Comparing Laws in the Enforcement of EU and National Competition Laws

Kati Cseres*

I. Introduction

This paper discusses the topic of 'Comparing Laws' in the specific context of the decentralised enforcement of EU competition law and the parallel application of national competition laws. More specifically, it deals with the harmonisation process between the Member States' and the EU competition laws. This is a unique process as at first sight it accommodates regulatory competition between the Member States and the Commission, resulting in the emergence of voluntary harmonisation. However, in fact the decentralised enforcement regime has preserved the Commission's dominance and Europeanised national competition laws to the model of EU law. Still, this process involves active comparative exercises by both the European Commission and the 27 Member States. The paper addresses the question why and how the Commission and the Member States compare competition rules. What makes these comparative exercises worth analysing is, on the one hand, that they are of recent origin and take place against a new decentralised enforcement system which has recently been transformed from a supranational EU policy into one which is subject to similar problems of multi-level governance as other substantive parts of EU law; on the other hand, that the creation of the European Competition Network (ECN) opened the way for spontaneous harmonisation between national and EU competition laws, but at the same time its hierarchical structure preserved certain constraints that limit its functioning as a platform of true regulatory competition.

The public enforcement of EU competition law takes place in a multiple layered setting composed of EU and national rules and supervised by the Commission and 27 national competition authorities (hereinafter NCAs). While the substantive EU rules that are to be enforced are the same and there is also a high convergence between substantive competition rules in national legislations, the procedural rules and the institutional settings that together form the framework of enforcement have been much less harmonised and reveal a challenging

* Associate professor of law, University of Amsterdam, Amsterdam Center for Law & Economics, Amsterdam Centre for European Law & Governance (k.j.cseres@uva.nl).

landscape for comparative analysis. The role of the Commission in conducting such comparisons among the various enforcement methods and institutional settings of the Member States will be examined in the Report on the functioning of Regulation 1/2003 and the Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003[1], as well as through the work of the ECN. The role of the NCAs in comparing the various enforcement rules and agency models can be analysed through their work in the ECN.

In analysing these comparative exercises, the paper will look into the question of what the purpose of these comparative efforts is and which methods of comparison are being used. Furthermore, the paper will also critically analyse the methods of voluntary convergence that are being applied in the Member States and the possibility of further extended harmonisation of the administrative procedural rules, as well as certain substantive rules, in the Member States.

Accordingly, the next section sets out the background of the comparative analysis and explains the legal changes that opened the comparative discourse on competition laws in Europe. Section III describes the impact of Regulation 1/2003 on the Member States' substantive rules, procedural rules and their NCAs' institutional designs. Section IV discusses the methods and the underlying reasons behind the Commission's comparative studies and the work within the ECN. Finally, section V takes a critical look at the Commission's proposal to further harmonise substantive and procedural rules as well as at the present voluntary harmonisation between the EU and national rules. The paper closes with conclusions.

II. The challenging landscape of EU competition law enforcement for comparative study

Competition law has for long offered little challenge for comparative research. This was due to a number of facts. First, many Member States lacked a proper competition law and enforcement regime until the 1980s or even late 1990s. Second, competition law in many Member States has not been regarded as an economic policy tool of primary importance.[2] Third, the question of convergence and divergence between the different national regimes remained largely unaddressed and without significant legal or economic consequences. This,

[1] **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003*, SEC/2009/574 final, 29 April 2009, paras. 160-169, 180-181.

[2] **F. CENGIZ**, *Regulation 1/2003 Revisited*, TILEC Discussion Paper No. 2009-042, 24 November 2009, p. 26.

however, all changed with the process of enlargement and the modernisation of EU competition law in 2004.

Before modernisation in 2004 the enforcement of European competition law was concentrated in the hands of the Commission and was an important exception to the general enforcement method of Community laws by Member States' authorities. This meant, on the one hand, that the relations between Community and national competition laws remained mostly unaddressed, in contrast to the judicial supremacy doctrine in other substantive areas of EU law, and, on the other hand, that competition policy was immune from general problems of multi-level governance.[3] Modernisation and more specifically Article 3(1) of Regulation 1/2003 have imposed not only a possibility but also an obligation on the Member States' NCAs to apply Articles 101 and 102 TFEU parallel to their national competition rules when the effect on trade criterion is fulfilled, and introduced a strict supremacy standard. In fact, this meant that national provisions have to comply with the EU interpretations of Articles 101 and 102 TFEU when they are applied parallel to their national rules. In accordance with Article 3(2) and (3) of Regulation 1/2003 the convergence rule does not apply to unilateral conduct, national merger laws and laws pursuing a predominantly different objective such as unfair trade practices.

While the convergence rule acts as a radical intervention in the domestic legal systems of the Member States, it should be remembered that this convergence had taken place or had been ongoing before Regulation 1/2003 came into force.[4] Many EU Member States had abandoned their ineffective competition regulation based on the so-called administrative control model during the 1980s and 1990s and had adopted a competition law system similar to the rules laid down in Articles 101 and 102 TFEU and the EC Merger Regulation.[5]

---

[3] *Ibid*., pp. 26, 30.

[4] **R.J. VAN DEN BERGH and P.D. CAMESASCA**, *European Competition Law and Economics: A Comparative Perspective*. Antwerpen, Intersentia, 2001, pp. 125-126.

[5] This is equally true for the new Member States, where competition was actually non-existent in the socialist area and where competition was of great importance in creating a functioning market economy. The basic conditions for free competition were introduced by the legal reforms between 1989 and 1991. From 1990 onwards new national competition laws were enacted and thus the enforcement of competition law could begin. After 1990 accession to the European Union became the most relevant external pressure to influence competition policies in Eastern Europe. See, for more details: **K.J. CSERES**, "Multijurisdictional Competition Law Enforcement: the Interface Between European Competition Law and the Competition Laws of the New Member States", *European Competition Journal*, 2007, Vol. 3, Issue 2, pp.465-502; **K.J. CSERES**, "The Impact of Regulation 1/2003 in the New Member States", *Competition Law Review*, 2010, Vol. 6, Issue 2, forthcoming.

Competition law and policy had gained importance and the ineffective abuse systems, which in certain jurisdictions included criminal law enforcement, had been abandoned.[6]

However, Regulation 1/2003 did accelerate the process of convergence and Europeanisation in the field of substantive competition rules. This convergence was most prominent with regard to Article 101-like cartel prohibitions but not with regard to unilateral conduct and procedural rules. Legal diversity of national procedures and institutional designs remains a challenge to the envisaged goal of uniform and consistent application of EU competition law by all 28 enforcers, the Commission and the 27 NCAs.

This challenge began to take shape when the enlargement of 2004 made the relevance of enforcement for the effective working of EU rules manifest. Procedural diversity among Member States became visible not only in competition law but also in other substantive fields such as consumer law. While previously issues of enforcement and institutional structures were regarded to remain in the exclusive competence of the Member States, in accordance with the Community principles of procedural autonomy and institutional neutrality, enlargement has pushed crucial questions of enforcement and institutional choice to the forefront of the EU agenda.[7] In the absence of a clear Union blueprint for effective enforcement methods and optimal institutional design, the old and new Member States were given considerable leeway in adapting the *acquis* to their own institutional preferences and legal systems.

EU competition law now offers a unique platform for comparative analysis for four reasons. First, European competition law is legislated through directly applicable Treaty provisions and regulations and thus European competition rules directly enter national legal systems and represent a higher pressure and form an important incentive to align national competition rules to the EU rules. This incentive has been even more pressing in the new

---

[6] **D.J. GERBER,** *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford, Clarendon Press, 1998, pp. 402-403. The new competition laws followed a prohibition system and enforcement was entrusted to an administrative body with judicial-like decision-making. Enforcement became primarily administrative law-based, with administrative law sanctions. These new competition regimes worked more effectively than their predecessors and indeed their main achievement was to gain social and political support for the enforcement of competition law.

[7] This trend can be seen in many other policy areas. In consumer protection, for example, very similar developments take place today. See **K.J. CSERES**, "Collective Consumer Actions: A Competition Law Perspective", in **W. H. VAN BOOM and M. LOOS *eds.***, *Collective Consumer Interests and How They Are Served Best in Europe: Legal Aspects and Policy Issues on the Border Between Private Law and Public Policy*, Europa Law Publishing, 2007; **K.J. CSERES**, "Consumer Protection in Eastern-European Member States", in *Vergelijkend Wijs*, Kluwer, 2007, forthcoming.

Member States, where the whole arsenal of competition law had to be created within a short period of time.[8]

Second, Regulation 1/2003[9] and the so-called modernisation package devolved enforcement powers to the national competition authorities and the national courts[10] and have created a system of parallel competences and simultaneous application of EU and national competition law. The new enforcement system not only delegated enforcement powers to national actors but also increased the Europeanisation of competition laws through cooperation between the European Commission and the NCAs. In the new framework, national competition legislations operate in parallel with EU competition law and the national competition authorities and/or courts apply both national and European competition rules. In enforcing the EU competition rules, full cooperation between the Commission and the national authorities of the Member States is necessitated by the fact that the European competition rules became directly applicable in the whole Union. The interaction between the European Commission and the national competition authorities is required by Article 11 of Regulation 1/2003. The NCAs and the Commission form a network of public authorities co-operating closely together. This so-called European Competition Network 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 consistent application of the rules.

Third, the new decentralised enforcement system preserved one of the most controversial elements of the previous centralised system, namely the Commission's central role in the enforcement framework. Before the 2004 modernisation of EU competition law, the Commission had a central monopoly-like role in the enforcement of EU competition law. In fact, competition law and policy acted as the "first supranational policy in the European Union".[11] Under the enforcement framework of Regulation 17/62[12], the Commission enjoyed a broad margin of discretion in applying the conditions under Article 101(3). On several occasions, the European Courts have acknowledged the Commission's discretionary powers

[8] Accession to the EU acted as considerable political and economic pressure and provided the most significant influence on the way competition laws have been shaped in the CEECs.

[9] **EC Council**, *Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty*, No 1/2003/EC, 16 Dec. 2002, *Official Journal*, 2003, L 1.

[10] Articles 5 and 6 of Regulation 1/2003.

[11] **L. McGOWAN and S. WILKS**, "The First Supranational Policy in the European Union: Competition Policy", *European Journal of Political Research*, 1995, Vol 28, p. 141, at p. 149.

[12] **EEC Council**, *First Regulation Implementing Articles 85 and 86 of the Treaty*, No 17/62 (EEC), *Official Journal*, 2003, L 1.

under Article 101(3)[13] and have neither dealt with the Commission's substantive application of the criteria under Article 101(3), nor intervened in Commission decisions.[14] The fact that the Commission no longer has a monopoly on the application of Article 101(3) and this provision can be applied by the NCAs and the national courts of the Member States has relevant implications for uniform law enforcement. As the Commission no longer has such considerable leeway under Article 101(3), it tried to narrow down the application of this provision to accommodate only pro-competitive effects as potential justification for anti-competitive restraints.[15]

Regulation 1/2003 granted the Commission new enforcement powers and extended some existing ones,[16] and has given it the prerogative to end investigations under Article 101 and 102 by NCAs by opening its own proceedings against the same violation.[17] In the hierarchical structure of the ECN, the Commission acts as *primus inter pares* and as manager of the system that needs to guard uniform application of EU rules. However, the Commission escapes accountability and control mechanisms through the informal character of the ECN.

Fourth, while Member States significantly harmonised substantive competition rules, a similar convergence of procedural rules or institutional designs has not taken place. The exact puzzles of converging and diverging rules across the Member States and EU law are subject to comparisons by both the Commission and the Member States.

---

[13] **E.C.J.,** Case C-26/76, *Metro I v. Commission*, para. 45; **E.C.J.**, Case C-71/74, *Frubo v. Commission*, para. 43. The Courts have held that the judicial review of the Commission's decisions under Article 81(3) is limited to establishing whether the Commission committed a manifest error of assessment, whether procedural rules had been complied with, or whether proper reasons had been provided. **E.C.J.**, Case C-42/84, *Remia BV and Others v. Commission*, para. 38; **E.C.J.**, Case C-45/85 *Verband der Sachversicherer e.V. v. Commission*, para. 15; more explicitly, the CFI even noted that "the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty." However, in this case it did not show that such considerations required exclusivity of rights to transmit sports events and that exclusivity was indispensable in order to allow a fair return on investments. **C.F.I.**, Cases T-528/93, T-542/93, T-543/93 and T-546/93, *Métropole Télévision and Others v. Commission*, para. 118.

[14] This, however, did not mean that the logic and rationality of Commission decisions under Article 81 (3) have not been scrutinised and criticised. The CFI has on several occasions criticised the lack of a proper economic analysis in the Commission's decisions. See, for example, **C.F.I.**, Case T-374/94, *European Night Services and Others v. Commission*, paras. 103-115, 140, 159; **C.F.I.**, Cases T-528/93, T-542/93, T-543/93 and T-546/93, *Métropole Télévision and Others v. Commission*, para. 120.

[15] The Commission can set out the lines of European competition policy but cannot alter the legal framework, namely the open and broad norm of Article 101(3) that allows national authorities to balance public policy goals with competition principles. Even though the new approach is laid down in the Guidelines on the application of Article 101(3), the question whether and to what extent non-competition policy objectives can be taken into account under Article 101(3) remains unclear. **H. SCHWEITZER**, *Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81*, EUI Working Paper, LAW 2007/30, Florence, European University Institute, 2007, pp. 8-9.

[16] Article 9 of Regulation 1/2003 grants the Commission the power of accepting commitments from the parties under investigation in Articles 101 and 102 procedures and making these commitments binding. Regulation 1/2003 also extended its search powers during sector inquiries.

[17] Article 11(6) of Regulation 1/2003.

In sum, despite the obligatory and voluntary convergence of substantive and certain procedural rules in national competition laws, the change was radical, with relevant policy implications for the Commission. On the one hand, the relevance of national competition laws and especially procedural rules has increased and has been pushed to the center of the Commission's attention. When NCAs apply Articles 101 and 102 TFEU, they make use of their national procedural rules and impose remedies and sanctions that are available in their respective legal system. On the other hand, the issue was raised whether consistent policy enforcement and the effective functioning of a network requires a certain degree of harmonisation of procedures, resources, experiences and independence of the NCAs.[18]

The Commission started relying on the effective administrative enforcement of EU rules through national administrative procedures and institutions. Immune from EU law regulation until 2004, now the national procedural rules and institutional settings became crucial for the uniform and consistent application of EU competition law, and, as a result, were subjected to the Commission's comparative analysis.

In the following, first, the present enforcement system will be described briefly by focusing on the impact of Regulation 1/2003 on the substantive, procedural rules and the institutional designs of the Member States. This section describes the scene where the new challenges of convergence and divergence between national laws took shape and which forms the subject of the comparative analysis in EU competition law. Then the Commission's and the ECN's comparative analysis will be further reviewed by revealing the ratio as well as the method of their comparative exercises. Finally, the harmonisation proposals will be evaluated.

III. Regulation 1/2003: the framework of comparison

A. The impact of Regulation 1/2003

The impact of Regulation 1/2003 on national legal systems can be seen clearly in the substantive competition rules. EU leverage has been most noticeable and direct on the statutory enactments of substantive competition law. However, the Regulation and the

[18] **F. CENGIZ**, *Regulation 1/2003 Revisited, o.c.*, p. 17; **C. GAUER**, "Does the Effectiveness of the EU Network of Competition Authorities Require a Certain Degree of Harmonisation of National Procedures and Sanctions?", in **C.D. EHLEMANN and I. ATANASIU eds.**, *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Oxford, Hart Publishing, 2001, pp. 187-201; **F. JENNY**, "Does the Effectiveness of the EU Network of Competition Authorities Depend on a Certain Degree of Homogeneity within its Membership?", in **C.D. EHLEMANN and I. ATANASIU eds.**, *European Competition Law Annual 2000, o.c.*, pp. 208-210.

Commission's policy were less pronounced with regard to the development of procedural rules and the institutional framework to be chosen by the Member States.

The new procedural framework abolished the notification system and Article 101 became directly applicable in its entirety, thus including Article 101(3). This required the Member States to enforce Articles 101 and 102 TFEU, without the need for notification and a prior administrative decision on Article 101(3). The most important legal obligations that stemmed from Regulation 1/2003 for all the Member States were laid down in Article 3, namely the obligation for national competition authorities and national courts to apply Articles 101 and 102, as well as the convergence rule for Article 101, and in Article 35 in conjunction with Article 5, the obligation to empower national competition authorities.

Beyond these specific obligations laid down in Regulation 1/2003, it has not been made clear what institutional and substantive solutions the Member States had to implement in their respective legal system beyond the obligation to bring their competition rules in conformity with EU law. For example, the candidate countries were never presented the exact parameters of their obligation to harmonise their competition laws. Therefore, it can be argued that harmonisation in their respective legislative systems was required as far as it was indispensable. This is also in line with the general principle of subsidiarity as enshrined in Article 5 TEU. In other words, the new Member States, just like the old Member States, had considerable latitude in deciding what kind of substantive and institutional regime they would adopt.

This freedom is, however, not unlimited. Article 4(3) TEU requires the Member States to take all appropriate measures to ensure fulfillment of the obligations arising out of the EU Treaty and facilitate achievement of the Community's tasks. Moreover, they should "abstain from any measure which could jeopardise the attainment of the objectives of this Treaty". On the basis of this loyalty principle, the European Court of Justice has also developed the so-called useful effect doctrine within the realm of competition law. According to this doctrine, the Member States may not introduce legislation or take decisions which would deprive the competition rules of their useful effect.[19]

[19] This doctrine has no explicit legal basis in the EC Treaty. It was founded on Article 3(1) (g)(now implemented in Protocol No. 27 on the internal market and competition), read in conjunction with Article 10 (now Article 4(3) TEU) and Articles 81 and 82 EC (now Articles 101 and 102 TFEU). **E.C.J.,** Case 267/86, *Van Eycke v. ASPA*, 1988 ECR 4769, para. 16.

B. The impact of Regulation 1/2003 on substantive rules

Article 3 of Regulation 1/2003 has directly influenced the substance of national competition rules. Article 3(1) defines the principle of simultaneous application of national law and competition law with the limitation posed in Article 3(2): Member States may not adopt and apply on their territory stricter national competition laws which prohibit agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1), or which fulfill the conditions of Article 101(3) or which are covered by a Regulation for the application of Article 101(3). In other words, stricter national competition laws are not as such objectionable, as long as they are not applied, in breach of Article 3(2), to agreements, concerted practices and decisions of associations of undertakings that fall within the jurisdictional scope of the EU competition rules. The convergence rule contained in paragraph 2, seeks to create a level playing field by providing for a single standard of assessment which allows undertakings to design EU-wide business strategies without having to check them against all the relevant national sets of competition rules. While leeways for national law still exist under Article 3(2), such as inherent restrictions, national group exemptions and national statutory *de minimis* rules, most of the Member States have enacted similar provisions to Article 101 and certain countries such as Italy and Luxembourg even opted for the exclusive application of EU competition law.[20] Stakeholders from the legal and business communities have largely confirmed that Regulation 1/2003 has positively contributed to the creation of a level playing field, along with the substantive convergence of national laws with EC competition rules.[21]

Nevertheless, this principle of convergence does not apply with regard to prohibiting and imposing sanctions on unilateral conduct.[22] Article 3(3) further excludes from the principle of convergence national merger laws and laws having a different objective than the protection of competition.[23]

The application of stricter national rules for unilateral conduct is worth further remarks. Recital 8 of Regulation 1/2003 explicitly mentions provisions regulating cases of

---

[20] **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003*, *o.c.*, paras .141, 152.

[21] *Ibid*., par a. 142.

[22] Recital 8 of Regulation 1/2003.

[23] Recital 9 of Regulation 1/2003.

abuse of superior bargaining power or economic dependence. The assessment of unequal bargaining power is currently the subject of vigorous discussion in competition law and one of the questions being discussed is whether competition law or private law or other specific legislation should regulate this issue and when regulation exists, whether competition authorities or civil courts should enforce it. Both the EU Commission *Staff Working Paper Accompanying the Report on the functioning of Regulation 1/2003*[24] and a recent survey of the International Competition Network[25] discussed the controversial topic of abuse of superior bargaining power (ASBP).[26]

Some jurisdictions, for example Germany, employ specific provisions in their competition law prohibiting abuse of superior buying power, others employ them in other specific contexts such as tort liability under the commercial code like France. Again in other jurisdictions, a private civil remedy (Italy) or separate administrative regulation of retail chains exist. A separate administrative act is often the legislative model opted for by the CEECs, like in Hungary,[27] Slovakia,[28] and a draft law in the Czech Republic.[29] However, in Latvia the provision is part of the competition law.[30] The diversity of regulatory standards on

---

[24] **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003*, *o.c.*, paras. 160-169, 180-181.

[25] **International Competition Network**, *Report on Abuse of Superior Bargaining Position*, 2008, http://internationalcompetitionnetwork.org/uploads/library/doc386.pdf; see also **F. JENNY**, *The "Coming Out" of Abuse of Superior Bargaining Power in the Antitrust World*, UNCTAD, 2008, http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0008_en.pdf.

[26] Abuse of superior bargaining power typically includes, but is not limited to, a situation in which a party makes use of its superior bargaining position relative to another party with whom it maintains a continuous business relationship to take any act such as to unjustly, in light of normal business practices, cause the other party to provide money, service or other economic benefits. A party in the superior bargaining position does not necessarily have to be a dominant firm or firm with significant market power. **International Competition Network**, *Report on Abuse of Superior Bargaining Position*, *o.c.*, p..3.

[27] Act on Trade of 2005 lists abuses of "significant market power", created basically for supermarket practices against retailers. It introduced specific rules on undertakings of significant market power and empowered the GVH (NCA) to apply the procedural rules on abuse of dominance in cases of infringements of the prohibitions enumerated by the Act on Trade.

[28] Act on Unfair Conditions in Business Relationships (AUC) of 11 April 2008.

[29] There have been several attempts to introduce the prohibition of the abuse of economic dependency into national law. A proposal currently being discussed in parliament suggests that such a position on the relevant market, which enables an undertaking to establish substantially more favourable business conditions with an economically dependent undertaking than it could without such a position, shall be considered an abuse of economic dependency and shall be prohibited. It seems that at least concerning food, the described regulations will be introduced. **D. BICKOVÁ and A. BRAUN**, *Section 4: Country Chapters, Czech Republic*, in *The European Antitrust Review 2010*; **International Competition Network**, *Report on Abuse of Superior Bargaining Position*, *o.c.*, p. 6; **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003*, *o.c.*, paras. 160-169.

[30] Section 13(2) of the Competition Law provides that a dominant position in the retail sector is held by such market participant or several market participants, which, taking into consideration its purchasing power for a sufficient length of time and dependency of suppliers in the relevant market, has the capacity to directly or indirectly apply or impose unfair and unjustified conditions, provisions and payments on the suppliers and has

unilateral conduct in the Member States has been critically assessed by stakeholders in the consultation process on Regulation 1/2003 and the Commission has devoted substantial analysis to the various legislations in the *Staff Working Paper*.[31] Moreover, the Commission has proposed to examine further the matter both with regard to the problems such as the causes of diversity as well as the need for some kind of harmonisation action.[32] This issue will be further discussed below in section IV.

C. The impact of Regulation 1/2003 on procedural rules

Regulation 1/2003 also contains certain procedural rules with regard to the powers of the national competition authorities. Article 5 lists the powers of the NCAs when they apply Articles 101 and 102 such as finding an infringement, ordering interim measures, accepting commitments and imposing fines. The *Commission Staff Working Paper accompanying the Report on Regulation 1/2003* admits that Article 5 is a very basic provision and does not formally regulate or harmonise the procedural rules followed by the NCAs or the ECN beyond Article 5.[33] This means that the NCAs apply the same substantive rules but in divergent procedural frameworks and they may impose different sanctions as well. These procedural differences were to some extent addressed in Articles 11 and 12 of Regulation 1/2003 with regard to the cooperation within the ECN. Despite this fact, the Member States have voluntarily converged their procedural rules to the EU procedural provisions applicable to the Commission. Table I. below shows this voluntary convergence.

---

the capacity to significantly hinder, restrict or distort competition in any relevant market in the territory of Latvia. Any market participant that holds the dominant position in the retail sector is prohibited from abusing such dominant position in the territory of Latvia. The relevant section then provides an exhaustive list of abuses of a dominant position in the retail sector.

[31] **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003*, *o.c.*, paras. 160-176.

[32] *Ibid*., para. 179.

[33] *Ibid*., para. 200.

TABLE I - Powers of NCAs: legislative implementation after Regulation 1/2003

Convergence of national competition laws with Regulation 1/2003	YES	NO	Partial implementation
Power to impose structural remedies	Czech Republic, Slovenia, Austria, Belgium, Spain, Greece, Ireland, Malta, Netherlands, UK, Germany	Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Denmark, Finland, Portugal, Luxembourg	Bulgaria, Romania, Sweden, France
Power to order interim measures	Poland, Hungary, Czech Republic, Romania, Lithuania, Slovakia, Slovenia, Austria, Belgium, Spain, Greece, Ireland, Malta, Netherlands, UK, Germany, Finland, France, Sweden, Portugal, Italy	Estonia, Denmark	Bulgaria, Luxembourg, Cyprus
Power to adopt commitments	Bulgaria, Romania, Lithuania, Hungary, Slovenia, Slovakia,Czech Republic, Poland, Austria, Belgium, Spain, Greece, Ireland, Netherlands, UK, Germany, Finland, France, Sweden, Italy, Luxembourg	Estonia, Malta	Latvia, Portugal, Cyprus
Power to seal business premises, books	Lithuania, Hungary, Slovakia, Czech Republic, Poland, Belgium, Spain, Greece, Netherlands, UK, Germany, Finland, France, Sweden, Denmark	Slovenia, Austria, Ireland, Luxembourg	Bulgaria, Latvia, Romania, Italy, Cyprus,
Power to inspect private premises	Estonia, Hungary, Poland, Czech Republic, Slovakia, Slovenia, Romania, Austria, Belgium, Spain, Finald, France, Greece, Ireland, Luxembourg, Malta, Netherlands, Sweden, UK	Bulgaria, Italy, Portugal, Denmark	Lithuania, Cyprus, Germany
Calculation of fine Max. 10% of undertaking's turnover	Czech Republic, Slovenia, Slovakia, Latvia, Romania, Lithuania, Bulgaria, Hungary, Poland	Estonia (fixed)	

Fines on association of undertakings	Hungary, Latvia Lithuania, Belgium, Spain, Finland, Netherlands	Estonia, Slovakia, Slovenia, Poland, Romania Luxembourg	Czech Republic, Bulgaria, Austria, Germany, Denmark, France, Greece, Ireland, Italy, Portugal, Sweden, UK
Informal guidance	Latvia, Poland, Romania, Slovenia, Austria, Belgium, Denmark, Germany, Ireland, Spain, Netherlands, Portugal, Sweden, UK	Czech Republic, Hungary, Estonia, France, Greece, Luxembourg, Malta	Lithuania, Slovakia, Bulgaria, Finland, Italy, Cyprus
Leniency	Czech Republic, Slovakia, Hungary, Poland, Latvia, Lithuania, Romania, Bulgaria, Estonia, Austria, Belgium, Denmark, Germany, Ireland, Spain, Netherlands, Portugal, Sweden, UK, France, Greece, Luxembourg, Finland, Italy, Cyprus	Malta	Slovenia[34]

Source: *Results of the questionnaire on the reform of Member States' national competition laws after EC Regulation No. 1/2003; International Comparative Legal Guide, Enforcement of Competition Law 2009, Global Legal Group, Cartels & Leniency 2009, Country Reports, 2009*

Yet, the Commission acknowledges that divergences of Member States' enforcement systems remain on important aspects such as fines, criminal sanctions, liability in groups of undertakings, liability of associations of undertakings, succession of undertakings, prescription periods and the standard of proof, the power to impose structural remedies, as well as the ability of Member States' competition authorities to formally set enforcement priorities. The *Commission Staff Working Paper* provides neither data nor an overview of these divergences; however, these differences have significant implications for how cases are eventually enforced by the NCAs. For example, the Member States' procedural rules on complaints and the rights of complainants during investigation largely differ from one another. While some countries provide extensive rights for complainants more or less on similar conditions as the European Commission[35] in a number of countries the NCAs initiate

[34] A true leniency program does not exist. However, according to Article 76 of the Competition Act the fine applicable to an undertaking in a cartel may be waived by the Office if certain conditions are fulfilled. **Z. ZORIC, N. PIPAN NAHTICAL**, "Chapter 37: Slovenia" in **Global Legal Group**, *Cartels & Leniency*, 2009, p. 219.

[35] The legal framework for handling of complaints has been laid down by Regulation 1/2003, *Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty*, No 773/2004/EC, 7 April 2004, *Official Journal*, 2004, L 123, and the *Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, Official Journal*, 2003, L 1.

proceedings exclusively on their own initiative and use complaints merely as a source of information. Differences still exist among those countries that grant certain procedural rights to complainants. The varying degrees of participation rights in the national procedures can jeopardise the uniform application of EU competition law.[36]

D. The impact of Regulation 1/2003 on institutions

While the transfer of substantive rules could rely on well-defined EU rules, clear guidance on how to enforce these rules has not been provided by the EU. Crucial questions of institutional choice were left unanswered except for some very general rules in Regulation 1/2003.

Under Article 35 of Regulation 1/2003, each Member State had a clear obligation to draw up a national competition law and designate a competition authority responsible for the application of Articles 101 and 102 before 1 May 2004;[37] however, the details were left to the Member States themselves. These authorities could be administrative or judicial. The only requirement imposed by Article 35, was that the authorities had to be designated in order to guarantee that the provisions of Regulation 1/2003 were effectively complied with.[38] The accession process merely required an adequate administrative capacity through well-

[36] Complaints are not only significant sources of market information for NCAs, but complainants' participation in the competition law proceedings constitutes relevant procedural safeguards of good administration. On the one hand, while the rights of complainants are not "as far reaching as the right to a fair hearing of the companies which are the object of the Commission's investigation" and their limits "are reached where they begin to interfere with those companies' right to a fair hearing" (**E.C.J.,** Joined Cases 142 and 156/84, *BAT and Reynolds v. Commission*, 1987, para. 20), both too broadly and too narrowly defined rights of complainants can lead to problems of administrative accountability *vis-à-vis* the undertakings concerned. On the other hand, granting certain procedural rights to those persons and organisations, in particular end-consumers whose economic rights have been adversely and directly affected by anti-competitive practices, also serves the purpose of sufficiently accounting for the representation of these interests in the procedure of the NCAs. NCAs are administrative authorities that must act in the public interest, not a judicial authority the function of which is to safeguard individual rights. Moreover, denying participation rights to complainants and structuring the procedure exclusively around the rights of the defence of the undertakings targeted is inconsistent with the overall aim of the procedure: effective enforcement of competition rules. It is also incongruous with the ultimate aim of these rules: ensuring consumer welfare. See also **C.F.I.**, Joined cases T-213/01 and T-214/01, *Österreichische Postsparkasse v. Commission*, para. 112; T-114/92, *BEMIM* v *Commission*, 1995, ECR II-147, para. 28.

[37] Article 35(1) of Regulation 1/2003: "The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts."

[38] Point 2 of the Notice on cooperation within the Network of Competition Authorities provides that "[u]nder general principles of Community law, Member States are under an obligation to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EC law". See also, **E.C.J.**, Case C-176/03, *Commission of the European Communities v. Council of the European Union*, 13 September 2005, ECR I-7879, paras. 46-55.

functioning competition authorities and thus the new Member States had a great deal of freedom in designing the institutional framework of competition law enforcement. Beyond Article 35 of Regulation 1/2003, neither further requirements nor formal rules had been formulated on the powers and procedures of these competition authorities.[39] The competences of the national authorities were very roughly set out in Articles 5 and 6 of Regulation 1/2003.

The *Report on the Functioning of Regulation 1/2003*[40] has acknowledged this institutional deficit. In the absence of Community guidance, institutional choices were guided by a learning process characterised by improvisation and experimentation. While the Community institutions seemed to have pushed towards separate treatment of competition law, unfair trade practices and consumer protection, the institutional division of competencies at the Community level (DG Competition, DG Sanco, DG Internal Market) has not served as a prototype in all Member States. In fact, many Member States have enforcement powers in several fields of market regulation and combine several (quasi-)regulatory competences in one agency. The diversity of institutional design among competition authorities across the EU is based on country-specific institutional traditions and legacies. For example, traditionally the new Member States in Central and Eastern Europe entrusted their regulatory agencies with broad market regulatory tasks and sometimes with overlapping competences (see Table II).

Three different models can be distinguished. There are NCAs that have competences in other regulatory fields than competition law. For example, the Netherlands Competition Authority (NMa) also accommodates the Energy Chamber. Similar institutional change has taken place in Estonia and Bulgaria recently. The Estonian NCA (ECA) was transformed into an integrated authority by merging with the previously separate communications, energy market and railway regulators at the beginning of 2008.[41] The Bulgarian NCA took up regulatory tasks in the fields of procurement and concession procedures under the Public Procurement Act and the Concession Act.[42] Monitoring public procurement is a task that can

---

[39] Although national procedural rules have to provide for admission of the Commission as *amicus curiae* in national procedures, NCAs will have to be empowered to conduct examinations in accordance with Regulation 1/2003, and Member States will have to report to the Commission. The Commission retains broad supervisory powers that allow it to intervene in proceedings before the national authorities and which in fact enable it to act as *primus inter pares*. See Article 11(6).

[40] **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003*, *o.c.*, paras. 190 and 200.

[41] As a result of the merger, the ECA consists of three divisions - competition, railway and energy regulation and communications regulation. Hence, the different divisions of the ECA regulate also specific sectors.

[42] **Bulgarian Law on Protection of Competition (LPC)**, *State Gazette*, Issue 102, 28 Nov. 2008, entered into force in May 2009. Prior to the adoption of the 2008 Law on Protection of Competition, there was quite some debate around whether or not prosecution of unfair trade practices should be excluded from the remit

be found in the portfolio of other NCAs as well, for example in Germany. Then there are NCAs that combine the enforcement of competition law and some specific parts of consumer law related to information, such as rules against deception or misleading advertising. This is the case in Hungary or Italy. A variation on this model is an agency with a double mission: responsibilities for the enforcement of both competition law and consumer protection law such as the United Kingdom's Office of Fair Trading (OFT) or the Polish Office of Competition and Consumer Protection (*UOKiK*).[43] The third model is where the sole competence of the NCA includes the enforcement of competition law, like in Romania or Portugal. An overview of the different models is provided in Table II.

TABLE II - Competences of the NCAs

Competence of competition agency includes unfair competition or consumer protection	**Competence of competition agency includes other regulator yarea than competition law**	**Competence of competition agency include sonly competition law**
Bulgaria, Poland, Hungary, Lithuania, Latvia, Estonia, Italy, Malta, France, United Kingdom, Ireland, Spain	Austria, Bulgaria, Poland, Hungary, Lithuania, Latvia, Estonia, Czech Republic, Netherlands, Sweden, Denmark, Germany	Romania, Greece, Portugal, Belgium, Luxembourg, Finland, Slovakia, Cyprus, Slovenia

The relevance of the different agency models can be seen in the growing recognition of the importance of institutions in economic and legal reforms. Institutions can considerably influence the implementation of legal rules and administrative policies.[44] Therefore, the effectiveness of law and economic reforms also depends on the institutional environment

---

of the Commission for the Protection of Competition and vested with the Commission for Consumer Protection. Eventually, the Commission for the Protection of Competition retained the powers to enforce the unfair trade practice rules.

[43] The Office of Competition and Consumer Protection (UOKiK) was established in 1990 as the Antimonopoly Office. (AO) A significant change took place in 1996, when after the reform of the central administration, the AO received its present name - the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów - UOKiK*.) The extent of its activities was simultaneously extended to include the protection of consumer interest. In 2000 the Office started monitoring the state aid granted to entrepreneurs and supervision of general product safety. On 16 February 2007 a new Act of Competition and Consumer Protection was adopted. In order to improve the effectiveness of the Office's operations, the Act eliminated the institution of proceedings launched upon a motion with regard to practices restricting competition and infringing collective consumer interests. The Act empowers the President of the Offices to impose fines on undertakings which have infringed collective consumer interest. In 2002 the Offices made an effort to create a market supervision system for products under community directives and a fuel quality monitoring system.

[44] The relevance of institutions has already been emphasised by Stiglitz, who argued that stages of economic development indicated the existence of the necessary pre-conditions for the development of the institutions required for a well-functioning market economy and the capability of the institutional apparatus to generate wealth for the citizens. **J. STIGLITZ**, "Participation and Development: Perspectives from the Comprehensive Development Paradigm", *Review of Development Economics*, Vol. 6, No. 2, June 2002, pp. 163-182, at p. 164.

comprising background constraints that guide individual behaviour. These constraints can be formal explicit rules such as codes of conduct, norms of behaviour and conventions, and informal, often implicit, rules.[45] Moreover, not only the institutional design but also reorganisations in the form of shifting legislative powers between regulatory agencies, can substantially influence the actual enforcement of legal rules. For example, many Member States have introduced the power to investigate private premises, but its practical application has remained limited. Similarly, many Member States have followed the Commission's example in introducing leniency programmes, but the application of these programmes has faced resource constraints, or, due to inappropriate design of the law, has resulted in uncertainty for businesses with regard to eligibility.

Despite the relevance of institutional designs, comparative studies have so far remained modest and have taken place within the framework of larger international organisations such as the OECD and the ICN. The OECD has previously discussed optimal competition agency, but the focus of this survey was on the 'external' design, that is, the place of this authority in the administrative structure, its relations to other bodies - horizontal and vertical - and its competences rather than the 'internal' organisational structure.[46] The Seventh Global Competition Forum of the OECD discussed the allocation of regulatory powers in the field of consumer protection and competition law.[47] Discussions on agency design have taken place within the International Competition Network, which has even launched a project and allocated a Working Group to the subject of agency effectiveness.[48] The ICN project produced a report in 2009, which contains an analysis of the relation between the definition of priorities and resource allocation and the effectiveness of competition agencies' decisions with a focus on compliance with agency decisions (e.g. payment of fines, compliance with behavioural and structural remedies imposed; for example, divestitures, amendments to contracts).[49] The report

---

[45] **P.G. KLEIN**, "New Institutional Economics", in **B. BOUCKAERT and G. De GEEST eds.**, *Encyclopedia of Law and Economics*, Cheltenham, Edward Elgar, 2000, pp. 458-459; **W.E. KOVACIC**, "Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement", *Chicago-Kent Law Review*, Vol. 77, 2001, p. 265.

[46] **OECD**, *Optimal Design of a Competition Agency*, C CNM/GF/COMP(2003)2, p. 2.

[47] **OECD**, *Global Forum on Competition, The interface between competition and consumer policies, Background Note*, DAF/COMP/GF(2008)4.

[48] **International Competition Network**, Competition Policy implementation Working Group: sub group 1, Agency Effectiveness Project, http://www.internationalcompetitionnetwork.org/working-groups/current/agency-effectiveness.aspx. See also **W.E. KOVACIC**, *The Federal Trade Commission at 100: Into Our Second Century*, Presentation Before the 21st Annual Western Conference of the Rutgers University Center for Research in Regulated Industries, Monterey, California, 18 June,2008.

[49] **International Competition Network**, *Report on the Agency Effectiveness Project: Second Phase – Effectiveness of Decisions*, 2009, http://www.internationalcompetitionnetwork.org/uploads/library/doc375.pdf.

acknowledges that effectiveness of agencies depends on a variety of factors such as strategic planning, prioritisation, project delivery, knowledge management, ex-post evaluation, human resource management and communication and accountability. However, it does not elaborate on the portfolio of the authorities, the tasks and competences they have and how those factors influence the effectiveness of enforcement. No similar studies exist on the institutional designs of the NCAs in the EU Member States.

IV. Comparing competition laws of the EU Member States

In the following the Commission's and the Member States' incentives and methods as well as the effects of comparing national and EU competition laws will be discussed by analysing the *Report on the Functioning of Regulation 1/2003* and the work of the ECN.

A. Report on the functioning of Regulation 1/2003

Regulation 1/2003 required the Commission to prepare a report on its operation by 1 May 2009. The aim of the Report on the functioning of Regulation 1/2003 was to understand and assess how modernisation of the EU competition enforcement rules has worked during the first five years from its entry into force. The preparation of the report involved a fact-finding phase to obtain input from stakeholders.[50] The *Report on the Functioning of Regulation 1/2003* and the accompanying *Staff Working Paper* evaluate the substantive and procedural aspects of the enforcement of Articles 101 and 102 by both the Commission and the national authorities. Thus in fact, these two documents serve as a comparative analysis of the EU and national legal rules as well as EU and national practice of enforcement. The Staff Working Paper extensively discusses national rules concerning unilateral conduct where the convergence rule does not apply,[51] the procedural rules defining the NCAs' enforcement powers[52] as well as the evolving structures of NCAs.[53]

The Commission concludes that the *Report*, and thus this comparative analysis, serve as a basis for the Commission to assess, at a further stage, whether it is appropriate to propose

[50] The Commission received submissions from businesses and business associations, law firms, lawyers' associations and academia. The Member States' competition authorities have been closely associated with the preparation of the report and have provided detailed input.

[51] **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003*, *o.c.*, paras. 160-176

[52] *Ibid*., paras. 195-207.

[53] *Ibid*., paras. 190-194.

any revision of the Regulation and extend the conversion of national rules in accordance with the EU legal framework. The *Staff Working Paper* actually says that "such a policy discussion should also explore the means by which procedural convergence could best be achieved, e.g. soft harmonisation or the adoption of certain minimum standards through legislative rules." [54]

The report highlights a limited number of areas which merit further evaluation, such as the procedures of national competition authorities and the area of unilateral conduct. However, the enforcement of EU competition laws is not only influenced by the fact that NCAs apply the EU rules according to divergent procedures and may impose a variety of sanctions, but also by divergent institutional settings, which should also be examined. The possibility of further harmonisation will be discussed in section V. In the next section the comparative work of the ECN will be analysed.

B. Comparing laws in the ECN

The ECN is a network formed by the national competition authorities of the EU Member States and the Commission, co-operating closely on European competition law. The ECN was created as a forum for discussion and regular contact and consultation in the application and enforcement of EU competition policy as well as in cases where NCAs apply Articles 101 and 102 TFEU. The two main pillars of the network are case allocation and information exchange.

The ECN is a highly juridified network with detailed cooperation mechanisms defined in Regulation 1/2003 and the *Notice on Cooperation within the Network of Competition Authorities*.[55] The ECN did not emerge at the initiative of the Member States, but was centrally designed and established by the Commission. It is characterised by formalism in order to safeguard consistent law application and it has a hierarchical structure where the Commission holds a central position *vis-à-vis* the Member States. While the ECN was primarily designed as a policy enforcement network, in fact it seems to function as a policy making network operating through policy discussions and mutual policy learning among the NCAs. It is clear that the ECN represents an active platform of comparative analysis among

[54] *Ibid*., para. 207.

[55] **European Commission**, *Notice on Cooperation within the Network of Competition Authorities*, 27 April 2004,*Official Journal*, 2004, C 101.

the NCAs[56], resulting in visible harmonisation, such as the ECN Model Leniency Programme,[57] the review process of Article 102 and sector specific regulations.[58]

The work of the ECN is organised at four different levels: yearly meetings of the Directors General of the European Competition Authorities, Plenary meetings, horizontal working groups and sector-specific subgroups. The Director General's meeting is the forum for discussing major policy issues such as the review of the Commission's policy on Article 102, the ECN Model Leniency Programme, increases in food and energy prices and the financial crisis. The ECN Plenary discusses horizontal policy issues of common interest such as the ability of national competition authorities to disapply state measures in their application of the EU competition rules. Within the ECN Plenary, several working groups operate which deal with horizontal issues of a legal, economic or procedural nature, situated at the interface between EU law and the different national laws, for example leniency programmes, sanctions, or even the review of vertical and horizontal agreements. Within these horizontal working groups, there are subgroups that engage in discussions on particular sectors. [59]

The ECN has a clear influence on both EU and national competition laws, demonstrated by the voluntary harmonisation of procedural rules. Cengiz argues that the success of the ECN is mainly to be found in its informal mechanisms of information exchange. She adds that at the same time, this comes with certain costs in terms of accountability and due process as a result of the ECN's isolation from the outside world.[60] While in theory national parliaments control NCAs, and the European Parliament the Commission, these mechanisms have proved weak due to information asymmetries.[61] Moreover, the procedures of the ECN and its main output in the form of soft law instruments marginalise judicial control by the European courts, as confirmed by the General Court in *France Télécom*.[62]

---

[56] See **ECN Working Group on Cooperation Issues**, *Results of the Questionnaire on the Reform of Member States National Competition Laws after EC Regulation No. 1/2003*, 14 April 2008, http://ec.europa.eu/competition/ecn/ecn_convergencequest_April2008.pdf.

[57] **ECN Model Leniency Programme**, *Report on Assessment of the State of Convergence*, 2009, http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf.

[58] **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003*, *o.c.*, paras. 248-249.

[59] *Ibid*.

[60] **F. CENGIZ**, *Regulation 1/2003 Revisited*, *o.c.*, pp. 23-25.

[61] *Ibid.*, p. 24; **C. SCOTT**, "Accountability in Regulatory State", *Journal of Law and Society*, 2000, pp. 38-60.

[62] **C.F.I.**, Case T-340/03, *France Télécom SA v. Commission*, 2007, ECR II-107, para.83.

The output of the ECN as well as these accountability problems also have to be evaluated by having regard to the Commission's role in the ECN. The comparative work within the ECN and the possibility to function as a melting pot of national laboratories is limited by the dominance of the Commission and its clear intention to push EU law as the benchmark of harmonisation. This can be seen through the convergence rule in Article 3 of Regulation 1/2003 and the Commission's plan to harmonise further substantive and procedural rules.

C. The purpose of comparing laws

The reason behind comparing national and EU competition laws is the need for coherent and uniform application of EU competition law, effective judicial protection and effective administrative enforcement in compliance with the principle of *effet utile*. Comparing national laws was brought about by the increased role of national procedural rules in the enforcement of EU competition rules. The direct connection between procedural and substantive rules can affect the outcome of a case considerably. As mentioned above, the decentralised enforcement of EU competition law made the actual outcome of EU competition rules subject to 27 administrative procedural laws. The Commission is concerned about the transparency of such a multi-faceted enforcement system and how this affects legal certainty and ultimately the level playing field for undertakings. Transparency, equal and fair access to justice might not be guaranteed by such an enforcement system with diverging national procedures.[63]

As for the Member States, they can use the consultative nature of the ECN to justify 'Europeanisation' of national policy. On the other hand, while the NCAs are being held accountable and they are evaluated by national control and audit mechanisms such as annual reports submitted to the parliaments, there is also a certain 'peer accountability' present within the ECN and other international networks such as the ICN and the OECD.[64] Even though the ECN was initially created in order to guard uniform and consistent enforcement of Articles

[63] Similarly, the Storme Commission argued that international businesses required an effective and transparent system of procedural law, and citizens an equal and fair access to justice; these results could only be achieved if a harmonised system of procedural rules was set up. **M. STORME *ed.***, *Approximation of Judiciary Law in the European Union*, Dordrecht, Martinus Nijhoff, 1994, pp. 44-45.

[64] Within the ECN, for example, all NCAs' annual reports are published in English on the website of the Commission's DG Competition, http://ec.europa.eu/comm/competition/ecn/annual_reports.html.

101 and 102 TFEU, it has proved to be a notable forum for discussing enforcement methods, for mutual learning and even for informally converging enforcement policies.

It is apparent from the Report on the functioning of Regulation 1/2003 that the Commission is using Regulation 1/2003 and its further legislation in EU competition law, such as the Leniency Notice[65], as the benchmark of comparison.[66] However, if the ECN was to serve as a valid framework for regulatory competition between Member States' laws, then it should be left to this competitive process to yield the most effective or most efficient rules between all the 27 national laws and the EU law. The comparison of national laws should not be steered by the Commission and should not be based on the benchmark provided by the EU rules. Even though application of EU rules in parallel with national law makes convergence with EU law easier in practice, it is argued that a more objective and more efficient approach would be to enable competition between all 28 alternatives.

So far, the Commission has conducted the most extensive and comprehensive comparative studies in the field of private enforcement of competition law with the clear purpose of harmonising national procedural laws at a later stage. This comparative exercise is worth mentioning as it also illuminates the Commission's overall policy with regard to harmonising national procedural rules.

a. Comparing laws for private enforcement of competition law

Irrespective of the Community's lack of competence in private law matters, the European Commission has taken a number of concrete steps in order to facilitate damages actions for the breach of European competition rules. The Commission published the Ashurst study in 2004, which found an "astonishing diversity and total underdevelopment" of private damages actions in the EU.[67] In order to stimulate private enforcement, the Commission published a *Green Paper* on how to facilitate actions for damages caused by violations of EC competition rules in December 2005.[68] The *Green Paper* outlined the reasons for the low levels of private enforcement of competition rules and found that the failure is largely due to

---

[65] **European Commission**, *Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, 8 Dec. 2006, *Official Journal*, C 298.

[66] **ECN Working Group on Cooperation Issues**, *Results of the Questionnaire on the Reform of Member States National Competition Laws after EC Regulation No. 1/2003*, *o.c.*

[67] **D. WAELBROEK, D. SLATER and G. EVEN-SHOSHAN**, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, 2004.

[68] **European Commission**, *Green Paper: Damages Actions for Breach of the EC Anti-trust Rules*, No COM(2005) 672 final, 19 December 2005.

various legal and procedural hurdles in the Member States' rules governing actions for antitrust damages before national courts. In 2008, the Commission published a *White Paper*[69] that made detailed and specific proposals to address the obstacles to effective damages actions.

Both the *Green Paper* and the *White Paper* addressed the main divergences of tort laws across the various Member States. The documents in fact argued that the differences among the various models of tort laws jeopardise the effective private enforcement of European competition law. At the same time they also clearly contrasted the high convergence of competition laws with the considerable divergences in tort laws.[70]

After the major comparative Ashurst study on the development of damages claims in the 25 Member States the Commission laid a causal link between the low degree of litigation resulting in much of the harm caused by anti-competitive practices remaining uncompensated, and the disparities in the tort and procedural laws of the Member States. This causal link was clearly stated in both the *Green Paper* of 2005 and the *White Paper* of 2008. In both documents the Commission concluded that the exercise of the right to damages in Europe is still facing considerable hurdles because the "traditional tort rules of the Member States, either of a legal or procedural nature, are often inadequate for actions for damages in the field of competition law, due to the specificities of actions in this field." In addition, the different approaches taken by the Member States can lead to differences in treatment and to less foreseeability for the victims as well as the defendants, *i.e.* to a high degree of legal uncertainty.[71]

The Commission established a similar line of argumentation in the *Report on the Functioning of Regulation 1/2003* and its accompanying *Staff Working Paper*, indicating that it is necessary to assess the potential problems related to the divergences of unilateral conduct

---

[69] **European Commission**, *White Paper on Damages Actions for Breach of the EC Antitrust rules*, No COM(2008) 165, 2 April 2008; **European Commission**, *Commission Staff Working paper Accompanying the White Paper on Damages for Breach of the EC Antitrust Rules*, No SEC(2008) 404, 2 April 2008.

[70] **F. MARCO and A. SÁNCHEZ GRAELLS**, "Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?, *ERPL*, 3/2008, p. 472-473

[71] "[A]ntitrust damages cases display a number of particular characteristics that are often insufficiently addressed by traditional rules on civil liability and procedure. This gives rise to a great deal of legal uncertainty. These particularities include the very complex factual and economic analysis required, the frequent inaccessibility and concealment of crucial evidence in the hands of defendants and the often unfavourable risk/reward balance for claimants." *White Paper*, Section 1.1; **European Commission**, *Commission Staff Working paper Accompanying the White Paper on Damages for Breach of the EC Antitrust Rules*, *o.c.*, point 5; **European Commission**, *Impact Assessment Accompanying the White Paper on Damages COM(2008) 165 final*, No SEC(2008) 405, 2 April 2008, Section 2.3.

rules, procedural rules and institutional matters and to explore alternative further actions.[72] The Commission in fact, now makes a far-reaching attempt to bridge "what until now seemed to be the 'unbridgeable'."[73]

V. Further harmonisation of national substantive and procedural rules

While harmonisation and convergence of substantive competition laws is well advanced, a similar convergence and harmonisation of the procedural rules and institutional frameworks has not taken place. The Commission argued that these divergences merit further examination and reflection. In fact, it has taken an initial step towards further harmonising substantive rules on unilateral conduct and procedural rules. It has stated that it considers soft harmonisation or the adoption of certain minimum standards through legislative rules.[74] Whether procedural rules and substantive rules on unilateral conduct (mostly administrative but in some Member States criminal) should be harmonised is questionable.

In the following, a critical look is taken at the Commission's proposal to further harmonise rules on unilateral conduct and the procedural framework of competition law enforcement. First, it will be examined whether this is legally, *i.e.* what legal basis and which legal arguments the Commission could use in order to further harmonise procedural rules. Second, it will be examined whether harmonising rules on unilateral conduct and further harmonisation of procedural rules would be more efficient than the existing legal diversity. The economics of harmonisation will be applied to assess the top-down harmonisation by the Union and comparative law and economics is applied to evaluate the bottom-up voluntary harmonisation of the Member States.

A. Harmonisation of procedural rules through the backdoor?

The Commission's intention to further harmonise national procedural rules for the public enforcement of EU competition law exhibits similar legal problems as the Commission's ongoing ambitious policy project on private enforcement, where in fact the

---

[72] **European Commission**, *Report on the Functioning of Regulation 1/2003*, *o.c.*, paras. 22, 33; **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003*, *o.c.*, paras. 177, 179, 207.

[73] **W. VAN GERVEN**, "Bridging the Unbridgeable: Community and National Tort Laws After *Francovich* and *Brasserie*", *International and Comparative Law Quarterly*, Vol. 45, 1996, pp.507-544.

[74] **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003*, *o.c.*, para. 207.

harmonisation of private law rules and civil procedures is at stake.[75] In both cases, the Commission faces the problem that it lacks competence and a clear legal basis to harmonise procedural rules. The private law consequences of competition law infringements as well as the administrative procedures fall within the competence of the Member States in accordance with the principle of subsidiarity and so-called national procedural autonomy. It is, therefore, for the Member States to provide for remedies to effectuate damages actions and it is for the national courts to hear cases.[76]

In accordance with Article 5 TEU, the Union is only empowered to act within the competences conferred upon it by the Treaty. With regard to the harmonisation of procedural rules, one could turn to Article 114 TFEU (ex 95 EC), which forms the legal basis for harmonisation measures when such measures have as their objective the establishment and the functioning of the internal market. For example, the Public Procurement Remedies Directives were issued on this legal basis.[77] However, this Article has been strictly interpreted by the Community Courts and it can be applied only when it can be proved that without the harmonisation measures the functioning of the internal market would be endangered and competition distorted. The ECJ, among others, held that the goal of the Commission's intervention had to be stated precisely by explaining the actual problems consumers faced in the internal market and the actual obstacles to the free movement principles as well as the distortions of competition. In *Germany v. Parliament and Council*, the ECJ said explicitly that "a measure adopted on the basis of Article 100a of the Treaty must genuinely have as its

---

[75] Private enforcement of competition law in fact is a question of national private law rules, contract, tort and corresponding civil procedural rules. The ECJ's judgment in *Courage* raised a number of legal questions that are related to the core of private law, such as invalidity of contract clauses, contractual and non-contractual liability, the nature of the damages (direct pecuniary loss and lost business opportunities) as well as the amount of damages, causal link between the damages and the infringement. **E.C.J.**, Case C-453/99, *Courage v. Crehan*, 2001 ECR I-6297.

[76] The ECJ has consistently held that "in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)." **E.C.J.,** Joined cases C-295/04 to C-298/04 *Manfredi v. Lloyd Adriatico Assicurazioni SpA and Others*, 2006 ECR, para. 62; **E.C.J.**, Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland (Rewe I)*, 1976 ECR 1989, para. 5; **E.C.J.**, Case C-261/95 *Palmisani v. INPS*, 1997 ECR I-4025, para. 27; **E.C.J.**, Case C-453/99, *Courage v. Crehan*, para. 29,

[77] **EEC Council**, *Directive on the Coordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts*, No 89/665/EEC, 21 December 1989, *Official Journal*, 1989, L 395/33; **EEC Council**, *Directive Coordinating the Laws, Regulations and Administrative Provisions Relating to the Application of Community Rules on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors*, No 92/13/EEC, 25 February 1992, *Official Journal*, 1992, L 76/14.

object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory."[78] Accordingly, the Commission has to define the legal problems precisely by providing clear evidence of their nature and magnitude, explaining why they have arisen and identifying the incentives of affected entities and their consequent behaviour.

Since the Amsterdam Treaty, Article 81 TFEU (ex Article 65 TEC) can be applied as the legal basis for harmonisation of civil procedural law. This legal basis can be used with regard to civil matters which have cross-border implications and as long as common rules are necessary for the functioning of the internal market. It could be argued that even though this legal basis concerns civil procedural measures, it could be applicable also to administrative procedural law.[79]

Both Article 114 and 81 TFEU require a justification for procedural harmonisation measures by showing that the functioning of the internal market is at stake, namely that the direct effect of substantive EU law might be at risk and market competition would not take place on equal terms, unless at least some minimal requirements concerning procedure were upheld in all Member States. Only then, there would be adequate grounds to support the introduction of harmonised remedies in national courts. Accordingly, in order to decide upon the necessity of EU harmonisation measures in the field of procedural law, the negative effects of diverging judicial remedies for European integration should be estimated.

The influence of procedural differences in the Member States on the internal market could be analysed by looking at their impact on business actors. For example, competition

---

[78] **E.C.J.**, Case C-376/98, *Germany v. Parliament and Council*, 5 Oct. 2000, ECR I-8419, para. 84. Two years later, in the 'Tobacco Labelling' judgment, when applying the same arguments, the Court approved the adoption of the Tobacco Labelling Directive on the basis of Article 95 EC and it thereby reaffirmed its interpretation of Article 95 as a legal basis for measures of harmonisation. **E.C.J.**, Case C-491/01, *British American Tobacco v. The Queen*, 2002 ECR; **EC Council**, *Directive 2001/37 on Tobacco Labelling*, *Official Journal*, 2001, L 194/26. The Court argued that the measures referred to in Article 95 EC "are intended to improve the conditions for the establishment and functioning of the internal market" and "must genuinely have that object, actually contributing to the elimination of obstacles to the free movement of goods or to the freedom to provide services, or to the removal of distortions of competition." The ECJ further stated that "recourse to Article 95 EC as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them." *Germany v. Parliament and Council*, paras. 83-84, cited in *British American Tobacco*, paras. 60-61.

[79] **M. ELIANTONIO**, "The Future of National Procedural Law in Europe: Harmonisation vs. Judge-made Standards in the Field of Administrative Justice", *Electronic Journal of Comparative Law*, Vol. 13.3, September 2009, p. 4.

would be distorted when business actors have to reduce their business in a certain Member State because of the difficulty that they might encounter in enforcing their EU law. Consequently, the benefits of harmonised procedural rules may be transparency and legal certainty, which might be much appreciated especially from the perspective of economic policy and competition. In particular, it can be argued that those participating in the economic life of the Community would benefit from a clear and transparent system in which they would be able to enforce their claims against public authorities all over Europe, pursuant to the same procedural rules.[80] This raises the question whether procedural harmonisation may be pursued in a 'compartmentalised' way for specific policy areas.[81] Two suggestions in the private enforcement debate are worth mentioning with regard to administrative procedures. They both concern a separate harmonisation of economic torts or in the present case economic administrative procedures. Heinemann proposed that general tort rules of the DCFR could be examined against the backdrop of the special needs of competition law.[82] Van Boom proposed a compartmentalised approach to work with the existing modest body of European tort law. By addressing the policy issues involved in each of these torts one by one, the European Union can make harmonised tort law more attainable. He pointed out that a likely candidate for harmonisation is the category of economic torts, such as the protection of intellectual property through tort law, liability for infringement of competition rules and liability for misleading advertising.[83]

The next section discusses the economic arguments of harmonisation and legal diversity.

---

[80] *Ibid*., p. 6; **J. NORMAND**, "Le Rapprochement des Procédures Civiles dans l'Union Européene", *European Review of Private Law*, 1998, Vol. 6, pp. 383-399.

[81] In the *White Paper on Damages Claims*, the Commission did acknowledge that some of the problems identified in the *Green Paper on Damages Actions* also occur in other areas of civil/tort litigation and that some of the suggestions of the *White Paper* might thus also be appropriate beyond the boundaries of competition damages actions. **European Commission**, *Commission Staff Working paper Accompanying the White Paper on Damages for Breach of the EC Antitrust Rules*, *o.c.*, point 312.

[82] **T.M.J. MÖLLERS and A. HEINEMANN *eds.***, *The Enforcement of Competition Law in Europe,* Cambridge, Cambridge University Press, 2007, p.377.

[83] **W.H. VAN BOOM**, "European Tort Law: An Integrated or Compartmentalized Approach?", in **A. VAQUER *ed.***, *European Private Law Beyond the Common Frame of Reference – Essays in Honour of Reinhard Zimmermann*, Europa Law Publishing, 2008, pp. 133-149.

B. The economics of harmonisation

As mentioned above, in EU law the harmonisation process is governed by the principles of subsidiarity and proportionality. These principles entail a cost-benefit analysis of legislation and require minimisation of transaction costs. The economics of harmonisation discusses the costs and benefits of legal diversity and harmonization. It addresses the optimal level of intervention by applying the economic theory of federalism as extended to the theory of regulatory competition.

The idea that decentralised decision making may contribute to efficient policy choices in markets for legislation was first formulated by Tiebout in his classic article on the optimal provision of local public goods.[84] Tiebout's model has been extended to legal rules and institutions. The theory of regulatory competition applies the dynamic view of competition to sellers of laws and choice between legal orders offering a number of criteria to judge whether centralisation or decentralisation is more successful in achieving the objectives of the proposed legislation.[85] In this section, these criteria will be applied to the Commission's harmonisation proposals in order to analyse the probable costs and benefits of top-down rule-making.

One reason to harmonise rules of unilateral conduct as well as procedural rules is that their difference across countries may lead to adverse externalities for other Member States. Such negative spillover effects could very likely flow from the protection of national interests

[84] This economic theory argues that local authorities have an information advantage over central authorities and are therefore better placed to adjust the provision of public goods to the preferences of citizens. Under certain strict conditions, the diffusion of powers between local and central levels of government favours a bottom-up subsidiarity. The economics of federalism deals with the allocation of functions between different levels of government. Tiebout argued that buyers "vote with their feet" by choosing the jurisdiction which offers the best set of laws that satisfy their preferences. The economics of federalism rests upon a number of assumptions. When the 'Tiebout conditions' are fulfilled, competition between legal orders will lead to efficient outcomes. There has to be a sufficiently large number of jurisdictions from which consumers and firms can choose. Consumers and firms enjoy full mobility among jurisdictions at no cost. Last, there are no information asymmetries, which on the one hand means that states have full information as to the preferences of firms and citizens and on the other, suppliers of production factors must have complete information on the costs and benefits of alternative legal arrangements. Only in the presence of these information requirements will consumers and firms be able to choose the set of laws, which maximises their utility or profit. Furthermore, no external effects should exist between states and regions. There must be no significant scale economies or transaction savings that require larger jurisdictions. **C. TIEBOUT**, "A Pure Theory of Local Expenditures", *Journal of Political Economy*, 1956, Vol. 64, No. 5, pp. 416-424.

[85] **R. VAN DEN BERGH**, "The Subsidiarity Principle in European Community Law: Some Insights from Law and Economics", *Maastricht Journal of European and Comparative Law*, 1994, Vol. 1, p. 337; **R. VAN DEN BERGH**, "Modem Industrial Organisation versus Old-fashioned European Competition Law", *European Competition Law Review*, 1996, pp. 7-19; **R. VAN DEN BERGH**, "Regulatory Competition or Harmonization of Laws? Guidelines for the European Regulator in The Economics of Harmonizing European Law", in **A. MARCIANO and J.-M. JOSSELIN *eds.,*** *The Economics of Harmonizing European Law*, Cheltenham, Edward Elgar, 2002.

by unilateral conduct rules, but might be present with regard to different procedures as well. While such negative externalities can be internalised by harmonisation, bargaining between the Member States can also solve this problem. According to the Coase theorem, when property rights are well specified, transaction costs are low, and information is complete, bargaining can be an efficient solution.[86] In fact, the ECN provides an appropriate institutional framework for such bargaining between the Member States. As mentioned above, one of the successes of the ECN has been policy cooperation in the field of unilateral conduct and procedures.

Another reason in favour of harmonisation is that different legal rules carry the risk of destructive competition. Such a 'race to the bottom' development has often been linked to and criticised as a result of competition among jurisdictions. It has been argued that competition among legal rules drives social, environmental, cultural and other standards down. This argument has mainly been embraced in international corporate law by making reference to the 'Delaware effect'. However, the risk of such declining levels of standards has not yet been proved[87] and what little empirical evidence exists is inconclusive. Furthermore, international trade may even stimulate a race to the top.[88] Gomez also argues that the outcome of such a competitive process cannot be examined without taking into account the relative power of the affected groups.[89] Such competition might not harm powerful and well-organised groups, but could have different effects for small and medium sized enterprises and consumers. Furthermore, the ECN serves as a platform for discussion and cooperation, and as such it can function as an information device between Member States. This function of the ECN reduces the prisoners' dilemma conditions, where a race to the bottom is likely to take place. As explained above, it also acts as an incentive to align the national laws voluntarily.

A third argument often raised to support harmonisation, is to achieve economies of scale and to reduce transaction costs. Transaction costs can be high when firms and consumers have to search and comply with different sets of national rules. In case of uniform rules, the search costs of information could be saved and complying with one set of rules can achieve economies of scale. Uniform competition rules can guarantee more stable and predictable

---

[86] **R.J. VAN DEN BERGH and P.D. CAMESASCA**, *European Competition Law and Economics*, *o.c.*, p. 132.

[87] **G. WAGNER**, *The Virtues of Diversity in European Private Law*, in **J. SMITS**, *The Need for a European Contract Law: Empirical and Legal Perspectives*, Europa Law Publishing, 2005.

[88] **R.J. VAN DEN BERGH and P.D. CAMESASCA**, *European Competition Law and Economics*, *o.c.*, pp. 153-154.

[89] **F. GOMEZ**, "The Harmonization of Contract Law through European Rules: a Law and Economics Perspective", *ERCL*, 2/2008.

jurisprudence and contribute considerably to transparency and legal certainty. These arguments promote centralised rules in competition law, and this has clearly been formulated by the stakeholders in the review process of Regulation 1/2003 as well.[90] However, these costs can be especially relevant for large firms operating in interstate commerce, the same might not hold for small and medium sized undertakings operating mainly in national markets or for consumers. Therefore, as mentioned above the impact of such harmonization also has to be analyzed with having regard to the relative power of the affected groups.

Furthermore, while uniform rules help to maintain economies of scale, which is an important argument for centralisation, they can only be advantageous from an *ex ante* perspective, when neither the Member States nor the Community have as yet adopted certain legislation.[91] This is neither the case with regard to the rules on unilateral conduct, nor with regard to administrative procedural rules, which are rooted in old legal traditions and characteristics of the different legal systems.

When all parties in one region have identical preferences, cost efficiency considerations might point to harmonising through one single instrument that suits all. This is clearly in line with the preferences of the business community, which is in favour of uniform rules.[92] However, the preferences of consumers and public administration can diverge significantly. In fact, it has been argued that the legal systems of the Member States are built through habits, customs and practices which dictate how law is going to be interpreted,[93] and that public law "has particularly deep roots inside a cultural and political framework".[94] This is clearly the case with regard to unilateral conduct as the above description of the various legislative alternatives of the Member States has shown.

Accordingly, the possibility of achieving a common procedural administrative law in Europe is doubtful, because the political conditions are missing and because the national legal

---

[90] **R. VAN DEN BERGH**, "The Subsidiarity Principle in European Community Law", *o.c.*; **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003, o.c.*, para. 206.

[91] **R. VAN DEN BERGH**, "Modem Industrial Organisation versus Old-fashioned European Competition Law", *o.c.*

[92] **R. VAN DEN BERGH**, "The Subsidiarity Principle in European Community Law", *o.c.*; **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003, o.c.*, para. 206.

[93] **P. LEGRAND**, "Public Law, Europeanisation and Convergence: Can Comparatists Contribute?", in **P. BEAUMONT, C. LYONS and N. WALKER *eds.***, *Convergence and Divergence in European Public Law*, London, 2002, p. 230.

[94] **C. HARLOW**, "Voices of Difference in a Plural Community", in **P. BEAUMONT, C. LYONS and N. WALKER *eds.***, *Convergence and Divergence*, *o.c.*, p. 208.

systems are based on very different conceptions.[95] The same is true for bridging the gaps between the various economic policies and the corresponding national rules on unilateral conduct. Harmonisation of administrative procedures might conflict with legitimate national interests, such as the need to protect fairness and efficiency in the administration of justice.[96] Due to these fundamental differences in national administrative procedures, it would be very difficult to agree on common rules for all 27 jurisdictions. In fact, it has been argued that "a general codification could be achieved only by reducing the requirements to the level of a common denominator, in which case it would prove as a barrier rather than an asset for an effective and uniform enforcement of Community law".[97] Moreover, some Member States may prefer to implement criminal law procedures for the enforcement of the most severe competition law violations, as is already the case in a significant number of Member States.[98]

In sum, there are insufficient economic arguments in favour of harmonisation, but there are good economic arguments in support of legal diversity. One such argument is that a larger set of legislations can satisfy a wider range of preferences, which leads to allocative efficiency. The broad range of preferences can easily be seen behind the various different regulations on unilateral conduct, but it also holds for administrative procedures. Another argument is the existence of information asymmetries which support decentralisation by maintaining the principles of subsidiarity and procedural autonomy. When information at the local level is more valuable for rule-making and law enforcement, decentralisation is more efficient.[99] Competition between these legal rules has the advantages of a learning process.

---

[95] For example, in some countries there is no procedural code, and there is no desire to have one; moreover, in some countries, there is no difference between the procedural rules with regard to civil and administrative claims. **M. ELIANTONIO**, "The Future of National Procedural Law in Europe", *o.c.*, p. 8.

[96] *Ibid*., p. 7.

[97] This point can also be found in Jürgen Schwarze's well-known publication, in which the national experts taking part in the research project were asked whether they thought that a codification of administrative rules concerning the indirect enforcement of Community law would be possible. **J. SCHWARZE**, "The Europeanization of National Administrative Law", in **J. SCHWARZE *ed.***, *Administrative law under European Influence: on the Convergence of the Administrative Laws of the EU Member States*, London, 1996, p. 832.

[98] The United Kingdom, Ireland, the Czech Republic, Estonia, Romania, Slovenia, Slovakia and Latvia have introduced criminal sanctions for the most severe violations of cartel rules while Hungary, Germany, and Poland have adopted criminal procedures for specific cartel cases such as bid-rigging. Actual invocation of criminal sanctions and procedures has, however, not taken place in these countries.

[99] Information asymmetries arise because centralised actors have an information disadvantage compared to decentralised actors with respect to the firms they have to control. As firms may be unwilling to reveal information needed for central agencies, there is a possibility of providing false information. Therefore, the information obtained might have to be checked and cross-checked against information from competitors, consumers and official sources. Local authorities will have a better overview of the market and thus of the firms to be controlled than a supranational authority.

National laboratories[100] produce different rules that allow for different experiences and which can improve the understanding of alternative legal solutions. These advantages are relevant both to the formulation of substantive rules as well as law enforcement. Moreover, legal diversity and competition does not necessarily exclude harmonisation. In fact, dynamic competition between legal rules can lead to voluntary convergence, which in turn can be more effective and successful than forced coordination of legislations. Instead, the Commission could guarantee the conditions for regulatory competition and let this process work up to voluntary harmonisation. These conditions could in fact be ensured within the ECN. However, the ECN does have some relevant shortcomings in functioning as a true platform for regulatory competition and voluntary harmonisation. These shortcomings will be addressed in the next section.

C. Voluntary harmonisation

As explained above, Regulation 1/2003 did not formally intervene in the procedures of national competition authorities over and beyond Article 5 of the Regulation and the rules applicable to cooperation mechanisms. The *Staff Working Paper stated* that in important respects, the Regulation reconciled the requirements of substantive coherence with the existing procedural diversity amongst European competition authorities.[101] Moreover, the *Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities* stated that the "Member States accept that their enforcement systems differ but nonetheless mutually recognize the standards of each other's system as a basis for cooperation."[102] Still, the *Staff Working Paper* acknowledged that the entry into force of Regulation 1/2003 has generated an unprecedented degree of voluntary convergence of the procedural rules dedicated to the implementation of Articles 101 and 102 TFEU. This section will analyse the underlying reasons and incentives behind this process of voluntary harmonisation by making use of insights from comparative law and economics.

---

[100] Justice Brandeis' famous metaphor for states as laboratories of law reform and his plea for decentralisation has been laid down in his dissenting opinion in **United States Supreme Court**, *New State Ice Corp. v. Liebmann*, 1932, 285 US 262; see also **R. VAN DEN BERGH**, "Regulatory Competition or Harmonization of Laws?", *o.c.*, p. 255.

[101] **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003*, *o.c.*, para. 200.

[102] *Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities*, http://ec.europa.eu/competition/ecn/joint_statement_en.pdf, point 8.

Comparative law and economics compares and evaluates the law of alternative legal systems with the 'efficient' model offered by economic theory.[103] It deals with 'legal transplants' by measuring them with the tool of efficiency and offers an economic analysis of institutional alternatives tested in legal history.[104] It "deals with the transplants that have been made, why and how they were made, and the lessons to be learned from this".[105] While providing comparative lawyers with the measuring tools of economics, it places the notion of efficiency in a dynamic perspective by offering a comparative dimension with concrete alternative rules and institutions.[106]

Convergence between different legal rules towards an efficient model may take place as a result of a legal transplant or as an outcome of a competitive process between different legal formants.[107] In the first case, legal transplants are implemented because they proved to be efficient in other legal systems. In the second case, convergence towards efficiency is the result of the interaction between different legal formants. So, while legal transplants are governed by hierarchy, the second scenario is characterised by competition.[108]

As section 2 of this paper and Table I demonstrated above, EU Member States voluntarily harmonised some elements of the national procedures in competition law. Yet, this process displays some shortcomings in terms of the used benchmark and in terms of the ECN's methods to achieve convergence.

Convergence between the different national rules uses Regulation 1/2003 and some accompanying soft-law instruments as its benchmark. Thus, harmonisation took place so far took place through imposed legal transplants and through implementation by the Member States of similar procedural rules as those of the Commission's. The underlying rationale might be that if these rules and enforcement methods have worked effectively and efficiently in the hands of the Commission, they will prove successful in the hands of the NCAs as well. However, the efficiency of these rules and their comparative advantage *vis-à-vis* other

---

[103] **U. MATTEI, L. ANTONIOLLI and L. ROSSATO**, "A. Comparative Law and Economics", in **B. BOUCKAERT and G. De GEEST eds.**, *Encyclopedia of Law and Economics*, Cheltenham, Edward Elgar, 2000, pp. 506-507; See also **U. MATTEI,** "Efficiency in Legal Transplants: An Essay in Comparative Law and Economics", *International Review of Law and Economics*, 1994, Vol. 14, pp. 3-19.

[104] **N.K. KOMESAR,** *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy*, Chicago, University of Chicago Press, 1994.

[105] **A. WATSON**, "Comparative Law and Legal Change", *Cambridge Law Journal*, 1978, p. 313, at p. 318.

[106] **U. MATTEI, L. ANTONIOLLI and L. ROSSATO**, "Comparative Law and Economics", *o.c.*, pp.512-13.

[107] *Ibid*., pp.508-511.

[108] *Ibid*., pp. 510-511.

national rules have neither been analysed nor confirmed. Furthermore, the success of such legal transplants is not guaranteed in the different institutional frameworks of the Member States, where agencies often have to divide resources between several competences. The actual outcome of enforcement depends heavily on the existing institutional framework.

The influence of the institutional framework should not be underestimated in measuring actual law enforcement and in understanding why a certain legal rule proves to be successful or fails in different institutional contexts.[109] Neo-institutional economics[110] emphasises the relevance of institutions and path dependence in explaining the evolution of legal systems both when legal change is endogenous and when it results from a legal transplant. Similar measures will lead to different outcomes because of diverging informal rules and informal constraints in different economies. Institutional path dependency is the downstream institutional choice inherent in any institutional framework which makes it difficult to alter the direction of an economy once it is in a certain institutional path. Formal rules can be changed overnight, but informal constraints change slowly.[111]

The insights of institutional economics have proved especially helpful in explaining the experience of the CEECs with regard to their transition process from central planning to a market economy and the implementation of competition laws.[112] The new enforcement models of the European Commission have a strong influence in all Member States. However, actual application of the mode was especially weak in the CEECs.[113]

Despite the blueprint convergence of procedural rules the NCAs could not or did not actually enforce these rules due to certain constraints present in their institutional framework. The strengthened enforcement tools have not always delivered the expected results in actual enforcement. This is, for example, the case with regard to the power to investigate private premises. No actual experience of this form of investigation exists in Cyprus, Spain, Sweden,

---

[109] Institutions consist of formal rules (such as laws and regulations) and informal rules (derived from culture, tradition, custom and attitude) that determine the behaviour of individuals and organisations. Formal rules and informal constraints are interdependent and in constant interaction.

[110] See *supra* note 44.

[111] **D.C. NORTH**, *The Contribution of the New Institutional Economics to an Understanding of the Transition Problem*, WIDER Annual Lectures, Helsinki, March 1997, p. 13.

[112] The failure to take institutions into account when designing reform policies has generated serious difficulties and challenges in these countries. **OECD**, *Small economies and competition policy: background paper*, OECD Global Forum on Competition, CCNM/GF/COMP(2003)4, pp. 9-10.

[113] In the CEECs, there are significant socio-economic factors, both formal and informal, that have a decisive impact on whether and how the implemented rules are actively invoked. These socio-economic factors are related to the process of economic transition, to the lack of previously existing market mechanisms and experience with free markets, to the absence of interaction between market regulation and constitutional and institutional reforms, and to the revival of private law and private law courts.

the Czech Republic, Greece, Luxembourg, Estonia, Hungary, Malta, Romania, Slovenia and Slovakia. In Portugal, Bulgaria, Finland, Italy and Denmark, this form of investigation has not even been foreseen in the competition rules.[114]

A similar experience can be found with regard to leniency programmes, which are often praised as the model for procedural convergence and a clear result of the cooperation mechanism within the ECN. However, Malta does not have a leniency programme. As for the CEECs, even though they have clearly defined leniency programmes (and Slovenia applies some other provisions that make termination of proceedings or fine reduction possible), the actual application has so far been very limited. The programmes adopted initially proved to be unproductive as a result of insufficient transparency or uncertainty about eligibility. That is why many national programmes have recently been revised and slowly begin to be applied in competition proceedings in the Member States.[115]

In addition, the comparison of national laws within the ECN seems to be steered from the center by the Commission, establishing the EU rules as the benchmark for harmonisation. While the Commission was seemingly decentralising enforcement powers, in fact it has retained a central policy-making role but without any control mechanism. As mentioned above, the work and procedures of the ECN are determined by soft-law measures beyond Regulation 1/2003 and the Network Notice, which procedures are not subject to judicial review by the EU Courts. The work in the ECN results in non-binding policy communications, but these might imply significant policy changes.[116] Due to the ECN's lack of transparency, it is difficult to see whether the harmonisation resulting from its work is the outcome of regulatory competition or legal transplants. The ECN's success could be seen in its character of a new mode of governance based on consultation, negotiations and soft-law instruments instead of

[114] **European Commission**, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003*, *o.c.*, para. 202.

[115] 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 regarding a cartel agreement in 2006, but revised its 2004 leniency programme significantly in 2009, due to shortcomings of the previous model. In the Czech Republic, Hungary and Slovakia, a marker system exists as well. However, in the Czech Republic, the decision to grant a 'marker' is entirely at the discretion of the Antimonopoly Office. **Global Legal Group**, *Cartels & Leniency 2009*, Chapter 36, Slovakia (M.H. Zahradnik and Madárová), p. 214; Chapter 10, Czech Republic (A. Braun, D. Bicková), p.54; Chapter 18, Hungary (G.J. Bacher, Budai), p.102. In Hungary, leniency has been applied in a few cartel cases, but only one of these cases was already closed by decision of the Competition Council in 2007. Vj-81/2006 Since 2009, Hungary has had a leniency programme even with regard to unfair and restrictive market practices. Leniency policy related provisions of Act No LVII of 1996 on the prohibition of unfair and restrictive market practices (2009).

[116] **F. CENGIZ**, *Regulation 1/2003 Revisited*, *o.c.*, p. 25.

on command and hierarchy in the form of hard law.[117] However, flexibility should be balanced with formal controls on the Commission's as well as the NCAs' activities.

Still, the ECN is a significant channel of harmonisation in a bottom-up perspective. The ECN has increased pressure on the agencies to quantify their enforcement and advocacy work.[118] This process is encouraged further by reputation mechanisms such as the OECD country reports, the International Competition Network or even the Global Competition Review rankings.[119] These mechanisms make actual enforcement modalities more visible and may induce competition among the agencies. Even though enforcement methods legislated in soft-law instruments at the EU level do not oblige Member States to follow those guidelines, there is certainly some pressure both from the Commission as well as within the ECN to adopt similar instruments in national legislations.

VI. Conclusions

Until now, comparative analysis has not been closely associated with competition law. Even after the decentralisation of EU competition law enforcement, one might not think of the need to compare national laws, as one of the main achievements of the new system was an increased convergence of substantive national rules. However, the new enforcement system made the differences between national procedural rules and institutional settings visible as the decentralised enforcement of EU rules necessitated a closer look at the procedures framing law enforcement and the institutions enforcing the competition rules. As the Commission no longer holds the exclusive position of enforcing EU competition law, but has to safeguard the uniform and consistent application of EU rules, it was urged to compare national procedures and assess the impact of the differences. The Commission has done so clearly with the aim of further harmonising national rules and thus creating a level playing field also in areas presently outside of the realm of EU law, such as unilateral conduct and procedural rules. The

---

[117] **D. COEN and M. THATCHER**, "Network Governance and Multi-level Delegation:European Networks of Regulatory Agencies", *Journal of Public Policy*, 2008, Vol. 28, No. 1, pp. 49-71; **I. MAHER**, "Competition Law in the International Domain: Networks as a New Form of Governance", *Journal of Law and Society*, 2002, Vol. 29, No. 1, pp. 112-136.

[118] However, it has to be admitted that quantification of the enforcement work of national competition authorities lacks clearly defined and commonly agreed benchmarks. **I. MAHER**, *The Rule of Law and Agency: The Case of Competition Policy*, IEP Working Paper 06/01, March 2006, http://www.chathamhouse.org.uk/files/3318_wp0306competition.pdf, p. 4. See also **W.E. KOVACIC**, *Using Evaluation to Improve the Performance of Competition Policy Authorities*, Background Note, Evaluation of the actions and resources of competition authorities, OECD, DAF/COMP(2005)30.

[119] **I. MAHER**, *The Rule of Law and Agency*, *o.c.*, pp. 4-5.

Commission's comparative analysis and its conclusions have been documented in the *Report on Regulation 1/2003* and can be also deduced from the ECN's work. One field which is remarkably absent in these comparative exercises, is the examination of the different institutional designs. Although the impact of different institutional settings on law enforcement has not been entirely neglected by the Commission, it has not explored this issue deeply.

This paper took a critical look at the Commission's intention to further harmonise certain substantive and procedural rules of the Member States. There seem to be few arguments to do so. Not only do relevant legal and constitutional problems arise, economic arguments also favour legal diversity. First, the Commission faces the problem of the lack of EU competence to harmonise procedural laws. The procedural rules are 'protected' by the national procedural autonomy of the Member States from EU intervention. Moreover, the Commission has furnished no evidence that such harmonisation measures are indeed needed for the unification of the internal market. Earlier cases in consumer law should warn the Commission that the ECJ will not hesitate to break down and reverse harmonisation measures of the Commission when it finds that the legal basis is not justified. The way forward could, however, be some kind of compartmentalised harmonisation for procedural rules in the field of economic law. Secondly, there are good economic reasons for regulatory competition that can be accommodated within the ECN. The ECN is a unique forum for policy discussions and comparative work among the NCAs. It has a great potential to serve as the platform for exchanging alternative legal solutions of the national competition law laboratories and as a melting pot for voluntary harmonisation. Nevertheless, when one examines the methods used within the network, significant questions of efficiency and accountability arise. The comparison of national laws is managed and steered by the Commission and takes place on the basis of the benchmark provided by the EU rules. Moreover, the ECN is not transparent for outside actors and the reach of judicial review is marginalised, which leaves the steering role of the Commission uncontrolled. The success of the Network needs to be reassessed in the light of these fundamental problems.

The framework for regulatory competition between the Member States and the Commission should be guaranteed in an objective and efficient way, without the imposition of EU legal transplants. Not EU rules, but genuine competition between the different legal formants should dominate. The arguments from comparative law and economics and especially from neo-institutional economics emphasising the influence of institutional frameworks on actual law enforcement support this approach. Informal harmonisation is a

process of social learning through conflict management and contestation,[120] which should be the result of dynamic processes of competition between legal orders.

[120] **C. JOERGES**, "The Challenges of Europeanization in the Realm of Private Law: a Plea for a New Legal Discipline", *Duke Journal of Comparative & International Law*, 2004, Vol. 14, p. 149.