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THE INSTITUTIONAL DESIGN OF
EUROPEAN COMPETITION POLICY

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Abstract

This paper analyzes the institutional design of the European competition policy system. Besides the multi-level public enforcement, the paper describes other two fundamental dimensions of the European competition policy system: the relationship between public and private enforcement and that between competition law enforcement and sector specific regulation, with particular regards with the Electronic Communications sector.

The main effort of the paper consists in representing the EU Competition policy system as a web of vertical and horizontal relationships among a large set of actors, sometimes coordinated by formal or informal mechanisms but still characterized by competence overlaps and strategic interdependencies. Finally the paper aims at assessing the relevant economic trade-offs associated to these overlaps and interactions in terms of efficiency and effectiveness of the system, giving some policy suggestions for the future evolution of its overall design.

Keywords

Competition policy institutional design, multi-level governance, public and private enforcement, competition policy in regulated industries

1. Introduction*

Competition policy constitutes an important facet of "market manufacturing". Indeed, it consists of a system of actors and rules explicitly meant to protect and enhance the competitive dynamics of markets and their efficient functioning. In Europe, competition policy has played an even deeper role in "manufacturing" the market than elsewhere, since its development has historically been influenced by the aim to contribute to the creation of a single geographical market space - the common internal European market.

Notwithstanding its relevant role in the design of markets and antitrust rules, European competition policy has not been characterized by a rationally designed enforcement system and its evolution seems rhapsodic in many ways. It may be more properly described as the result of more or less unintended evolutionary patterns linked to political forces, existing constraints and, to a certain extent, chance events. In this paper we investigate whether, in spite of this tortuous evolution, the current EU competition policy framework is nonetheless evolving towards an efficient institutional design.

In order to evaluate the characteristics of the EU competition policy system, we adopt (and adapt, where appropriate) a framework of analysis based on the notion of "multilevel governance", originally derived from the political science literature and more recently cast in economic terms (Brousseau and Raynaud, 2006). The notion of "multilevel governance" has gained wide currency both in Europe and elsewhere. It refers to a system of allocation of powers and responsibilities among vertically related policy layers (EU institutions, nation-states, regions, etc.), each of which is autonomous from the others, yet it cannot be considered completely free to exercise such powers and responsibilities, since the attribution of competences is not clear-cut (Grande, 1996; Marks et al., 1996; Scharpf, 1994).

The EU competition policy system, similarly to most aspects of the EU institutional framework,¹ does fit this description, although only a few contributions have adopted this approach in the analysis of EU competition policy (McGowan, 2000; Budzinsky and Christiansen, 2004; Walzenbach, 2006), and generally not from an economic perspective (with the exception of some works by Kerber, and particularly Kerber, 2003 and 2009).

The EU competition policy system has traditionally been characterized by a rather strong centralization of competences and powers held by the EU Commission. Indeed, as many National Competition Authorities (hereinafter, NCAs) were born after the Commission started playing its role in competition policy, the bulk of Commission's decisions shaped the evolution of national antitrust approaches. However, recent policy developments have strengthened the "multi-level" nature of the system. In particular, the so-called "modernization" of competition policy, whose main step has been the enactment of Regulation 1/2003 (hereinafter REG)², has increased the extent of decentralization of competition policy enforcement, thus fostering the role played by NCAs. As a result, powers and responsibilities in relation to either the definition of substantive competition rules or competition enforcement are currently shared among actors, placed at different governance level, none of which can operate independently from the others.

This vertical dimension is crucial to understand the institutional design of European competition policy, yet an exclusive focus on it would entail the risk of missing important features of the overall picture. Indeed, the vertical dimension of the multi-level governance interfaces horizontally with at

* We are grateful to Anna Renata Pisarkiewicz and Lúcio Tomé Fêiteira (Law Department, European University Institute) for their useful comments and suggestions.

¹ The principal focus of the multilevel governance literature has for some time been on policy areas that primarily involve budgetary issues, as this literature developed to provide an account of the evolution of the relationships among EU decision-making layers, with specific regard to the allocation of structural funds and to regional policies (Marks, 1993).

² Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty.

least two other very important “parallel domains” of competition policy. First, besides administrative bodies (the EU Commission and NCAs), also national courts can apply competition law, giving rise to the so-called private enforcement. Second, within regulated sectors, such as for instance the Electronic Communications or the Energy sectors, National Regulatory authorities (hereinafter, NRAs) play an important role in the design of competition rules. This is because EU policy has been recently pushing towards a convergence of competition law and sectoral regulation, formally defining competition enhancement as a main goal of NRAs³.

Therefore, the EU Competition policy system amounts to a dense web of vertical and horizontal relationships among a large set of relevant actors, all concurring to define the institutional environment in which competition takes place. These relationships, governed by both formal and informal coordination rules, imply significant competence overlaps and strong interdependencies. This institutional design raises two fundamental questions: how do these overlaps and interdependencies affect the overall effectiveness and efficiency of the system? What problems, if any, do they solve or, on the contrary, do they cause?

In order to assess the implications and trade-offs associated to these overlaps and interactions, our analysis highlights whether the actions of the different subjects involved in competition policy enforcement are complements or substitutes from the perspective of the achievement of a competitive EU market. The analytical focus is placed on “core” competition policy enforcement (i.e. to activities relating to art.101 and 102 TFEU), and particularly on the three aspects of the system that we deem most significant, namely: (a) the design and the vertical allocation of competences and powers among the European Commission and NCAs (section 2 below); (b) the horizontal allocation of competences and powers among parallel competition policy domains, that is the interactions between administrative and judicial enforcement (section 3) and between competition law enforcement and national regulation (section 4).

2. The Vertical design and allocation of competences and powers within the EU multi-level competition policy system

The vertical design of the EU competition policy system can be described by reference to two main aspects: (i) the allocation of competences in the design of substantive competition law and (ii) the allocation of competences in the enforcement of competition policy. The current EU system is characterized by: (a) a high degree of harmonization of substantive law; (b) a relatively high degree of enforcement decentralization, mitigated by a strong unifying role played by the European Commission.

As for (a), the provision of substantive competition law was envisaged by the founders of the European Community as a key instrument to ensure the integrity of the internal common market and has therefore been a longstanding feature of the EU competition policy system. Consequently, European competition law is uniformly applied to all behaviours and practices affecting “trade between member states”.⁴ At the same time, this design does not exclude the existence of national laws and the possibility that these may to some extent diverge from European law, although the importance of these divergences has been substantially reduced through the modernization process.⁵

³ A complete analysis of the multi-level system would also take into account the fact that all the competition policy decisions adopted by administrative bodies (Commission and NCAs) are subject to judicial revision by the General Court (previously the Court of First Instance), the European Court of Justice or national (administrative) courts. In this paper we have chosen to disregard this aspect.

⁴ As a matter of fact, the European Court of Justice has always adopted a wide interpretation of this general concept, i.e. ECJ, 13/07/66, *Consten and Grundig/Commission EC*, C-56 and 58/64. More recently, the Commission has adopted a Communication aimed to clarify and delineate the concept. Communication 2004/C 101/07.

⁵ Indeed, art. 3(1) REG states that where NCAs and national courts apply national competition law to illicit behaviours within the meaning of European competition law, they shall also apply the latter to such behaviours. This naturally tends

As for (b), the current design of the system is the result of more recent developments, as it follows the enactment of Regulation 1/2003 (REG), pursuant to which member States must designate competition authority(ies) responsible for the application of Articles 101 and 102 TFEU (art. 35 REG), which can apply Articles 101 and 102 of the Treaty in their entirety in individual cases⁶ (art.5) with powers very similar to those held by the Commission.⁷

Both aspects of the vertical design of the EU competition policy system could in principle be analyzed from an economic perspective. However, we believe that focusing on the allocation of enforcement competences allows to grasp more relevant insights in terms of efficiency of the overall system. This is for at least two reasons. First, substantive law has been rather static in the past few decades within developed economies' jurisdictions, thus placing at the center stage of the analysis the way in which the law is enforced rather than its substance. Second, competition law is principle-based, which implies that relevant norms are filled of concrete significance only when the principle is applied, i.e. at the enforcement stage.

Therefore, in what follows, we will focus on competition policy enforcement and analyze the current EU system in terms of optimal degree of enforcement decentralization, following insights offered by the fiscal federalism literature (Oates, 1972; Tiebout, 1956) and the relatively less developed legal federalism literature (see, for instance, Faure, 2004; Van den Bergh, 1998; Kerber, 2003 and 2009).

The choice of the optimal degree of enforcement decentralization involves relevant trade-offs. On the benefits side, a first advantage of decentralization may reside in the reduction of the Commission's workload that may allow it to selectively focus on the most relevant cases. Second, decentralization provides further benefits in terms of the effective use of dispersed information. Enforcement requires to identify rule-breakers by observing their behaviour and measuring the anti-competitive effects locally generated, sometimes evaluating the lawful/unlawful nature of observed practices on the basis of sector - and context-specific information. As NCAs may have easier access to such information than a centralized enforcer (the Commission), they are in a better position to apply competition rules. In this respect, a decentralized system appears comparatively more efficient than alternative arrangements. Finally, a decentralized enforcement system may favor dynamic efficiency because it entails a learning process that, through the comparison of the costs and benefits of competing legal rules and precedents, leads to the emergence of the most efficient rules. This has been highlighted, in particular, by the literature on regulatory competition (see, for instance, Sun and Pelkmans, 1995; Sinn, 1997; Ogus, 1999; Van den Bergh, 2000) and, with specific regard to the competition policy domain, by Kerber (2003 and 2009) and Van den Bergh and Camesasca (2006; ch. 10).

A further advantage of decentralization focused upon in the fiscal federalism literature - the greater ability of a decentralized system to meet local preferences - is more questionable when applied to the competition policy domain, since satisfaction of consumers' short-term preferences is not necessarily consistent with long-term welfare maximization (assuming this is the objective of competition policy)⁸ and the risk of "regulatory capture" is possible also for competition authorities.

On the opportunity costs side, enforcement decentralization has some negative implications created by the uncoordinated interplay among the actions of several decentralized enforcers that would, of course, not represent an issue in a centralized system. In particular, we refer to (a) possible duplication of enforcement costs, as multiple NCAs may intervene in the same case; (b) legal uncertainty associated to the possibility of treating differently - in different EU countries - similar cases; and (c)

(Contd.) _____

to reduce conflicts among substantive normative systems. Moreover, art. 3 (2) REG reduced also abstract divergences of EU and national competition rules.

⁶ Before REG the exemption of art. 101(3) could be enforced only by the Commission.

⁷ From art. 7 to 10 REG for the Commission's powers and art. 5 REG for NCAs'.

⁸ This could be the case of some exclusionary price practice, like predatory pricing or selective "win-back" offers, Nicita (2009).

the externalities created by the positive or negative external effects of the control of anticompetitive behaviour not taken into account by a single NCA .

The latter is a particularly important issue. Externalities among the actions of different NCAs arise in presence of two joint conditions: (a) anticompetitive behavior concerns a relevant geographic market that crosses national boundaries; and (b) either joint action by multiple national authorities is needed to effectively control anticompetitive behavior (so that NCAs' actions are complementary) or a single case is investigated by multiple NCAs but action by one NCA is sufficient to ensure adequate enforcement (so that NCAs' actions are substitutes).

The conventional approach to externalities in this context (Parisi and Deporter, 2006, Van den Bergh and Camesasca, 2006) assumes a symmetric setting where NCAs have identical objective functions and are self-interested and where optimality is exclusively defined in terms of enforcers' joint interests rather than in terms of some broader notion of social welfare. In this “private interest” framework, (a) when NCAs' actions are complements, enforcement activity is assumed to involve a positive externality: enforcement by one NCA raises the benefits obtainable by enforcement by the other concerned NCA(s); and (b) when NCAs' actions are substitutes, enforcement activity is assumed to involve a negative externality: action by one NCA eliminates the utility associated to further actions. As a consequence, within this framework, positive externalities entail a sub-optimal level of enforcement action (leading to under-restriction and free-riding), while negative externalities involve an excessive level of enforcement (leading to over-restriction and rent-dissipation).

Alternatively, it is possible to make different assumptions on NCAs' objective functions, by assuming that each NCA's objective function includes social welfare (i.e consumer welfare plus firm profits), but only of their own country. Under this alternative “public interest” framework, externalities arise because of the divergence of the specific interests of different NCAs whose actions are complementary or substitutes. In this case, actions that would improve overall efficiency of the internal market may not be adopted because their costs are borne by a given NCA, while their benefits are enjoyed in a different country. Alternatively, NCAs may adopt actions that are sub-optimal for overall efficiency at the European level because they entail benefits for a given NCA's own country, while the costs fall predominantly on different countries.

However, irrespective of the specific objective function assumed, the important point to stress is that decentralization involves opportunity costs, due to externalities that would be absent if enforcement were performed by a single entity. These costs result from the attainment of a second best level of enforcement, which can be either higher or lower than it is socially optimal.

What is crucial to us is to highlight how the current EU multilevel competition policy system scores in terms of the highlighted trade-offs. The analysis of the rules disciplining the vertical allocation of competition policy competences allows us to reach two broad conclusions. The first is that the vertical design of the allocation of competences within the EU multi-level system appears to reflect awareness of the above-mentioned trade-offs, as it incorporates some features typical of a centralized system and some coordination rules susceptible to mitigate the costs of decentralization. The second is that a hybrid system that involves some competence overlaps such as the current EU institutional framework may be considered a relatively more efficient system than a fully centralized or a fully decentralized one.

This hybrid multi-level system incorporates rules that may overcome the risk of duplication of enforcement costs and of legal uncertainty associated to the adoption of a fully decentralized system. This is the case, for instance, for art. 11(6) REG, providing that the initiation by the Commission of proceedings for the adoption of a decision shall relieve NCAs of their competence to apply those articles, and of art. 16(2) REG, providing that NCAs rulings on agreements, decisions or practices under Article 101 or Article 102 of the Treaty which are already the subject of a Commission decision, should not run against the decision adopted by the Commission.

Most importantly, the EU multi-level system incorporates rules that may address the negative implications of the existence of externalities in a decentralized system. First of all, the European

Commission exerts exclusive jurisdiction when anticompetitive practices within the meaning of art.101 or 102 affect more than three member states, whereas the EU Commission Notice on cooperation within the Network of Competition Authorities provides for parallel enforcement by multiple NCAs if two or three domestic markets are affected. Thus, the multi-level system seems to foresee centralization when externalities are particularly relevant.

Moreover, rules having the effect of minimizing the negative effects of externalities by promoting cooperation and coordination among NCAs and between NCAs and the Commission have been set in place. The Commission and the NCAs compose a network of public authorities (European Competition Network - ECN) that is supposed to “*apply the Community competition rules in close cooperation*”. To this purpose, art. 11 and 12 REG establish information exchanges and coordination procedures. Further arrangements for information and consultation have been set up. In this regard, if a NCA is already scrutinizing a case, the Commission has the obligation to consult with that NCA before initiating its own proceedings. Art. 13 REG provides incentives for cooperation affirming that where NCAs of two or more Member States have received a complaint or are acting on their own initiative under Article 101 or Article 102 of the Treaty against the same practice, the fact that one authority is dealing with the case shall be sufficient ground for the others to suspend the proceedings before them or to reject the complaint. The same applies for the Commission. These rules have the additional effect of reducing duplication of enforcement costs.

Thus, the vertical competence overlaps characterizing the EU multi-level competition policy system are governed by coordination rules aimed at minimizing to some extent the negative implications of decentralization. The overall structure of the multi-level system may therefore turn out to be more efficient than a fully centralized or fully decentralized system.

Moreover, the competence overlaps among different NCAs and between NCAs and the Commission in a context characterized by a given level of substitutability may help to mitigate the risks of regulatory capture with respect to either a completely centralized or a completely decentralized system. A decentralized system with vertical competence overlaps may, at the same time, increase accountability, since it allows closer monitoring by citizens and firms and it may raise the "minimum efficient scale" of investment in rent-seeking activities to subvert effective antitrust decisions and indeed makes renegotiation harder (Laffont and Martimort 1999, Martimort 1999).

3. The interaction between administrative and judicial competition law enforcement

Another relevant feature of the European competition policy system is the interface between public and private enforcement, i.e., between application of competition law by the Commission and NCAs, which initiate proceedings *ex officio* (public enforcement), and by national courts, which act following complaints by private parties (this is the reason why it is generally called private enforcement).

The interplay between public and private enforcement concerns both the relationship between the Commission and national courts, and the relationship between NCAs and national courts. From a more general standpoint, the whole interaction is based on a horizontal relationship between administrative and judicial enforcement, where the nature and the instruments of enforcement are different and generally considered complementary. Indeed, while courts protect the "*interests of private parties*" (or, more accurately, the rights that Community laws confer upon them), NCAs and the Commission safeguard the Community's public interest. Thus, private and public enforcement are complementary in the sense that the former ensures direct compensation to the victims of EC antitrust infringements through the payment of damages and is therefore not necessarily concerned with the issue of general deterrence, while the latter is concerned with general deterrence at the market level, and the fines it imposes are punitive in nature and not compensatory.

While conventionally interpreted as complementary, public and private enforcement should also be considered substitutes from at least two perspectives. First, they are alternative tools that may be used to ensure legal certainty, as either one would be sufficient to clarify what is the licit behavior in a

given circumstance. Second, more important for our purposes, they are to some extent substitute tools from the point of view of deterrence and fair compensation. In fact, public enforcement of competition law (both at the supranational and at the national level) is often 'regulatory' in nature, as it may impose compensatory remedies in the form of positive obligations to infringing companies, which may be implicitly assessed as a component of victims' lost profits (as it is the case, for exclusionary abuses, for remedies providing access to an essential facility at a non-discriminatory price to the benefits of the plaintiffs). Conversely, damages compensation through private enforcement can indirectly pursue public interests, because of the indirect deterrence effect that compensatory damages can cause.

The increasing extent of horizontal competence overlaps among NCAs, the Commission and national courts derives from the mentioned Regulation 1/2003 (art. 6) and from the 2008 Commission White Paper - that has called the attention on the need to strengthen the complementarity between public and private enforcement of antitrust law, foreseeing a further strengthened role of national courts.⁹ In particular, the White Paper's aim is to set out measures to address the current ineffectiveness of antitrust damages actions due to "*various legal and procedural hurdles in Member States' rules governing actions for antitrust damages before national courts*".¹⁰

By increasing the role of private enforcement, the Commission seeks to: (a) provide for compensation of the victims of antitrust infringements; (b) increase the level of deterrence of anticompetitive behaviours; and (c) decrease the probability of false negatives by increasing the number of parties that may initiate antitrust proceedings and by giving incentives to victims to reveal relevant information.

The benefits from the increased role played by private enforcement follow from the fact that the latter may address some of the concerns expressed by the Commission. At the same time, though, its overlap with public enforcement may give rise to a number of costly coordination failures, such as: (a) the possibility of inconsistent decisions and therefore the lack of uniformity in the application of EU competition law; (b) the poorly coordinated overlapping between sanctions in the form of antitrust fines and the compensatory damages awarded to victims; and (c) the scarcely coordinated overlapping between remedies in the form of commitments before antitrust authorities and the liquidation of damages.

As for (a), the possibility that national courts take decisions that are to some extent different for similar cases and eventually in contrast with Community law is a general feature of a system that envisages a high degree of decentralization of enforcement, to an even greater extent than it is the case in relation to decentralized enforcement by NCAs. However, the possibility of inconsistencies or even of outright mistakes appears particularly likely in regard to the enforcement of art. 101(3), which involves articulated economic reasoning and the delicate balancing of efficiencies and anticompetitive effects that courts may not be best positioned to perform.

As for (b), the very fact that the objectives of public and private enforcement are intrinsically different - the first being aimed at deterrence, the second at compensation - are bound to give rise to inevitable negative effects in terms of the ability of the system to determine and enforce optimal deterrence, that is the ability to minimize social costs, including the costs of both antitrust violations and of antitrust enforcement action. Indeed, even assuming that the fines imposed through public enforcement are optimally determined, i.e. leading therefore to optimal deterrence, the very overlap with private enforcement before courts could undermine such optimality since, from the point of view of deterrence, public and private enforcement should be considered substitutes. This holds if the actors involved - the Commission or the NCAs and the courts - do not take into account each other's

⁹ White paper on Damages actions for breach of the EC antitrust rules - COM(2008) 165 final.

¹⁰ The Commission points, in particular, to "the very complex factual and economic analysis required, the frequent inaccessibility and concealment of crucial evidence in the hands of defendants and the often unfavorable risk/reward balance for claimants" (White Paper, p.2).

decisions, as the amount of damages added to the amount of the (optimal) fine, clearly would generate over-deterrence.

Finally, as for (c), undertakings' commitments taken by the parties before a NCA or the Commission clearly should be quantified and included in the optimal amount of damages that should be awarded by national courts, which rarely happens.

The three issues raised above call for a substantial extent of coordination between private and public enforcement. To some extent, there are rules currently in place that appear to reflect awareness of these concerns. However, coordination is currently only partly achieved through formal means (i.e., through legislative provisions) and the debate on how to improve such coordination is still in its infancy.

In particular, some formal rules of coordination contained in Regulation 1/2003 are meant to reduce the possibility of inconsistencies and conflicts between decisions of national courts and Community law. This is the case for the leading role held by the Commission in the general enforcement of competition policy also with respect to the judicial application of antitrust law. In fact, the mentioned art. 16(1) REG states that when national courts rule on agreements, decisions or practices under Article 101 or Article 102 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running against the decision adopted by the Commission. They must also avoid giving decisions that would conflict with a decision contemplated by the Commission in proceedings it has initiated. To this purpose, the national court may assess whether it is necessary to stay its proceedings.

Moreover, similarly to the rules disciplining the relationship between the Commission and NCAs, the Commission and national courts have a reciprocal duty of cooperation, mainly in terms of information exchange, communication and consultation procedures stated by art. 15 REG. Due to the principle of "independence" of national courts, however, and to the fact that national courts protect individual rights conferred by art.101 and 102, the Commission does not have the power to relieve national courts of their power to apply art.101 and 102, as it is the case for NCAs.

The interactions between the Commission and national courts are governed by two types of coordination mechanisms, succinctly described in art. 15(1) REG. The first is activated by national courts and relates to the Commission's *amicus curiae* role, played by (a) transmitting relevant information to national courts; and (b) giving its opinion on the application of the competition rules, albeit without considering the merits of the case pending before the national courts (the opinion given to national courts thus differs from that which may be requested by NCAs, perhaps in order to limit the Commission's intervention).¹¹ In order to give its opinion, the Commission may "request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case" (art.15(3) REG).

The second type of coordination mechanism can be activated by the Commission *ex officio* (and by NCAs as well) and consists of two monitoring mechanisms. Art. 15(3) entitles the Commission to submit written observations to courts of the Member States "where the coherent application of art.101 or 102 of the Treaty so requires", both if judgment is pending and if it is appealed. It is important to note, however, that national courts are not legally bound to follow the "opinions" and the "observations" of the Commission, as they are not part of a binding act and are not subject to review by the Court of Justice.

However, these formal rules of coordination are not sufficient for at least two reasons. First, the issue of coordination is largely left to Member States' law relative to the relationship between national

¹¹ In this regard a specific but relevant information exchange issue is related to the interaction between leniency programmes and actions for damages. The Commission in the aforementioned White paper suggests that an adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant in order to avoid placing the applicant in a less favorable situation than the co-infringers.

courts and NCAs., which is much less well developed than those existing between the Commission and national courts. More specifically, European competition law, while attributing to Member States the power to submit observations to national courts on issues relating to European competition policy (but not to national competition policy), does not at present specify how a national authority should be informed on judgments applying Community antitrust law given by national courts.

As a matter of fact, only in some Member States victims of the infringement of art. 101 or 102 can rely on NCA's decision as a binding proof in civil proceedings for damages. Indeed, this has led the Commission to suggest in its "White Paper" that such a rule should be included in each national antitrust law.

Second, while the issues of the internal coherence of the system and of the creation of the internal market through homogeneous application of competition policy are explicitly addressed through the formal rules described above, the issue of economic efficiency, in terms of fulfillment of optimal enforcement, is left to the (potential) presence of informal means of coordination that are, at present, mostly lacking and highly debated.

An increased recourse to informal means of coordination should thus be called for, especially having regard to the horizontal dimension of the interface between public and private enforcement. A number of measures in this direction could be envisaged such as, for instance, the possibility for NCAs to play an *amicus curiae* role along the lines of the role that may be played by the Commission, the possibility for the NCAs to distinguish between punitive and "efficiency" components of the fine or to provide a (non-binding) estimate of the damages caused by infringements, and, finally, means to ensure that national courts take explicitly into account the adoption of commitments before the NCA in calculating damages. These measures, while not decisive, may improve the current situation.

4. The interaction between competition law enforcement and regulation: the case of the Electronic Communications sector

Competence overlaps exist also across parallel domains of competition policy, in the interplay between NCAs and National Regulatory Authorities (NRAs). The EU policy framework envisages the coexistence of competition policy and sectoral regulation, interpreting them as complementary tools¹². In the US, by contrast, competition policy and sectoral regulation are perceived as substitutes, so that competition policy intervention is ruled out in regulated sectors.¹³

Within this framework of coexistence, thus of competence overlapping between Competition law enforcement and sector-specific regulation, a recent trend, in Europe, is increasing the degree of substitutability of the two activities. This trend, falling under the label of "convergence" of antitrust and sectoral regulation, implies that, although NRAs do not enjoy formal competence on competition law enforcement¹⁴, they should be included within the competition policy system since they are explicitly attributed by recent EU directives a competition-enhancing role.

For the sake of concreteness, the implications of this convergence and the ensuing overlaps and interdependencies will be illustrated by reference to a specific regulated sector, the Electronic

¹² Commission decision of 04 July 2007, case COMP/38.784 – Wanadoo Espana vs. Telefonica; General Court decision of 10 April 2008, Deutsche Telekom vs. Commission, confirming the appealed Commission decision 2003/707/CE of 21 May 2003. As a matter of fact, the legal basis of those decision is represented by the primacy of competition law (primary law) over sector specific regulation (secondary law).

¹³ In this regard the US Supreme Court Decision, on the 13 January 2004, Verizon Communications Inc v. Law Offices of Curtis Trinko.

¹⁴ Important, despite partial, exceptions are represented by UK national Regulators (Ofcom, Ofgem, ORR), which have formal competence of competition law enforcement, concurrent to the national NCA, OFT.

Communications¹⁵ sector, where attribution to NRAs of competition enhancing aims and competition law-inspired powers is more advanced and clear.

In the Electronic Communications sector, the extent of substitutability characterizing the action of enforcers belonging to the parallel domains of antitrust and regulation has increased from two angles. On the one side, European competition law allows public enforcement bodies (both at the supranational and at the national level) to adopt decisions which can be classified as regulatory, in that they prescribe behavioral obligations. On the other side, NRAs' decisional practice, whose main aims are, by statute, the promotion of competition and the enhancement of consumer welfare tends to be based to a significant extent on concepts and categories drawn from competition policy.

As for the first aspect of the convergence - competition policy enforcers' regulatory powers – a) the vagueness of art. 7 REG leaves the Commission, in applying art. 101 and 102, the possibility to impose on dominant undertakings, in particular in recently liberalized industries, behavioural or structural remedies that not only bring infringement to an end but also design a more competitive market where that infringement will not be possible; b) art. 9 REG gives the Commission the power to render binding commitments “formally” proposed by undertakings; c) art. 101(3) states the possibility for the Commission to exempt illicit agreements from the application of art. 101(1) when these could imply productive or dynamic efficiency gains. Similar regulatory powers are assigned to NCAs by art. 5 REG when they apply EU competition law. Moreover, NCAs - when acting as European administrative bodies - can “disapply” national rules, substantially de-regulating.¹⁶ As for the second aspect - regulators' use of competition policy tools - ex-ante obligations can be imposed by NRAs only on operators having significant market power (SMP), a concept stated to be equivalent to a dominant position in antitrust analysis. Furthermore, besides basic interconnection and interoperability obligations, NRAs can impose on firms with SMP obligations that correspond to typical antitrust remedies against abuse of dominant position.¹⁷

Thus, the actions by the Commission and NCAs, on one side, and by NRAs, on the other, generally overlap, as they affect the same relevant markets. Moreover, since they pursue the same public interest - “a competitive market” – and adopt similar policy tools, they are increasingly designed as substitute tools for the pursuit of a competitive EU market. Yet, they still coexist.

This policy framework entails both benefits and costs. The benefits follow from the elements of complementarity that competition law enforcement and regulation still maintain and that justify their coexistence. In fact, ex-ante regulation and ex-post antitrust intervention would be perfect substitutes if either (a) ex-ante regulation was perfectly effective (i.e., no regulatory failures are possible) or (b) ex-post competition law enforcement had the same probability to fail as ex-ante regulation. These circumstances, however, do not seem to hold, since the effectiveness of regulation is necessarily limited by imperfect and incomplete information, higher ex-ante - before abusive conducts actually materialize – than ex-post.

Thus, regulation, restricting and specifying the set of dominant firms' licit behaviors, increases the likelihood of their compliance with competition law in markets where otherwise the probability of their abusive behavior is very high. However, competition law still plays a role (being complementary to regulation) when regulation is not effective, i.e., when ex-post it turns out that regulation has not restricted or specified enough the set of dominant firm's licit behaviors.

¹⁵ In Electronic Communications sectors a very complex regulatory system has emerged in Europe, after the 2002. The main act is represented by the Directive 2002/21/EC on a common regulatory framework (FD), recently amended by the “Better Regulation Directive” 2009/140/EC.

¹⁶ In several circumstances, the European Court of Justice confirmed the duty of each national body enforcing European law to “disapply” national law contrasting with art. 101(1) and art. 102 of the Treaty in combination with art.10 and 86). For example, ECJ C-198/01.

¹⁷ In particular, Art 8(1) Access Directive (Directive 2002/19/EC) give NRAs powers to impose: transparency obligations (art. 9), non-discrimination obligations (art. 10), obligation of accounting separation (art. 11), obligations of access to, and use of, specific network facilities (art.12), price control and cost accounting obligations (art.13).

The costs of the current institutional solution derive from coordination problems analogous to those relative to the optimal degree of decentralization of enforcement, namely: (a) the possible duplication of enforcement costs; (b) externalities; and (c) legal uncertainty.

The issue of cost duplication appears, in this specific context, a second-order problem. This is because, strictly speaking, cost duplication would ensue if Commission/NCAs' and NRAs' actions were perfect substitutes, i.e. they were alternative means to achieve exactly the same outcome while, for the reasons mentioned above, they should rather be considered complementary to some extent.

As for externalities, the analysis developed with reference to the competence overlaps among different NCAs in section 2 offers useful insights also in the present context. In particular, the nature of the externalities and strategic interactions varies according to whether we assume that authorities' actions are characterized more by complementary or substitute features. Moreover, the final outcome of the interaction among different authorities may be influenced by the fact that the two authorities may include in their objective functions different notions of social welfare (for example, NCAs' objective function may have a pro-consumer bias while NRAs' a pro-companies one). In both cases, we should expect to observe a level of enforcement different from the optimal level, with the most likely outcome being an empirical question. (Barros and Hoernig 2004)

The issue of the legal uncertainty associated to the possibility of the adoption of inconsistent decisions is likely to constitute a more serious problem, as the multi-level system does not incorporate explicit rules or mechanisms aimed at ensuring full coordination. Moreover, the occurrence of inconsistencies resides in the substitutability characterizing the action of NRAs and competition law enforcers (Commission and NCAs) and in particular in the possibility that the latter choose to intervene ex post, modifying the market outcome determined by regulation, not just because regulation failed but rather because they intend to pursue a different regulatory outcome for idiosyncratic, eventually country-specific, reasons.¹⁸

The risk of such strategic interactions is particularly high with regard to the interactions between the Commission and NRAs, although it exists also for interactions between NCAs and NRAs. Indeed, this sort of issues has emerged within recent margin squeeze cases under regulated wholesale and retail prices¹⁹. This is because of the regulatory design of Electronic Communications, where enforcement is decentralized (through NRAs) and the Commission manages mechanisms of harmonization, similarly to the competition policy domain²⁰. Differently from the competition policy domain, however, the Commission cannot directly intervene to change regulatory choices made at the national level²¹. The rationale of this different institutional design could be found in the greater discretion necessary to positively prescribe behaviors and the greater importance in this procedure of dispersed information and dynamic adaptation of regulation to market changes. Given this institutional design, competition policy intervention may be improperly used to modify regulatory choices adopted at the national level. However, in these cases it is particularly hard to detect strategic behavior, as it

¹⁸ A limit to substitutability and thus legal uncertainty in this context is represented by the ECJ statement affirming that it is the possible to enforce competition law when the illicit behavior depends on autonomous decentralized private choice, yet it is somehow constrained by specific regulation. See, for instance, the General Court decision of 10 April 2008, *Deutsche Telekom vs. Commission*, confirming the appealed Commission decision 2003/707/CE of 21 May 2003.

¹⁹ Case T-271/03, *Deutsche Telekom AG v. Commission*. Case COMP/38.784, *Wanadoo España vs. Telefónica*.

²⁰ As a matter of fact, also horizontal mechanisms of coordination between NRAs are defined by the framework directive. That is a) the exchange of relevant information (art. 3.5); b) the possibility for a NRA to raise comments about a market analysis held by another NRA (art. 7.3). However, those mechanisms have been extremely scarcely used. On the contrary, institutional coordination mechanisms, as the establishment of ERG (European Regulators Group, Decision 2002/627/EC) and recently substituted by BEREK (Body of European Regulators of Electronic Communications, Regulation 1211/2009/EC) has been more effective. Actually, these mechanisms have envisaged both vertical and horizontal coordination dimensions.

²¹ The EU Commission covers a fundamental role in the regulatory procedures, ex-ante generally defining relevant market subject to national regulation and ex-post controlling the national regulatory procedure, whose outcome cannot though be substituted but only partially inhibited.

may be difficult to assess whether ex post intervention is motivated by the perception of a failure of regulation or by the pursuit of idiosyncratic objectives.

The previous analysis suggests that some modifications are needed to the current system to increase institutional efficiency. First, in order to avoid the highlighted risks of legal uncertainty, the Commission should adopt a different legal tool to modify an undesired national regulatory outcome. Rather than recurring to competition policy intervention (enforcement of art.102 TFEU), the Commission should initiate an infringement proceeding against a Member State under article 226. Second, formal and more effective mechanisms of coordination between NCAs and NRAs are necessary, while at present, from the perspective of both competition and regulatory substantive law, NCAs and NRAs activities are basically independent and characterized by mere obligations of reciprocal consultation (often not binding). This very much contrasts with the substantial interdependences previously described.

5. Concluding remarks

In this paper we have made a first attempt at evaluating the overall efficiency of the institutional design of European competition policy. This has been interpreted as a multi-level and multi-dimension system, i.e., as a hybrid institutional system characterized by relevant interdependencies among the involved actors. In particular, emphasis has been placed on the relevant competence overlaps existing at both the vertical and horizontal level.

The existence of overlapping competences at both the vertical and the horizontal level entails both benefits and costs. The cost-benefit balance seems to be more clearly favorable to the current institutional arrangement when analyzing the vertical dimension of the system. Indeed, our main conclusion in this regard is that the evolution of this institutional design appears today more consistent with the objectives of the creation of the internal market and of the promotion of efficient market outcomes than full centralization or full decentralization, given the substantial harmonization of substantive competition rules. By contrast, the overall cost-benefit balance appears more uncertain when considering the horizontal competence overlaps across parallel domains of competition policy - private vs. public enforcement and competition law enforcement vs. regulation.

Our analysis thus suggests the need to pay greater attention to these (mainly) horizontal aspects of the institutional design, that have so far been relatively neglected. Indeed, the relatively scarce attention paid to the issue of the efficient overall design of European competition policy has been devoted predominantly to the vertical dimension, and particularly to the issue of the optimal degree of decentralization in the design and enforcement of competition law.

With regard to the issue of the interface between public and private enforcement, the brief overview we have provided points to the need for more refined coordination mechanisms. Formal rules of coordination do exist, but they address mainly the issues of the internal coherence of the system and of the creation of the internal market through homogeneous application of competition policy. Informal mechanisms of coordination are, by contrast, scarcely developed at present. Since it is to these mechanisms that the issue of economic efficiency, in terms of fulfillment of optimal enforcement, is mostly left, care should be taken to ensure that they develop through time.

As for the overlaps among competition law enforcement and regulation, our analysis has highlighted the tension existing between institutional actors who tend to attribute greater weight to industries' long term constraints (i.e., regulators) and actors who tend to be more short termists and consumer oriented (i.e. antitrust authorities). This tension can be easily explained by two complementary observations. On one side, because of the necessity to build the internal market, deeply ingrained into the founding documents of the Community, the Commission had, over the years, the opportunity to develop a strong antitrust capability and legitimacy, relatively well co-ordinated in a multilevel perspective with the NCAs. On the other side, the historical heterogeneity across industries and across countries of market conditions, resources, constraints and national interests that

affects regulatory choices has prevented the full development of a truly harmonized regulatory environment. Addressing the shortcomings emerging from the coexistence of a relatively well harmonized multilevel system of NCAs and a much less harmonized system of NRAs constitutes an important challenge for European decision-makers.

Given the importance of the design of rules for the process of market manufacturing, it is essential that the rules disciplining the enforcement of competition policy are well-designed and lead to efficient outcomes. This suggests that the shortcomings identified in this paper should be taken seriously in the future evolution of the European multi-level competition policy system.

The institutional design of European competition policy: a Summary Chart

	ACTIONS AND ACTORS	DIMENSION OF ANALYSIS	CURRENT EU POLICY	EVALUATION OF EU POLICY
<p>LEVEL OF COMPETITION LAW PUBLIC ENFORCEMENT</p> <p>(SECTION 2)</p>	<p>Centralized public enforcement (A)</p> <p>EU Commission</p> <hr/> <p>Decentralized public enforcement (B)</p> <p>NCA's</p>	<p>Vertical dimension: decentralization vs. centralization → different level of enforcement (governance)</p>	<p>Decentralized public enforcement, joint with coordination mechanisms between NCA's and Commission playing a role of functional superiority</p>	<p>The hybrid public enforcement system reaps most decentralization benefits:</p> <p>i) Commission can focus on selected actions ii) Effective use of dispersed information; iii) Dynamic efficiency benefits; → while mitigating its potential problems, through some degree of centralization and coordination mechanisms, which: i) internalize some externalities; ii) avoid enforcement costs duplications; iii) favor legal harmonization and certainty; iv) decrease risk of regulatory capture</p>
<p>NATURE OF COMPETITION LAW ENFORCEMENT</p> <p>(SECTION 3)</p>	<p>Public enforcement (C=A+B)</p> <p>EU Commission and NCA's</p> <hr/> <p>Private enforcement (D)</p> <p>National courts</p>	<p>Mainly Horizontal: administrative vs. Judicial enforcement → different nature of the enforcer and different interest protected</p>	<p>Public enforcement jointly with an enhanced private enforcement and coordination mechanisms between Commission and judges</p>	<p>The increasing overlap between public and private enforcement implies positive effects:</p> <p>i) protects "privates' interests" through infringements compensation; ii) increase incentives to victims to reveal information → but formal rules of coordination are insufficient, implying: i) sub-optimal deterrence; ii) unfair compensation of damages; iii) costs of legal uncertainty</p>
<p>SET OF NORMS APPLIED</p> <p>(SECTION 4)</p>	<p>Competition law enforcement (E=C+D)</p> <p>EU Commission, NCA's and national Courts</p> <hr/> <p>Sector-specific regulation (F)</p> <p>EU Commission and NRA's</p>	<p>Mainly Horizontal: Competition law enforcement vs. Regulation → application of a different set of norms (by a different administrative body)</p>	<p>Coexistence of regulation and competition law enforcement and convergence of the two domains</p>	<p>The COEXISTENCE of regulatory and antitrust actions (justified by complementarity features) jointly with CONVERGENCE (which leads to substitutability):</p> <p>→ makes regulation pro-competitive in nature → but gives rise to coordination problems, particularly in terms of: i) legal uncertainty; ii) externalities. → since formal rules of coordination are insufficient: i) need for more effective coordination between NRA's and NCA's; ii) necessary restraint of competition policy intervention aimed at modifying regulatory outcomes for idiosyncratic reasons.</p>

References

- Barros P.P, Hoernig S. (2004), "Sectoral Regulators and the Competition Authority: which relationship is best?" CEPR Discussion Paper N. 4541.
- Brousseau E., Raynaud E. (2006), "The economics of Multilevel Governance", paper presented at the 2006 ISNIE Conference, U. of Colorado at Boulder.
- Deporter B., Parisi F. (2006), "The modernization of European antitrust enforcement: the economics of regulatory competition", *George Mason Law Review* 309 -13.
- Dixit, A.K. (1996), "The making of Economic Policy: A Transaction-Cost Politics Perspective", MIT press, Cambridge
- European Commission (2008), "White Paper on damages actions for breach of EC antitrust rules", COM(2008) 165 final.
- Faure M. (2004), "Economic analysis of tort law and the European civil code", in *Towards a European civil code*.
- Kerber, W. (2003), "An International Multi-Level System of Competition Laws: Federalism in Antitrust", in: Drexl, Josef (ed.), *The Future of Transnational Antitrust - From Comparative to Common Competition Law*, Berne/The Hague/London/Boston: Staempfli/Kluwer 2003, pp. 269-300.
- Kerber, W. (2009), "The Theory of Regulatory Competition and Competition Law", in: Meessen, Karl (ed.), *Economic Law as an Economic Good, Its Rule Function in the Competition of Systems*, Munich: Sellier European Law Publishers.
- Laffont J.J., Martimort D. (1999), Separation of regulators against collusive behavior. *RAND Journal of Economics* Vol. 30, No. 2, pp. 232-262.
- Liesbet Hooghe and Gary Marks. 2001. *Multilevel Governance and European Integration*. Rowman and Littlefield.
- Majone, G. (2001), "Non majoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach", *Journal of Institutional and Theoretical Economics* , 157, 1, 57-78.
- Marks G., 'Structural policy and Multi-level governance in the EC' in: A. Cafruny and G. Rosenthal (ed.) *The State of the European Community: The Maastricht Debate and Beyond* (Boulder 1993) pp.391-411.
- Marks, Gary; Liesbet Hooghe; and K. Blank. 1996. "European Integration from the 1980s: State-Centric v. Multi-Level Governance." *Journal of Common Market Studies* 34: 341 – 78.
- Martimort D. (1999), Renegotiation Design with Multiple Regulators, *Journal of Economic Theory* 88, 261 – 293.
- McGowan, Francis. 2000. "Competition Policy" in Wallace, H and Wallace, W *Policy-Making in the European Union*, OUP.
- Motta M. (2004), *Competition Policy*, Cambridge University Press.
- Nicita A. (2009) Consumers Win-back as Exclusionary Conduct. Some Insights for Antitrust Law, *Quaderni del Dipartimento di Economia Politica*, University of Siena, n. 565
- Nugent, N. and Paterson W. 2003. "The Political System of the European Union" In J. Hayward and A. Menon. *Governing Europe*. Oxford: OUP: 92-113.

- Oates W.E. (1972), "Fiscal federalism". New York, Harcourt, Brace, Jovanovich.
- Ogus, A. 'Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law' (1999) 48 *International and Comparative Law Quarterly* 405.
- Parisi F., Schulz N., Klick J. (2006), "Two dimensions of regulatory competition", *International Review of Law and Economics*, Vol. 26, pp. 56-66, 2006.
- Rosamond, B., 2003, 'New Theories of European Integration', in Michelle Cini (ed.) *European Union Politics* Oxford: Oxford University Press, pp.109-127.
- Scharpf, Fritz. 1994. "Community and Autonomy: Multilevel Policy Making in the European Union." *Journal of European Public Policy* 1: 219-42.
- Sinn, H.W. 'The Selection Principle and Market Failure in Systems Competition' (1997) 88 *Journal of Public Economics* 247.
- Stigler, G.J. (1971), "The Theory of Economic Regulation," *Bell Journal of Economics* 2: 3-21.
- Sun, J.M. and J. Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 *Journal of Common Market Studies* 67.
- Tiebout C. (1956), "A pure theory of local government expenditure", *Journal of Political Economy*, vol LXIV, 416-424.
- Van den Bergh R. (1998), "Subsidiarity as an economic demarcation principle and the emergence of European private law", *Maastricht Journal of European and Comparative Law*, 5(2), 129-152.
- Van den Bergh R., Camesasca P. (2006), "European competition law and economics: a comparative perspective". London, Sweet and Maxwell.
- Van den Bergh, RJ 'Towards an Institutional Legal Framework for Regulatory Competition in Europe' (2000) 53 *Kyklos* 435.
- Walzenbach, G.P.E., 2006, "European Competition Policy: Governance as graduated coordination", in Walzenbach, G.P.E. (ed.) "European Governance. Policy Making between Politicization and Control", Ashgate, Aldershot.

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