 17 March 2010)

²⁰⁴ European Commission Press (2008c) 'Antitrust: Commission imposes fine on E.ON for the breach of a seal during inspection – frequently asked questions', available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/61&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 8 March 2010)

²⁰⁵ Case COMP/B-1/39.326 E.ON Energie AG's proceeding under Article 23(1) of Council Regulation (EC) No 1/2003, Commission Decision of 30 January 2008

7.5.3 Conclusion: the Enforcement of Council Regulation 1/2003

In Section 7.5, DG COMP's implementation of new Council Regulation 1/2003 is identified in the quantitative study of cartel fines since 2004 and the qualitative analysis on the prominent cases of the Article 24(2) competence of cartel fine, the Article 23(2) competence of applying turnover threshold, and the Article 23(1) competence of imposing fines for breaking the seals. With these non-exhaustive findings, the study shows that **the implementation of Council Regulation 1/2003 suggests DG COMP is capable to exercise the changed competence**, proving sub-hypothesis H6-4.

First, the quantitative analysis of antitrust fine suggests that DG COMP is highly capable of enforcing Council Regulation 1/2003. The considerable growth of fine and the historical records of single cartel fines are the affirmative endorsement of DG COMP's role in the modernised competition regime. It is further accompanied by the favourable rulings of ECJ and CFI to assure the authority of DG COMP. 'The ECJ has modified the level of fines imposed by the Commission only in exceptional cases where the Commission has patently omitted to consider a factor that was relevant to determining the amount of the fine.' (Subiotto, Eclair-Heath and Rabinovici, 2010: 133) Therefore, recent pleas to the courts show that 'appeals against cartel decisions are essentially aimed at obtaining a reduction of the fines imposed by the Commission, rather than demonstrating that the firms in question have been wrongly convicted of cartelistic behaviour' (Geradin and Henry, 2005: 472).

Second, the qualitative analysis of three prominent cases also sustains DG COMP's capacity to enforce new competences authorised by Council Regulation 1/2003. In the Microsoft case, DG COMP demonstrates its capacity to impose extraordinary fines and the first use of Article 24(2) of periodic penalty payment. In the Car Glass case, DG COMP's capacity to enforce Council Regulation 1/2003 is again convinced for its strength of investigation, the flexibility of carrot-and-stick approach, the own initiative

nature of case, and the imposition of record-high fines. The punitive aggravation of 60% extra fine on St Gobain's repeating violation has shown DG COMP's flexible use of its competence. DG COMP further applies the 2002 Leniency Notice to grant ASAP/AGC group a 50% reduction of fine for their cooperation and information. DG COMP is certainly the master authority in the modernised European competition regime. In the E.On case, DG COMP enforces the Article 23(1)(e) competence for the breaching of a seal during the investigation. The decision is widely accepted and attributed to DG COMP's expertise and carefulness. Therefore, the qualitative study is able to provide the detailed operation of new competition rules and the effective implementation by DG COMP.

7.6 Conclusion: the Financial and Legal Autonomy of DG COMP

This chapter investigates two fundamental fields of bureaucratic autonomy: financial and legal aspects. The assessment on the financial autonomy of DG COMP probes the availability of own financial resources and the budgetary discretion for the prospect of an independent regulatory agency. However, the study shows that the modernisation reform has limited relevance to the increase of financial autonomy. DG COMP is unable to establish any own financial resources to increase its budgetary leverage. It can neither exert more discretionary use of the centralised budget nor acquire any partial amount of the antitrust fines. The financial autonomy is not available for DG COMP in the modernisation reform.

In the legal autonomy aspect, the research examines both the regulatory aspect and the enforcement of new competition rules. First, the comparative analysis of Council Regulation 17/62 and Council Regulation 1/2003 focuses on six fields: the power of the Commission, the investigation power, the fine and penalty payment, the professional secrecy and hearing, the judicial review, and new regulatory fields. They provide the essential justification on the expanded competence of DG COMP. In particular, the legal autonomy of DG COMP is increased in the fine and penalty competence, and the new

competences, e.g., the withdrawal capacity in exempted area of business, the inspection on other premises, the power to take statement, etc. Second, the law-making process is studied to discover to what extent the autonomy of DG COMP is retained from the Commission Proposal to the Council Regulation. The content analysis of the Preamble and main Articles reveals that the Council has reviewed the Proposal thoroughly and made substantial changes in eleven Articles. Nevertheless, the preferences of DG COMP are mostly reserved in Council Regulation 1/2003, such as the relationship with NCAs, the request for information, the fine and penalty, etc. Third, the study of essential competition laws also indirectly suggests the increase of DG COMP's autonomy. Therefore, the increase of DG COMP's competence is seen in the regulatory aspect.

The implementation gap is well-known in public policy studies. Therefore, the examination on the enforcement of new competition rules is able to provide the other justification on the legal autonomy of DG COMP. In the quantitative study, the steady growth of antitrust fines and the enormous amount of individual cartel fines and periodic penalty payments would indicate DG COMP's full endorsement and implementation of new Council Regulation 1/2003. In the qualitative aspect, three prominent cases are studied to reflect the effective use of new competences by DG COMP, in particular, the Article 24(2) competence of cartel fine, the Article 23(2) competence of applying turnover threshold, and the Article 23(1) competence of imposing fines for breaking the seals. Following the examination on the legal aspect of modernisation reform, it is fair to say that DG COMP has successfully maintained its important role and expanded its core competences. The dominance of DG COMP in the modernised European competition regime is seen in the regulatory development.

Chapter 8 – Conclusion

The aim of the thesis is to assess the bureaucratic autonomy of DG COMP after the modernisation reform. Following the theoretical discussion in Section 3.3, this research adopts the bureaucratic autonomy approach and the principal-agent theory to assess the autonomy change of DG COMP. With this in mind, the research seeks to provide a comprehensive understanding of the role of DG COMP in the modernised European competition regime. In fact, the bureaucratic autonomy of DG COMP is reinforced by the many changes of modernisation reform. For example, DG COMP is able to urge the paradigm shift from the SCP paradigm to the Chicago School paradigm in the underlying economic method of enforcement for many competition cases. The institutional change within DG COMP and the relationship between DG COMP and NCAs in the ECN also illustrate the exertion of autonomy by DG COMP. Therefore, understanding the bureaucratic autonomy of DG COMP is helpful for resolving the puzzles of modernisation reform on the impact of change and the actual enforcement of Council Regulation 1/2003.

The bureaucratic autonomy of DG COMP after the modernisation reform is an interesting case because the modernisation reform has radically changed the way in which competition policy enforcement is delivered. The modernisation reform changes the system of enforcement and the operation of European competition regime. In essence, Council Regulation 1/2003 has replaced the long-lived Council Regulation 17/62 with three primary changes: the decentralisation of enforcement, the establishment of ECN, and the enhanced power of inquiry for DG COMP. First, the reform decentralises the enforcement of competition rules by allowing NCAs and national courts to apply Article 81 and 82 EC (now Article 101 and 102). It transforms the prior notification system to the *ex post* directly applicable exception system. Second, the quasi-binding ECN is established for the purpose of information exchange, effective case allocation, and uniform application of competition rules. DG COMP and NCAs are the necessary members. Third, the reform

modernises the power of inquiry and punishment for the competition authorities, in particular, DG COMP. Competition authorities are equipped with enhanced competences for the investigations and case proceedings.

Therefore, the modernisation reform is the most important policy development in the history of European competition regime. DG COMP's exclusive competence in the enforcement is terminated in exchange for the enhanced power of investigation, the better allocation of resources for the *ex officio* cases, and the entrusted responsibility for consistent enforcement. DG COMP may evolve as the policy entrepreneur for the development of European competition regime. As a result, these changes make it possible to study the autonomy change of DG COMP for the public policy studies and the competition literature. Studying the bureaucratic autonomy of DG COMP clarifies the changing role of DG COMP and the new appearance of the modernised European competition regime.

To examine the autonomy change of DG COMP in the modernisation reform, this research has to draw on a broad body of literature, namely the principal-agent theory (Majone, 2001; Huber and Shipan, 2002; Pollack, 2003), the bureaucratic autonomy approach (Carpenter, 2001; Peters, 2001; Yesilkagit, 2004), and the EU legal and public policy studies (Thatcher, 2005; Komninou, 2008; Kassim and Wright, 2009). According to the literature reviews in Section 2.2~2.5, there are two deficits in the study of modernisation reform: the very limited analysis of the effect of reform, and the lack of studies on the role of DG COMP. First, it is uncertain whether the new Council Regulation 1/2003 regime has effectively resolved the problems in the prior notification system of Council Regulation 17/62, in particular the capacity of DG COMP in enforcement. Second, the modernisation reform has changed the role of DG COMP, which requires a comprehensive redefinition. The role of DG COMP is decisive in the decentralised enforcement regime. The operation of ECN and the relationship between DG COMP and NCAs should be studied in this context. Consequently, this research aimed to supplement the deficiencies in the existing studies on the modernisation

reform, by offering its account of the changing role of DG COMP and the effects of reform. It also attempted to provide some value-added findings to the literature on bureaucratic autonomy and principal-agent theory. Therefore, the changes of modernisation reform provide this research a chance to apply the above theoretical arguments, in particular, the U.S. concepts of the principal-agent relationship and the bureaucratic autonomy of governmental institutions, to an interesting case in the EU.

8.1 Revisiting the Research Question and the Research Findings

Based on the theoretical discussions stemming from the principal-agent theory and the bureaucratic autonomy approach in Section 3.1~3.3, the thesis attempts to assess the research question on the bureaucratic autonomy of DG COMP: **does DG COMP have more bureaucratic autonomy since the modernisation reform?** This research considers the autonomy change of DG COMP and adapts the U.S. bureaucratic autonomy literature to the EU public policy context. The study is contributive mainly in identifying the autonomy change of DG COMP, defining the role of DG COMP in the modernised competition regime, and applying the theoretical context of bureaucratic autonomy approach and principal-agent explanation to the modernisation reform. To do so, six aspects of bureaucratic autonomy were systematically assessed: political differentiation, organisational capacity, personal capacity, multiple networks, financial capacity and changes in legal status.

Chapter 4 explored the political differentiation by looking at the substantive change of modernisation reform. The paradigm shift from the SCP paradigm to the Chicago School paradigm was observed in the institutionalisation of economists in DG COMP and the increased use of economic assessment. DG COMP has successfully urged the paradigm shift and exerted its political differentiation.

Chapter 5 examined the organisational and personnel capacity of DG COMP to understand the procedural changes of modernisation reform. The analysis of organisational capacity observed that the extensive organisational changes and developments in the modernisation process have had a major impact on the increase of organisational capacity for DG COMP. The personnel capacity of DG COMP was studied not only in conventional areas, such as the role of the bureaucratic chief and the mobility of staff, but also in the advanced field as another unit of analysis, namely the possibility of independent recruitment. The findings are rather diversified to explain the change in DG COMP's personnel capacity.

Chapter 6 discussed the multiple networks of DG COMP by focusing on DG COMP's horizontal cooperation with other DGs, DG COMP's bilateral and multilateral engagement in the international context, and the leading role of DG COMP in the ECN. The study showed a strong momentum from multiple network activities supporting the bureaucratic autonomy of DG COMP. The study also revealed the role of DG COMP in the ECN as the possible policy entrepreneur and supervisor in the decentralised competition enforcement.

Chapter 7 first explored the possibility of DG COMP's financial autonomy, by looking at the availability of own resources and the budgetary discretion. It then scrutinised the legal autonomy of DG COMP through a comparative analysis of Council Regulation 17/62 and Council Regulation 1/2003, the law-making process of core regulations, and the enforcement of new rules, in order to understand the regulatory changes in the reform. The study indicated that the competence of DG COMP has been particularly increased in the fine and penalty competence. DG COMP also demonstrated its capacity to enforce Council Regulation 1/2003 in some pivotal cases.

This chapter provides three main findings from the study of DG COMP's bureaucratic autonomy. First, according to the results of this research, DG COMP has increased its bureaucratic autonomy after the modernisation reform, with some reservations. There are areas still in need of the effort of

DG COMP to exert its autonomy. As the Commission's competition authority, DG COMP is still an agent to the conventional EU principals, namely, the Council and the EP. Assigned with multiple tasks and competences, DG COMP has managed to escape from further political controls in the law-making process of Council Regulation 1/2003. In addition, this research adapts the U.S. bureaucratic autonomy model to the EU context to assess the autonomy change of DG COMP. The assessment may further be applicable to other public policy studies about institutional changes or competence reforms.

Second, innovative findings are reported on the multiple roles of DG COMP in the European competition regime. In particular, this research argues that, since the implementation of Council Regulation 1/2003, DG COMP is holding a new 'supervisory' role, along with a shrinking administrative role (Cseres, 2007; Motta, 2007b) and an unchanged 'jury-judge-prosecutor' role (Montag and Rosenfeld, 2003; Bauer, 2006; The Economist, 2010; Killick and Dawes, 2010). Consequently, this study claims to have clarified the complex role of DG COMP in the European competition regime²⁰⁶ (Kassim and Wright, 2009). DG COMP is still the most important actor in the European competition regime. (Wilks, 2007)

Third, according to the analysis of the quasi-binding ECN and the activities of DG COMP in the network, two levels of principal-agent relationship have emerged and the leading role of DG COMP in the ECN is confirmed. In fact, there is a new principal-agent relationship between DG COMP and NCAs, co-existing with the conventional principal-agent relationship in the EU context. (Pollack, 2003; Magnette, 2005)

According to the literature review of Chapter 2, we notice that three perspectives account for the mainstream explanations of the changes and effects of the modernisation reform. The Commission dominance explanation,

²⁰⁶ 'Acting as a regulatory organ in some fields, as an executive body in others, and being a key element of legislative process, the Commission's profile is often misunderstood.' (Magnette, 2005: 17)

arguing that the reform is an opportunity for DG COMP to dominate the competition regime, competes with the decentralisation explanation for the prevailing perspective, whilst the alternative explanation tries to establish its argument in the regulatory processes.

Comparing to these perspectives, this study of the bureaucratic autonomy of DG COMP accounts for two unique and different characteristics. First, this study is the first one to apply the theoretical context of bureaucratic autonomy approach and principal-agent explanation to the modernisation reform. The bureaucratic autonomy approach has been used to study the U.S. administrations, e.g. the postal service (Carpenter, 2001) and judicial authorities (Crowe, 2007). The principal-agent theory is widely discussed in many policy areas. (Pollack, 1997; Thatcher and Stone Sweet, 2002; Kassim and Menon, 2003; Miller, 2005) But there is no previous study of the competition policy to apply them into an empirical analysis. Furthermore, the examination of the bureaucratic autonomy of DG COMP can be seen as a basis to describe the principal-agent relationship of DG COMP with other actors in the regime. Therefore, this research provides an added value to and expands the application scope of the bureaucratic autonomy approach and the principal-agent theory. It further establishes the connections between the bureaucratic autonomy approach and the principal-agent theory in this modernisation case.

Second, while other competition studies aim to explain the modernised competition rules, this study puts its focus on the role of DG COMP and its autonomy change, as well as the process and effect of the reform. The discussion on the paradigm shift is important to explain the substantive changes in the reform. The role of DG COMP in the modernisation process is widely examined for a thorough understanding of the procedural changes. The findings of this research are able to test the arguments of the Commission dominance perspective and the decentralisation perspective. The new supervisory role for DG COMP suggests further influence of DG COMP towards other competition authorities and the dominating role of DG

COMP in the ECN. The reduced administrative role of DG COMP, on the other hand, indicates a certain degree of decentralisation in the enforcement. Therefore, this study provides a different view of the modernised European competition regime, in particular the enforcement authorities and the role of DG COMP.

8.2 Defining the Bureaucratic Autonomy of DG COMP

The primary observation of the thesis is that **DG COMP has increased its bureaucratic autonomy in certain aspects of substantive and procedural changes**. Nevertheless, there is still room for DG COMP to extend its bureaucratic autonomy after the reform.

8.2.1 The Positive Evidence for the Bureaucratic Autonomy of DG COMP

As noted above, this research explores six fields of bureaucratic autonomy: political differentiation, organisational capacity, personnel capacity, multiple networks, financial autonomy, and changes in legal status, so as to identify the substantive and procedural change in the modernisation reform. In particular, four areas have returned positive evidence for the increase of DG COMP's bureaucratic autonomy.

The first piece of evidence for this increase comes from DG COMP's successful push for a paradigm shift from the SCP paradigm to the Chicago School paradigm and the increased use of the economic approach in the competition enforcement. As discussed in Chapter 4, the research studies the political differentiation of DG COMP by looking at the substantive change in the modernisation reform. The political differentiation is seen through the institutionalisation of economists within DG COMP, the increased use of economic assessment in many antitrust cases, and the paradigm shift to the Chicago School. The follow-up development of CCE and CET in DG COMP and the prevailing use of Chicago School's approach in the regulatory changes of merger regulations and block exemption regulations further

indicate the exertion of political differentiation by DG COMP. Moreover, the study identifies the resemblance between the competition systems of the EU and the U.S. (Schinkel, 2007; Kovacic, 2008b; Brandenburger, 2011) Therefore, economic thinking is now the mainstream approach in the enforcement and is applied to the interpretation of competition laws and other legal documents.

Second, DG COMP shows its capacity to initiate the procedural change in the modernisation reform. The study in Section 5.1 identifies the extensive organisational changes in the modernisation process. From simple to complex, six types of re-organisation are conducted by DG COMP. In addition, the directorate level of organisational change, the creation of CCE and CET, the establishment of Cartel Units and Cartel Directorate, and other organisational changes of policy sectors and top positions, further indicate the increase in DG COMP's organisational capacity. DG COMP is capable of conducting the organisational changes as a result of the changes in the competition enforcement and the enactment of new Council Regulation 1/2003. (Peters, 2001; Yesilkagit, 2004)

Likewise, the research also examines pivotal cases of organisational development in Section 5.2 to justify the organisational capacity of DG COMP. The smooth development from the Cartel Units to the Cartel Directorate is outstanding in DG COMP's institutional development. DG COMP is able to manage its incremental resources and staff, establishing a sizable Directorate for cartel-specific issues. The importance of CCE and the increase in CET members also confirm the organisational capacity of DG COMP to accommodate the increasing need of economic analysis in many antitrust cases. The recomposition of Deputy Directors-General reveals that the organisational discretion of DG COMP is applied even to top level positions. Nevertheless, DG COMP's organisational capacity is not fully exercised with positive results. The story of the Consumer Liaison Officer shows there is still room for improvement. Accordingly, it is fair to say that DG COMP has exhibited its organisational capacity to conduct both the

organisational changes and developments as the procedural changes in the modernisation reform. This is further evidence to suggest the increased bureaucratic autonomy of DG COMP.

Third, the existence of multiple networks for DG COMP increases its bureaucratic autonomy and consolidates the procedural change of modernisation reform. The study of DG COMP's network activities is so far innovative for the public policy studies. The analysis focuses on the horizontal cooperation with other DGs, the bilateral and multilateral engagement in the international context, and the leading role of DG COMP in the ECN. Section 6.1 shows that DG COMP's horizontal connection with other DGs is merely a routine matter and a common feature in the Commission. However, DG COMP has managed a series of diverse activities in the bilateral and multilateral aspects of international cooperation. There are five ratified bilateral competition agreements – with the U.S., Canada, Japan, and Korea; three Memorandum of Understanding, with Korea, Brazil, and Russia; and one set of Terms of Reference with China. Although less remarkable, DG COMP's network participation in the WTO and ICN ensures its intellectual leadership in the competition epistemic community and its unique representativeness of the European competition regime. (Crowe, 2007; Kovacic, 2008b) Most important of all, DG COMP has successfully established its leading role in the ECN through the regulatory settings and the implementation of ECN. The contextual analysis of Council Regulation 1/2003, the Joint Statement, and the Commission Notice on Cooperation within the Network in Section 6.3, indicates the predominant role of DG COMP in the initiation, case allocation and proceedings. The enforcement of ECN further confirms the leading role of DG COMP in several respects, such as the resemblance of institutional structure in NCAs, the development of ECN Model Leniency Programme, the zero application of Article 11(6), etc. Therefore, the multiple networks of DG COMP are helpful to the increase of its bureaucratic autonomy in the modernisation reform.

Fourth, in comparing the pre-modernisation and post-modernisation framework of competition enforcement via a comparative analysis of Council Regulation 17/62 and Council Regulation 1/2003, the study of regulatory change is fundamental to explain the bureaucratic autonomy of DG COMP. DG COMP's exclusive competence in the enforcement is terminated in exchange for the enhanced power of investigation, the better allocation of resources for *ex officio* cases, and the responsibility for the consistent enforcement of decentralised competition rules. In fact, the power of investigation and the power of the Commission have largely contributed to the increase of DG COMP's legal autonomy. The competence of DG COMP has been expanded in particular in the fine and penalty aspects and new competences, e.g., the withdrawal capacity in the exempted area of business, the inspection on other premises, the power to take statements, etc. Likewise, the scrutiny of the legislative process and essential competition laws in Section 7.3 and 7.4 shows a similar result of increased autonomy. The Preamble and main Articles are carefully reviewed by the Council, but the preferences and competences of DG COMP are mostly reserved. Moreover, this study also examines the implementation of Council Regulation 1/2003 in Section 7.5 and finds that DG COMP has properly enforced the new rules from both the quantitative and qualitative perspectives. For example, the Article 24(2) cases regarding cartel fines, the enforcement of Article 23(2) competence concerning turnover thresholds, and the Article 23(1) cases for breaking the seals, reveal the extensive enforcement by DG COMP. Therefore, it is fair to say that the legal autonomy of DG COMP is greater than before the modernisation reform.

In conclusion, DG COMP has successfully conducted the substantive and procedural change in the modernisation reform. From the substantive perspective, the antitrust assessment has largely incorporated the economic methodology, the Chicago School paradigm in particular. The institutionalisation of economists and the development of CCE and CET have consolidated the substance of the European competition regime with a proportionate balance between economic and legal assessment in many

antitrust cases. The effectiveness and correctness of case justification may be expected. From the procedural perspective, the exertion of organisational capacity by DG COMP accounts for the most important procedural development. Extensive organisational changes and developments are witnessed, such as the establishment of CCE and CET, the development from Cartel Unit to Cartel Directorate, the changes of Deputy Directors-General, etc. In addition, the continuing success of bilateral relationship and the commitment of engagement in multilateral networks have consolidated the network activities of DG COMP and increased its political multiplicity. The regulatory analysis of ECN and the investigation of the operation and enforcement of ECN further guarantee the leading role of DG COMP in the decentralised competition regime. This leading role also assures that 'European competition policy is *de facto* a Commission policy. It is the Commission that determines what the policy is and how it is implemented on the ground' (Cini and McGowan, 1998: 41). Therefore, the bureaucratic autonomy of DG COMP is potentially increased by the substantive and procedural change in the modernisation reform.

8.2.2 The Limits of Bureaucratic Autonomy

In addition to the positive findings on the increase of bureaucratic autonomy, this research also reveals the limits of bureaucratic autonomy in the modernisation reform, notably in the personnel capacity and financial aspects of DG COMP.

First, despite successfully managing its personnel capacity in the conventional areas such as the personnel changes involving bureaucratic chiefs and staff, DG COMP has failed to establish an advanced capacity for independent recruitment. Still, the analysis showed that two bureaucratic chiefs in the modernisation process were candidates qualified to protect the interests of DG COMP and the consistent enforcement of decentralised competition rules. Their seniority, educational background, and career routes through the civil service in the Commission confirm the importance of

bureaucratic chief in the pursuit of bureaucratic autonomy. In particular, Philip Lowe's authority and expertise are vital for accomplishing the modernisation reform. Moreover, various types of training programmes also suggest DG COMP's flexibility and discretion in exercising its personnel capacity and influencing the epistemic community of the European competition regime. Likewise, the personnel capacity is seen in the mobility of DG COMP officials, such as the proportionate circulation of staff mobility, the career development of senior officials, and the prompt recomposition of DG COMP officials to tackle the recent financial crisis. Nonetheless, the study ascertains only that DG COMP has exercised, rather than increased, its personnel capacity since the modernisation reform.

The advanced analysis of independent recruitment shows that there is no room for DG COMP to develop its own selection over the recruitment of permanent officials. The recruitment is still managed by the centralised European Personnel Selection Office (EPSO). Similarly, the discretionary preference for type (a) agent is not exclusive to DG COMP. The goal of independent recruitment seems to be rather far for DG COMP.

Second, the modernisation reform has conferred no financial autonomy for DG COMP. The study indicates that DG COMP is not permitted to have any share of cartel fines as its own resources. Moreover, there are stringent conditions for the use of Commission's regular budget. DG COMP may not increase its discretionary use of the budget in the modernisation process.

Therefore, it is fair to say that DG COMP has successfully increased its 'traditional' autonomy in areas such as political differentiation, network multiplicity, and organisational capacity. But it has failed to extend its capacity in certain areas, such as the recruitment flexibility and the financial autonomy. However, there is still room for DG COMP to extend its bureaucratic autonomy in the modernised competition regime.

8.3 The Multiple Roles of DG COMP: A New Supervisory Role

DG COMP has been described as the policeman, detective, investigator, prosecutor, judge and executioner in the European competition regime. (Brittan, 1992; Wilks and McGowan, 1996; Montag and Rosenfeld, 2003; Bauer, 2006; The Economist, 2010; Killick and Dawes, 2010) ‘DG-Competition investigates, prosecutes and decides on competition law matters, subject to appeal to the courts.’ (Marsden, 2009: 25) Even after the modernisation reform, we can still witness the existence of such multiplicity for DG COMP. ‘The Commission will continue to enjoy its multiple roles as investigator, prosecutor and judge in the same proceeding.’ (Montag and Rosenfeld, 2003: 112)

In fact, we have discovered that **DG COMP actually holds a new ‘supervisory’ role in the modernised competition regime**, along with its reduced administrative role and the unchanged ‘jury-judge-prosecutor’ role. At least three pieces of evidence were found in this research to uphold this argument. First, the zero record of Article 11(6) case shows DG COMP’s unconventional effort to reserve the Article 11(6) competence as the last resort of intervention in the NCA’s proceedings. To keep this zero record perfection, DG COMP has managed extensive communication and expertise sharing with NCAs. It is not surprising to see that newly established NCAs tend to follow the guidance and assistance of DG COMP, which results in a supervisory relationship between DG COMP and NCAs. The arrival of the ECN Model Leniency Programme has a similar rationale. Second, the various types of training programmes and the strategic outsourcing to deliver the programmes may be evident as well. The training programmes have proven useful to national competition officials and judges. Through different deliveries such as exchanges and outsourcing to third parties, DG COMP is able to instruct national officials the operational techniques. Instead of giving direct orders, DG COMP is able to ‘supervise’ other competition enforcers by its expertise and experience through these training schemes. Third, the bilateral cooperation in the international context suggests further evidence of DG COMP’s supervisory role. As a senior competition authority, DG COMP is

willing to provide informal guidance to other competition authorities. For example, DG COMP assisted the Chinese government to establish their Anti-Monopoly Law in 2005. With solid performance in the ECN and global networks, the supervisory role of DG COMP exists both in the EU and externally in the international context.

The new supervisory role gives DG COMP the opportunity to be the policy entrepreneur²⁰⁷ and the trustee of European competition regime. (Mojane, 2001; Wilks, 2005b) It is expected that DG COMP will act as a supervisor in the ECN and as a leading policy entrepreneur in the international context. What remains uncertain is whether it is a deliberate agenda of DG COMP's exercise of bureaucratic autonomy, or whether it is an unintended consequence of the modernisation reform. After all, the multiple roles of DG COMP in the competition regime have been redefined.

8.4 Two Levels of the Principal-Agent Relationship

Since the competition policy is one of the most independent EU policies (Komninos, 2008), this research examines the bureaucratic autonomy of DG COMP and the substantive and procedural changes in the modernisation reform. Based on the bureaucratic autonomy approach, the empirical chapters discuss six aspects of bureaucratic autonomy and identify that DG COMP has successfully increased its 'traditional' autonomy in areas such as political differentiation, network multiplicity, and organisational capacity. The bureaucratic autonomy analysis further focuses on the relationship between DG COMP and other actors in the competition regime. For example, the study of the regulatory and operational aspects of ECN aims to explain the relationship between DG COMP and NCAs. The existence of bureaucratic autonomy for DG COMP in the modernisation reform can be seen as a basis to describe the principal-agent relationship of DG COMP with other actors in the regime. Therefore, the bureaucratic autonomy approach is able to

²⁰⁷ 'Entrepreneurship may involve setting the policy agenda, popularizing the issue and potential solutions, building support and legitimacy for particular positions, inventing solutions that overcome political hurdles and brokering deals.' (Roberts, quoted in Zito, 2001: 586)

enhance our understanding of the principal-agent relationships in the European competition regime, in particular the relationship between DG COMP and NCAs in the ECN, and helps to explain the multiple role of DG COMP in the modernised European competition regime.

The study would lead us to believe that the European Union can be seen as a principal-agent relationship, with the Commission as the primary agent. In the competition regime, DG COMP is acting more like an independent regulatory agency (IRA). (Thatcher, 2005; Coen and Thatcher, 2008) DG COMP experiences limited control from the Council and virtually no control from the European Parliament. The modernisation reform does not aim to change this settlement. After the modernisation reform, DG COMP is still autonomous from the mainstream EU policy-making process, such as the comitology and the co-decision. (Pollack, 2003) In other words, the existing principal-agent relationship is unchanged and regarded as the first level of the principal-agent relationship.

The decentralisation of enforcement invites NCAs to apply Article 81 and 82 (now 101 and 102) of the Treaty. The creation of a quasi-binding ECN provides the venue for further coordination between DG COMP and NCAs. Therefore, the emergence of a new relationship between DG COMP and NCAs is witnessed through the cooperation and achievement in the ECN. DG COMP is particularly well placed to deal with complex cases or cases involving more than three Member States. DG COMP is further entitled to initiate own proceedings at any time and substantially put an end to the proceeding of a NCA. The ECN Model Leniency Programme and the zero application of Article 11(6) competence also suggest a promising development of the relationship between DG COMP and NCAs. Therefore, the study of the ECN enforcement in Section 6.4 confirms the leading role of DG COMP and **the hierarchical relationship in the European Competition Network (ECN), in which DG COMP is the principal** and NCAs are the agents. This is the second level of the principal-agent relationship.

In this way, the research identifies the dual roles of DG COMP in the principal-agent explanation. On the first level of the principal-agent relationship, DG COMP continues to be the agent of the conventional principals in the EU. On the second level of this relationship, DG COMP becomes the principal and NCAs are the new agents in the ECN. Therefore, two levels of principal-agent relationship are observed in the context of multilevel governance. (Hooghe and Marks, 2001; Coen and Thatcher, 2008)

8.5 Conclusion

The modernisation reform in the EU has shown us the important role of DG COMP in the ECN and other networks, the ability of DG COMP to create the bureaucratic autonomy for itself by urging the paradigm shift from the SCP paradigm to the Chicago School paradigm and more economic assessment in the competition enforcement, and the capacity of DG COMP to manage a series of organisational changes and their follow-up developments. The resemblance of the EU and the U.S. competition regime is seen. The reform also shows the salience of European competition regime in which DG COMP is able to establish a new principal-agent relationship with NCAs and to maintain its highly independent role as an agent to the Council and the EP in the conventional principal-agent relationship. The enforcement of competition policy remains detached from the Member States' preferences and exempt from the involvement of the Council and the EP. The modernisation reform further charges DG COMP with a new supervisory function through the design of ECN and the implementation of modernised competition rules. The new supervisory role allows DG COMP to be the policy entrepreneur and the trustee of the European competition regime. DG COMP continues to enjoy its multiple roles in the proceedings of competition enforcement.

This study has also discovered the limits of bureaucratic autonomy for DG COMP in the modernisation reform. The modernisation reform does not provide DG COMP with the opportunity to explore the possibility of independent recruitment and financial autonomy, in particular, the budgetary

discretion and the availability of own resources. There is still a long way to go if DG COMP attempts to evolve as an independent regulatory agency.

This study on the bureaucratic autonomy of DG COMP has, it is hoped, provided a certain degree of understanding about the changing role of DG COMP and the new appearance of the modernised European competition regime. Therefore, it is fair to say that DG COMP has increased its 'traditional' autonomy in areas, such as the political differentiation, the network multiplicity, and the organisational capacity. The limits of bureaucratic autonomy for DG COMP are also seen in certain fields. The modernisation reform is indeed the most important policy development and a reform on the largest scale in the history of European competition regime. DG COMP is still the most important actor in this modernised regime.

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Appendix I – Abbreviation List

Abbreviation	Full Title
BER	Block Exemption Regulation
CCE	Chief Competition Economist
CEECs	Central and East European Countries
CET	Competition Economist Team
DG COMP	Directorate-General for Competition
DG MARKT	Directorate-General for Internal Market and Services
DG TREN	Directorate-General for Transport and Energy
DG ENER	Directorate-General for Energy
DG MOVE	Directorate-General for Mobility and Transport
DG TRADE	Directorate-General for Trade
DoJ	Department of Justice
EAGCP	Economic Advisory Group on Competition Policy
ECCG	The European Consumer Consultative Group
ECN	European Competition Network
EPO	Economic Policy Office
EPSO	European Personnel Selection Office
ESSCP	Economic Seminar Series on Competition Policy
FTC	Federal Trade Commission
ICN	International Competition Network
IRA	Independent Regulatory Agency
JFTC	Japanese Fair Trade Commission
MNC	Multi-national Corporation
MoU	Memorandum of Understanding

Abbreviation	Full Title
NCA	National Competition Authority
OECD	Organisation for Economic Cooperation and Development
OFT	Office of Fair Trading
WTO	World Trade Organisation

Appendix II – Details of Interviewees

Interviewee Number	Type of Interviewee	Position
1	DG COMP Official	Head of Unit
2	DG COMP Official	Administrator
3	DG COMP Official	Administrator
4	DG COMP Official	Administrator
5	DG COMP Official	Head of Unit
6	Lawyer	Partner
7	Lawyer	Partner
8	National Competition Official	Director-General
9	National Competition Official	Administrator
10	DG COMP Official	Economist
11	National Competition Official	Administrator
12	Academic	Senior Lecturer
13	Academic	Professor
14	Academic	Lecturer
15	Academic	Professor
16	Academic	Reader
17	Lawyer	Partner
18	Lawyer	Partner
19	Lawyer	Senior Associate
20	National Competition Official	Director

