

Datum

2016-01-31

Ansökan om forskningsmedel

Observera att bilagor endast ska skickas elektroniskt till konkurrensverket@kkv.se

1 Sökande (huvudansvarig för projektet)

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3 Projektbeskrivning

Projekttitel För att radbryta texten, använd Alt + Enter

Economics and Value Judgment: Between Accountability and Independence of Competition Agencies

Projektet avses starta/startade, datum

2016-09-01

Projektet beräknas vara slutfört, datum

2019-09-01

Sammanfattning av projektets syfte, betydelse och genomförande (högst 1400 tecken).

För att radbryta texten, använd Alt + Enter

Bifoga en utförligare projektbeskrivning (max 10 A4-sidor).

4 Kostnadsredovisning

4 Kostnadsredovisning

Fyll i de ofärgade cellerna med för projektet gällande information, så uppdateras de färgade automatiskt. Ge akt på de felmeddelanden i rött som visas vid överträdelse av Konkurrensverkets riktlinjer för anslag till forskningsprojekt.

Projektår 1				
Personnamn, akademisk titel (bifoga CV)	Månadslön enligt KKV:s riktlinjer	Anställningstid i projektet, månader	Arbets id i procent av heltid	Lönekostnad inkl. sociala avg.
Dr Julian Nowag	37000	12	75%	492 840
	Summa övriga kostnader (hämtas från tabell 4a)			20 000
	Total kostnad inklusive sociala-, och förvaltningsavgifter			692 334

Projektår 2				
Personnamn, akademisk titel (bifoga CV)	Månadslön enligt KKV:s riktlinjer	Anställningstid i projektet, månader	Arbets id i procent av heltid	Lönekostnad inkl. sociala avg.
Dr Julian Nowag	37000	12	75%	492 840
	Summa övriga kostnader (hämtas från tabell 4a)			20 000
	Total kostnad inklusive sociala-, och förvaltningsavgifter			692 334

Projektår 3				
Personnamn, akademisk titel (bifoga CV)	Månadslön enligt KKV:s riktlinjer	Anställningstid i projektet, månader	Arbets id i procent av heltid	Lönekostnad inkl. sociala avg.
Dr Julian Nowag	37000	12	75%	492 840
	Summa övriga kostnader (hämtas från tabell 4a)			20 000
	Total kostnad inklusive sociala-, och förvaltningsavgifter			692 334

4a Redovisning övriga kostnader

	År 1	År 2	År 3
Material och utrustning	5 000	5 000	5 000
Resor	15 000	15 000	15 000
Övriga kostnader			
Summa	20 000	20 000	20 000

5 Kostnadssammanfattning (anges i kronor) för nu sökt anslag

Total återstående projektkostnad

2 077 002

Därav söks från

Tidigare erhållna anslag från

Konkurrensverket	Annan anslagsgivare *	Konkurrensverket	Annan anslagsgivare **
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*Anslagsgivarens namn

Ansökan inlämnad, datum

Sökt belopp

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**Anslagsgivarens namn

Ansökan beviljad, datum

Beviljat belopp

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6 Övriga projekt som samtidigt kommer att ledas av huvudansvarig

Projekttitel För att radbryta texten, använd Alt + Enter

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Namn och institution på personer som beviljas forskningsbidrag kommer att publiceras på Konkurrensverkets webbplats.

Economics and Value Judgment: Between Accountability and Independence of Competition Agencies

Abstract

The key question that the proposed project aims to address is: To what extent can a competition policy which is based on economic principles and oriented towards efficiency create conflicts with constitutional principles of a democratic order? The project is an interdisciplinary one as it combines competition law and economics with and constitutional theory, jurisprudence and political science. The project examines in particular the interaction between the political stakes in the competition law and democratic principles such as separation of powers and democratic accountability. At its core the project that examines the appropriate role of democratic accountability and therefore politics in the enforcement of competition law. It challenges the conventional view that the application of competition law based on economic principles is a technical and apolitical exercise. In course of this investigation, the project uses policy documents such as the EU and national competition law guidelines as a case study to highlight political elements in the traditional competition analysis. The project contributes to the understanding of the political stakes involved in competition policy and helps framing the debate on the direction of competition law and policy and engages with the Competition Authority and the Parliament.

1. Project Description

Aim:

The proposed project challenges the orthodox and widely held view that competition law becomes an apolitical merely technical exercise where the application of competition law is based on sound economic principles and where it is oriented towards increasing efficiency. The project takes a cross-disciplinary approach in linking jurisprudence, constitutional theory and political science with competition law and economics. As a case study the project uses competition policy documents such as guidelines to explore the core research question: To what extent can an economics-based competition policy pose challenges to the constitutional principles governing a democratic order?

Background:

Globally, competition law has rapidly gained importance. In the last decades the number of countries with competition law regimes has nearly doubled to more than a hundred and twenty now. At the same time, within competition law the trend has been to move away from a traditional legal approach towards a more economics-based approach. The move towards economics provides an additional justification for establishing (often) independent competition agencies to apply these laws, because these agencies possess the necessary expertise in law and economics. Such expert competition agencies shape how fundamental parts of the economy are organised with their decisions and policies. Occasionally political elements are highlighted in competition proceedings when powerful companies in particular from other States are subject to proceedings. Such claims may rise in the context of the recent decision of the Ukrainian competition authority to fine Gazprom or in the context of the EU's Google investigation. Yet, the extent to which political stakes play a role within the law and economics-based framework has not been sufficiently addressed by existing competition law scholarship.

The view that the application of competition law is an apolitical, merely technical exercise has to some extent already been challenged by some sobering scholarly studies on the problematic interaction of competition law and public policy (Townley 2009, Monti 2002, Kingston 2012, my own PhD thesis). Moreover, this year Ezrachi (my former supervisor) showed how, beyond core competition principles, competition law provisions are effected by different variables of the legal systems in which they are embedded.

Yet, these studies have focused on ‘external’ political elements that affect competition law. The focus has not been on the political elements ‘within’ an approach towards competition policy that is based on economics. More importantly, main stream competition law sees the interaction of other policies with competition law very critical because this would introduce political value judgement into a ‘pure’ economics-based competition law (OFT 2010; Odudu 2006, 2010; Whish/Bailey 2015).

2. Research Outline

The project will find its basis in an interdisciplinary methodology. It links jurisprudence, constitutional theory and political science with competition law and economics. It explores the extent to which political elements within an economics-based, efficiency oriented competition policy can be identified and the extent to which these pose challenges to the constitutional principles governing a democratic order. It will address this question by in three subsets of questions.

First and most importantly the project asks: To what extent can we identify political elements in an economics-based competition policy? This part of the project will build its analysis on work of Dworkin (1977) and Chang (2014). Dworkin’s theory of legal interpretation and rule making highlights how legal decision making is based on moral and political preconceptions. Chang’s analysis highlighted why economics is not a science that establishes an objective truth but rather seems to be based on political views. This part of the project therefore explains that competition policy is always based on moral and political preconceptions and that the ‘flight into economics’ as guiding principle to a rational competition policy does not lead to the exclusion of political elements either. Dworkin’s and Chang’s work is used to establish the framework for analysing competition policy routed in economics. This part develops a continuum between the purely mechanical application of the law on the one end of the scale and legislative choices on the other end of the scale. This scale is used in the second part of the project.

Second, the project examines, in form of a case study, national and EU policy documents such as Guidelines and where necessary individual decisions if these establish an important precedent going beyond the guidelines. It explores the extent to which the policy choices taken by a competition agency involve political elements and maps out where they should be placed on the continuum established in the first part. The research can benefit from experience gained during my PhD where I examined EU competition law with regard to environmental protection. This research provides me with sufficient knowledge of the area and helps me in identifying political stakes. Moreover, my PhD research is a good starting point as it also highlighted how environmental consideration might feature within competition’s internal efficiency framework rather than as an external parameter that is balanced against competition law. This part of the examination can also benefit from the work of Hovenkamp (2011) who examined the interaction between distributive justice and consumer welfare in competition law. His work can assist in identifying further political elements in competition policy.

Third, the final part the project examines these policy decisions from a normative point of view and engages with the legislator. With a view to the constitutional principles of separation of powers and accountability, this part asks: How the level of political stakes in competition

decisions interact with issues related to separations of powers and accountability? Are there decisions that the competition agency currently takes that should rather be taken by the legislature? Do we have sufficient arrangements in place to ensure accountability of the (independent) competition agency, in particular when taking into account the findings of the second part of the research project? This part of the project focuses on democratic and procedural accountability. It builds in part on the work of Prosser (2010) who has examined accountability-related issues with regard to independent agencies also covering competition agencies. Yet, Prosser's work has focused on accountability of such agencies when dealing with 'external' policy considerations. In contrast accountability with regard to the political stakes within an economics-based competition policy is largely unexplored. Moreover, the third part should also engage with *Konkurrensverkets* and other competition agencies as well as the legislator to ascertain the level of awareness of the relevant parliamentarians to the political elements in an economics-based competition policy. In this regard this project would provide a wonderful opportunity to interact with *Konkurrensverkets*. Moreover, I can use my network to engage with other agencies, equally UNCTAD offered to help with further contacts. In terms of the Swedish parliament this part will make use of the *sällskapet riksdagsledamöter och forskare* (RIFO) network. This network facilitates the contact and dialogue between members of the Swedish *Riksdag* and researchers. This part of this research project will involve structured interviews/a questionnaire to establish the level of awareness with regard to the political elements present in apparently technical competition policy decision.

Outcome:

Bringing together all three interrelated components of the research, the project tries to draw conclusions which are not only relevant for Sweden, the EU and its member States but are important more broadly for the enforcement of competition law by independent agencies around the world. The project is also aimed at helping to further the understanding of competition law as a form of public law that has gained some attention recently (Dowdle 2014). Additionally, the research project provides interesting new perspectives for regulatory tasks of other independent agencies. Such agencies, like sector regulators, increasingly have to apply competition provisions and more broadly aim for an economics-based approach to regulation.

Competition law expands its realm across the globe and initiatives like those of the International Competition Network aim at fostering competition policy by independent agencies based on economic principles globally. Against this background, the proposed areas of research urgently need scholarly efforts to address the challenges with regard to competition policy, accountability and separation of powers.

3. Methodology

This project is interdisciplinary, it brings together: jurisprudence, constitutional theory and political science with competition law and economics. In its first part the project is engaging with jurisprudence in particular Dworin's theories of legal interpretation as well as economics. In the context of economics Chang will provide the basis to examine the extent to which political values influence the economic analysis. In its second part the project will use social science methods, as it will be collecting material from Commission guidelines and will perform a mapping exercise. This mapping exercise will involve placing different competition policy decisions on the continuum between on the one hand pure application of the law and legislative choices on the other end. The third part is normative and engages with political science and constitutional theory. In this part the project in particular engages with political science and theories on regulation which deal with the so called outsourcing of decisions to independent agencies. It moreover employs social science methods when it engages with the members of parliament in

particular where it uses a questionnaire/structured interview to establish the awareness of Member of Parliament in terms of the political elements in competition law.

4. Time Frame and Plan of Action

This research project has a three-year time frame. The project is ambitious in its scale and scope, but its feasibility is greatly enhanced by previous experience in the field. I have partly already gathered and analysed the relevant EU guidelines. Additionally, I have developed networks of scholars and policy makers and which will further expand in my new role as issue editor of a leading law review on competition law enforcement (The Antitrust Enforcement Journal). This greatly facilitates my understanding of the processes behind the drafting of competition policies and provide opportunities to engage in discussion with and receive feedback from the relevant officials. My previous experience in EU competition policy and its interaction with environmental protection will also help the proposed research to progress smoothly and successfully. The research project will develop in four phases:

1. Framework Stage:

September 2016- September 2017

This time will be devoted establishing the theoretical framework for the case study. On the basis of a systematic literature review, I will conceptualise the jurisprudential framework based on the work of Dworkin's theory of legal interpretation and rule making. I will combine this with the examination of literature on the political elements that might drive economics (Chang (2014)). In the end I should have established the structure for a continuum between -on the one end of the scale- the purely mechanical application of the law and legislative choices on the other end of the scale. I plan to present my work to a jurisprudence/legal theory audience to ensure that I can include their feedback. The framework established during this phase should serve as a yardstick for the subsequent case study.

2. Case Study:

September 2017- September 2018

Having established the framework for analysis, the case study begins. In this context I will identify the main EU and national guidelines in the area of competition law that are relevant for the study. My previous work which has examined many of the relevant guidelines will be an advantage as I am already familiar with the majority of the material. During this time I will also write the first journal article which summarises the theoretical framework bringing together jurisprudence, economics and competition law. Furthermore, I will submit my proposal for the monograph to a widely recognised publisher such as Oxford University Press. Moreover once the first preliminary findings of the cases study examining the policy documents are available, I will design a template for a questionnaire/structured interview to engage with competition agencies and Member of Parliament using the RIFO network.

3. Normative evaluation and Dissemination:

September 2018- September 2019

In the final year of the project I will be writing the last part of the monograph, the evaluation of the case study in terms of principles of separation of powers and accountability. I will also summarise the findings of the case study in form of a journal article. Finally I will engage and disseminate the research findings by presenting at academic conferences and start the preparations for meetings with

the policy makers in various fora, like the OECD, the International Competition Network or the United Nations Conference on Trade and Development (competition law section).

5. Research Output

I plan to write a monograph and submit at least three articles to leading peer-reviewed journals: 1) A jurisprudential article on the political in ‘merely technical’ competition law 2) an article on the level of political stakes in competition law, based on my case study 3) an article on the separation of powers and accountability of competition agencies when pursuing a economics bases competition policy.

The main scholarly output of the project will be a research monograph to be published with a widely recognised publisher such as OUP; the manuscript should be complete by July 2019.

Throughout the duration of the project, research findings will be presented at important conferences in the field of competition law and jurisprudence.

Furthermore it is planned to present the key research findings at international competition law meetings like at the OECD, the International Competition Network or the United Nations Conference on Trade and Development where policy makers regularly meet. This should help to promote the understanding of the policy role of competition beyond academia.

6. Dissemination

I will use my already established network to disseminate the research findings. I will present the findings at some of the leading conferences in the competition law field like the antitrust enforcement symposium in Washington/Oxford and aim to present the findings also at international venues where policy makers gather for exchange like the OECD, the International Competition Network or the United Nations Conference on Trade and Development (competition law section) where I have already made some contacts and will be presenting a study which is currently prepared for the Antitrust Enforcement Journal.

YEAR 1:

Present a paper on jurisprudence, economics and competition law at a jurisprudence conference or workshop and at a competition law conference where practitioners and academics interact, like the Antitrust Enforcement Symposium which is organised by Oxford Centre for Competition Law and Policy.

YEAR 2:

Publish an article based on the work of the first year which highlights the interaction between competition law, jurisprudence and economics. Moreover, secure a book contract with a widely recognised publisher such as Oxford University Press Oxford University Press or Hart Publishing that publishes to a wide and interdisciplinary audience. I would also present some preliminary results at various institutions, like universities.

YEAR 3:

Complete the monograph, submit the second article presenting the findings of the case study to a top-rated competition law journal. Present the findings of the case study at a practitioner venues like the OECD, the International Competition Network or the United Nations Conference on Trade and Development (competition law section) and start preparing the publication of the third article on the normative implications of the study with regard to separation of powers and democratic accountability.

7. Impact

The impact and significance of this project are threefold.

First, this project is research at the forefront since this is an unexplored area of competition law and economics, and thereby contributes to driving the relevant scholarship forward. It helps in better understanding the underlining economic and political implications of competition policy issues, thereby helping in the framing of the debate.

Second, the research draws conclusions not only relevant for the national competition agencies or the EU. Instead the conclusion are important more broadly for independent competition agencies around the world. The project may, moreover, provide new perspectives for other independent agencies with regulatory tasks. In particular, as these increasingly apply competition provisions and more broadly aim for an economics-based, efficiency oriented approach.

Third, and crucial to this project, it also engages *Konkurrensverkeets* and other the competition agencies and the relevant Members of Parliament in the debate on political stakes in an apparent apolitical, technical area. As such, this project seeks to tie research-findings to actors involved with the aim of furthering a fundamental aim: separation of powers and democratic accountability. In this way the project improves the efficacy of these important elements of a democratic society. Moreover, it should provide the theoretical basis for future legislative interventions by contributing to the understanding how competition agencies make and should make their decisions.

8. References

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