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THE EUROPEAN COMPETITION NETWORK: STRUCTURE,
MANAGEMENT AND INITIAL EXPERIENCES OF POLICY
ENFORCEMENT

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MAX WEBER PROGRAMME

*The European Competition Network:
Structure, Management and Initial Experiences of Policy Enforcement*

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Abstract

The European Competition Network came into life in 2004 as an atypical network with a relatively hierarchical and highly regulated structure. As a result, predictions regarding the future functioning of this network were largely sceptical at the time of its inception. Now the network is about to complete its fifth year in operation and the European Commission is due to present a report to the European Parliament and the Council regarding experiences of policy enforcement by this network. Therefore, it is particularly timely to have a retrospective look at the European Competition Network and assess its achievements and failures. This paper reviews the structure and management methods of the European Competition Network in the light of the policy network literature and comments on initial experiences with its operation. The paper argues that in general the sceptical predictions regarding the operation of the network have not been realised. The network has been successful particularly in terms of accelerating communication between the competition authorities of Europe and increasing their contribution to the design of European competition policy. However, the paper also reveals certain weaknesses of the operation of this network. Particularly the inefficiencies of investigations by the national competition authorities, the low level of horizontal cooperation between the national competition authorities in individual investigations and the opaque nature of network management appear as matters which need to be addressed to achieve more effective network management.

Keywords

European Competition Network, Council Regulation 17/62, Council Regulation 1/2004, National Competition Authorities, Policy Networks.

Introduction*

Competition policy enjoys a special constitutional status in the European Community (EC). Unlike constitutional documents of many other polities, the Treaty founding the EC, which was declared by the European Court of Justice “the constitutional charter of the EC”¹, set forth the substantive rules of competition in Art.85 (now 81) regarding anticompetitive agreements and Art.86 (now 82) regarding the abuse of dominance. Furthermore, the Treaty attributed a special role to competition policy in the realisation of the Common Market objective.² Therefore, arguably, EC competition law and policy constitutes the strongest pillar of the European economic constitution alongside the free movement of production factors. Accordingly, particularly under the European Single Market programme, Arts.81 and 82 of the Treaty were enforced and interpreted by the European Commission and the Court of Justice in the light of the general EC objectives and they significantly contributed to the integration of formerly local and national markets.³

However, despite the paramount position of competition law in the European economic constitution, the Treaty was silent when it came to the enforcement of Arts.81 and 82. In particular, enforcement of Art.81(3), which exempts certain anticompetitive agreements from the general prohibition due to their efficiency enhancing effects, was under question at the time, due to the substantial differences between the German and French enforcement traditions, which followed authorisation and direct applicability models respectively.⁴ The question was resolved by the Council Regulation 17/62 which conciliated these two different approaches and brought forward an “individual exemption regime” where undertakings would lodge a notification to the European Commission, and the agreement in question would be legal and valid if the Commission issues an exemption after the assessment of the agreement under Art.81(3).⁵ Regulation 17/62 granted the Commission exclusive authority to enforce Art.81(3) through individual exemptions and it further strengthened the Commission’s enforcement monopoly by requiring the national authorities to terminate their investigations under Arts.81 and 82 when the Commission opens proceedings regarding the same matter.⁶ Such a centralised enforcement regime was the only notable exception to the general Community method where EC laws and policies were enforced by the national authorities and courts under the monitoring of the EC institutions. Nevertheless, centralised enforcement of EC competition law was deemed inevitable at the time, due to the immature natures of competition laws and authorities in most of the Member States and the crucial importance of consistency in the enforcement of EC competition law under the economic integration objective⁷.

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¹ C-294/83, *Parti écologiste "Les Verts" v European Parliament*, [1986] ECR 1339.

² Treaty Founding the European Community, Art.3(g).

³ David J. Gerber, “The Transformation of European Community Competition Law”, 35 *Harvard International Law Journal* 97 (1994), p.98; D.G. Goyder (2003), *EC Competition Law*, Oxford University Press, Oxford, p.413.; Jonathan Faull, “Effect on Trade between Member States and Community: Member State Jurisdiction”, 1989 *Fordham Corp. L. Inst.* 000 (B. Hawk Ed. 1990), 485-508, p.488.

⁴ Claus Dieter Ehlermann, “The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution”, *Common Market Law Review*, (2000), 37:537-590, p.540; Jean Monnet, *Mémoires*, Fayard, (1976), p.413; Wouter P. J. Wils, “Community Report”, in *Modernisation of EU Competition Law Enforcement in the EU: FIDE 2004 National Reports*, pp.343-44.

⁵ Council Regulation 17/62 (EEC), First Regulation implementing Articles 85 and 86 of the Treaty (hereinafter “Regulation 17/62”), *Official Journal of the European Communities*, P 013 , 21/02/1962, Art.4.

⁶ *Id.*, Art.9(3).

⁷ David J. Gerber (2003), *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, Oxford, p.349; Claus-Dieter Ehlermann, “Implementation of EC Competition Law by National Anti-Trust Authorities”, *European Competition Law Review*, (1996), 17(2):88-95, pp.88-89.

The individual exemption regime and the Commission's exemption monopoly had substantially affected the development of EC competition policy. Firstly, this regime provided the DG IV (now DG Competition) of the Commission with a powerful instrument to almost single-handedly design the European cartel policy using its discretion in application of the vaguely defined criteria of Art.81(3) under -of course- the control and observation of the European Court of Justice, and later the Court of First Instance.⁸ Secondly, under the individual exemption regime, National Competition Authorities (NCAs) did not show any significant contribution to the enforcement of EC competition rules as, after devoting their scarce resources to investigating violations of Art.81, their proceedings could always be brought to an end if undertakings under investigation lodged a dilatory exemption application to the Commission. Therefore, alongside the scarcity of resources and relatively weak competition cultures at the national level, the enforcement monopoly of the Commission under the individual exemption regime resulted in a lack of enforcement enthusiasm by the NCAs.⁹ Although the European Court of Justice confirmed that the NCAs and the national courts were empowered to enforce Art.81 and 82 under the general EC principle of direct effect¹⁰ and the Commission published cooperation notices to invigorate enforcement by the NCAs and the national courts,¹¹ these efforts did not provoke the expected level of activity at the national level.

Towards the new millennium the dynamics of policymaking, policy enforcement and governance in the EC experienced certain transformations which were reflected in all policy domains, including the competition policy. A shift from "government" to "governance" took place in Europe as a result of the continuous movement of liberalisation of formerly state dominated industries, rapid technological progression and re-regulation through independent regulatory agencies.¹² Likewise, the Single Market Programme which aimed to fully integrate national markets through harmonisation of various regulatory standards at the Community level resulted in an immense body of technical economic regulations. Additionally, the EU was about to carry out its most ambitious enlargement project yet which would increase its population by more than 80 million and almost double the number of its Member States. There was a certain reaction to the ever-expanding policymaking and enforcement powers at the Community level which resulted in *inter alia* incorporation of the principle of subsidiarity to the founding Treaty.¹³ All of these developments rendered the conventional top-down

⁸ Emphasising the significance of individual exemption regime as a policymaking tool, some accounts describe the Regulation 17/62 as the "procedural bible" of the Commission. See Lee McGowan, "Safeguarding the Economic Constitution: The Commission and Competition Policy", in Neill Nugent (Ed., 1997), *At the Heart of the Union: Studies of the European Commission*, Macmillan, London, 145-166, p.147; Lee McGowan, Stephen Wilks, "The First Supranational Policy in the European Union: Competition Policy", *European Journal of Political Research*, (1995), 28:141-169, p.149.

⁹ See Gerber, Ehlermann, both at supra note 7. This paper confines its analysis to the enforcement of EC competition law by the NCAs only and therefore it will not comment on enforcement by the national courts. However, there are two very interesting pieces of scholarly work which reflect opposing perspectives on the powers and roles of national courts in enforcement of the EC competition law and which, therefore, deserved to be mentioned here. See Stephen Kon, "Article 85, Para.3: A Case for Application by National Courts", *Common Market Law Review*, (1982), 19:541; *contra* Ernst Steindorff, "Article 85, Para.3: No Case for Application by National Courts", *Common Market Law Review*, (1983), 20: 125.

¹⁰ C-127/73, *BRT v. Sabam*, [1974] ECR-313. See also C-453/99 *Courage Ltd v Bernard Crehan* ECR [2001] I-6297 and C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* ECR [2006] I-06619 for the recent jurisprudence on the direct effect of EC competition rules.

¹¹ European Commission, Notice on Cooperation between National Courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ C 039, 13/02/1993, 6-11; European Commission, Notice on Cooperation between National Competition Authorities and the Commission in handling cases falling within the scope of Articles 85 and 86 of the EC Treaty, OJ C 313, 15/10/1997, 3-11.

¹² Giandomenico Majone, "The Rise of the Regulatory State in Europe", in W.C. Müller and V. Wright (Eds., 1994), *The State in Western Europe: Retreat or Redefinition?*, Frank Cass, London, pp.77-101; Giandomenico Majone (1990), *Deregulation or Re-Regulation? Regulatory Reform in Europe and the United States*, Pinter, London; Giandomenico Majone, "The Regulatory State and Its Legitimacy Problems", *West European Politics*, (1999), 22(1):1-24; Burkard Eberlein, Edgar Grande, "Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State", *Journal of European Public Policy*, (2005), 12(1): 89-112, p.90.

¹³ Art.5(2) EC which reads: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

Community method of policy enforcement (in other words enforcement by the European Commission or by the national authorities under the monitoring of the European institutions) ineffective. In order to meet the challenge of efficient and responsive policy enforcement under these new dynamics, the Commission signalled a move towards different methods, such as network governance and open method of coordination, which would involve continuous but swift communication and collective action with the national regulatory authorities, bureaucrats and experts.¹⁴ In the field of competition policy, the wind was also blowing towards more efficiency and responsiveness both in terms of substantive underpinnings of the policy and its enforcement methods. In the late 1990s the Commission started a project in which interpretation and application of Arts.81 and 82 as developed to that time were revised in order to follow a more economics-based approach.¹⁵ On the other hand, certain progress had been made in laying down the foundations of the European Single Market, and therefore, the centralised enforcement regime brought by Regulation 17/62 had fulfilled its function. Likewise, there was less reason to fear inconsistency now, as application of Arts.81 and 82 to particular types of violations had been clarified and firmly established by the jurisprudence of the European Court of Justice and various notices, guidelines and other policy communications of the European Commission.¹⁶ Furthermore, it was unrealistic to expect efficient enforcement under the individual exemption regime with the then forthcoming enlargement which would almost double the size of the European market.¹⁷

In 1999 the Commission published a White Paper which reflected these interconnected developments and opened up to discussion various possible strategies for the modernisation of the centralised enforcement regime.¹⁸ This initiative resulted in a new “Modernisation Regulation”¹⁹ which came into force in 2004 and replaced the Regulation 17/62. The Modernisation Regulation transformed Art.81(3) EC into a legal exception rule and granted the NCAs as well as the national courts the authority to apply Arts.81 and 82 in their entirety.²⁰ As explained powerfully by Ehlermann, the abolition of the individual exemption regime and decentralisation of the enforcement of EC competition rules was a significant “cultural revolution”.²¹ Nevertheless, since competition policy constituted a strong pillar of

¹⁴ See European Commission, *European Governance: A White Paper*, COM(2001) 428 final, Brussels 25.7.2001, p.25 *et seq.* See also Peter Sutherland (1992), *The Internal Market after 1992: Meeting the Challenge*, Report to the EEC Commission by the High Level Group on the Operation of the Internal Market (“Sutherland Report”), Brussels. Sutherland Report was one of the key inspirations behind the new governance methods followed under the framework of the Single Market Programme.

¹⁵ Arguably this revision started with the adoption of a Commission Green Paper on vertical restraints in 1997 (Green Paper on Vertical Restraints in EC Competition Policy, COM (96) 721 final, 22 January 1997). This Green Paper reviewed the strict application of EC competition law to vertical restraints under the economic integration objective and resulted in the adoption of an umbrella Block Exemption Regulation replacing various block exemption regulations dealing with different types of vertical restraints (Commission Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, 1999 OJ L336/21). Likewise in 2000 the Commission published a set of guidelines accompanying the Block Exemption Regulation which promised a more economics-based approach based on the market structure and particularly the foreclosure effects (Commission Notice, Guidelines on Vertical Restraints, 2000 OJ C291/2). The revision process continued with the publication of the White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty (1999 OJ C 132/1) which resulted with the decentralisation of enforcement of the EC competition law. As a part of the same process, the Commission published a Green Paper in 2005 (Green Paper on damages actions for breach of the EC antitrust rules, Brussels, 19.12.2005, COM(2005) 672 final) and a White Paper in 2008 (White Paper on damages actions for breach of the EC antitrust rules, Brussels, 2.4.2008, COM(2008) 165 final) to invigorate private enforcement of EC competition law through consumer damages actions. Additionally, for the first time in the history of EC competition law, the Commission has recently published guidelines regarding application of the Art.82 EC (Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, Brussels, 3 December 2008, COM(2008)) reflecting the discussion process initiated by the Commission Staff Working Paper on exclusionary abuses published in 2005 (DG Competition discussion paper on the application of Art.82 of the Treaty to exclusionary abuses, Brussels, December 2005).

¹⁶ European Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* (hereinafter “White Paper”), 1999 OJ C 132/1, p.15 *et seq.* and p.25 *et seq.*

¹⁷ *Id.*, pp.6, 7, 10, 32.

¹⁸ *Id.*

¹⁹ Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter “Modernisation Regulation”), 2003 OJ L 1/1.

²⁰ *Id.*, Arts.1, 5 and 6.

²¹ Ehlermann, *supra* note 4.

the European economic constitution, consistency and uniformity in its enforcement was not to be compromised even in the era of decentralisation. In order to facilitate cooperation between the competition authorities of Europe and protect consistent enforcement of competition policy, a network between the NCAs and the Commission was formed. The network was named the “European Competition Network” (ECN) and its cooperation and management mechanisms were determined in detail by the Modernisation Regulation and a separate Commission notice (Network Notice).²²

As will be explained later in this paper, the ECN is a highly regulated network and to a certain extent it has a hierarchical structure in which the Commission enjoys a superior managerial position both in the enforcement of EC competition rules and in the management of the network. In these respects the ECN appears rather atypical, as its structure is highly different from other European regulatory networks and it does not fully reflect the dynamics of policy networks as determined by political science literature. Therefore, at the time of its inception, academic predictions in particular regarding the future functioning of the ECN were largely sceptical. The main aim of this paper is to have a retrospective look at the operation of the ECN since its inception and to assess its achievements and failures. Given that the ECN has been in operation for five years now, and the Commission is due to submit a report to the European Parliament and the Council regarding experiences of enforcement under the Modernisation Regulation²³ such assessment happens to be particularly timely.

This paper starts with a brief review of policy network literature and continues with the analysis of the structure of the ECN under such models. After this, the paper goes into the analysis of initial experiences of policy enforcement through this network. The paper reveals that, fortunately, sceptical academic predictions regarding the functioning of this network have in general not been realised. The ECN functioned successfully particularly in terms of facilitating interaction and communication between the competition authorities of Europe and increasing contributions of the NCAs to the design of European competition policy. Despite such positive experiences, however, there are some weaknesses as well which should be addressed in order to achieve more effective policy enforcement. Particularly the inefficiencies caused by the workload of the NCAs, the low level of practical cooperation between the NCAs and the trend of opaqueness in network management appear as particular matters of concern.

Network literature and policy enforcement through networks

In general terms, network approach explains the choices and behaviours of individuals under the assumption that those choices and behaviours are affected by the social environment in which the individual is embedded.²⁴ A wide range of disciplines, from psychology to the political sciences, utilise network models in the analysis of group and individual behaviour. Generally, all models rely on the visualisation of networks as links between “nodes” or “actors” who share some common attributes, and are therefore, identified as members of the same group.²⁵ Mutual resource interdependencies play the key role in the formation of networks.²⁶ Actors who need resources controlled by each other in order to achieve an outcome which they all desire form networks; and within the structure of those networks they exchange resources, particularly information.²⁷

²² Commission Notice on cooperation within the Network of Competition Authorities (hereinafter “Network Notice”), 2004 OJ C101/43.

²³ Modernisation Regulation, supra note 19, Art.44.

²⁴ David Knoke, James H. Kuklinski, “Network Analysis: Basic Concepts”, in Grahame Thompson (et. al. Eds., 1994), *Markets, Hierarchies and Networks: The Coordination of Social Life*, Sage, London, 173-181, p.173; David Knoke, James H. Kuklinski (1982), *Network Analysis*, Sage University Series: Quantitative Applications in the Social Sciences, No.28, Sage, London, p. 9.

²⁵ Knoke, Kuklinski (1994), *id.*, p.175; Knoke, Kuklinski (1982), *id.*, p.12.

²⁶ Walter W. Powell, “Neither Market nor Hierarchy: Market Types of Organisation”, in Grahame Thompson (et al. Eds.), supra note 24, p.272.

²⁷ Martin J. Smith (1993), *Pressure, Power and Policy: State Autonomy and Policy Networks in Britain and the United States*, Harvester Wheatsheaf, London, p.56.

The policy networks approach, on the other hand, focuses on relations between actors who are involved in the formulation and enforcement of policies and on how those relations affect policy outcomes in contemporary societies.²⁸ The network approach became particularly popular in the analysis of policymaking and enforcement as a result of the transformation from government to governance in post-modern societies. This transformation rendered the traditional hierarchical approach to policymaking and enforcement redundant in many policy fields due to the involvement of various actors (such as regulators, bureaucrats, business organisations and other interest groups) in these activities. In contemporary societies, policies were no longer made and implemented within a hierarchical, vertical structure. Rather, complex relations between horizontally arrayed, largely autonomous, but interdependent actors began to perform this function.²⁹ It was especially so in multi-level polities, such as the EC, where multiple actors from local, national and supranational levels were engaged in the formulation and delivery of policies.³⁰

Policy networks literature is replete with various different models which offer different definitions of the concept.³¹ Incorporating common elements of these different models into one simple sentence, policy networks can be defined as complex and dialectical relations between multiple and mutually dependent actors which take part in the formulation and enforcement of policies.³² However, despite the abundance of policy network models, luckily, there is some agreement in the literature regarding the main characteristics of policy networks.³³ First of all, similar to other types of networks, resource interdependencies play the key role in the formation of policy networks. Such resources can be financial resources or human resources as well as experience and expertise. For instance, to give an example from the EC, under the dynamics of modern complex markets, the European Commission needs the assistance of national regulators in the collection of market specific information in order to formulate responsive and effective policies, whereas the national level requires the cooperation of the Commission for their perceptions to be reflected in EC policies, since the Commission holds the key to policymaking in the EC with its right of initiative. Such mutual interdependence results in the formation of networks and resource exchanges and continuous interactions between the actors involved in those networks.

²⁸ Bernd Marin (Ed., 1990), *Generalized Political Exchange: Antagonistic Cooperation and Integrated Policy Circuits*, Campus/Westview Press, Frankfurt a.M, p.16; Bernd Marin, Renate Maytz, "Introduction: Studying Policy Networks", in Bernd Marin, Renate Maytz (Eds., 1991), *Policy Networks: Empirical Evidence and Theoretical Considerations*, Westview Press, Colorado, 11-23, p.14.

²⁹ Marin, Maytz, *id.*, p.14; Patrick Kenis, Volker Schneider, "Policy Networks and Policy Analysis: Scrutinizing a New Analytical Toolbox", Marin, Maytz (Eds.), *id.*, 25-59, p.27. Marin disagrees by arguing that "what distinguishes the networks from bureaucracy is not horizontal versus vertical relations, but rather organisational versus interorganisational relations and the nature of power relations, such as conditions of entry-exit, inclusion-exclusion, expulsion, membership or other adherences.", see Marin (Ed.), *id.*, pp.19-20.

³⁰ Modern multi-level polities incorporate not only a 'maze of institutions', but 'matrix[es] of reciprocal power relations', D Krane, "American Federalism, State Governments, and Public Policy: Weaving Together Loose Theoretical Threads", 26 *Political Science and Politics* 186, (1993), p.187.

³¹ See, e.g. David Marsh and RAW Rhodes, "Policy Networks in British Politics: A Critique of Existing Approaches", in David Marsh and RAW Rhodes (Eds., 1992), *Policy Networks in British Government*, Oxford, Clarendon Press, 1; Walter Kickert, "Complexity, Governance and Dynamics: Conceptual Explorations of Public Network Management", in J Kooiiman (Ed., 1993), *Modern Governance*, London, Sage Publications, pp.191-92.

³² Firat Cengiz, "Management of Networks between the Competition Authorities in the EC and the US: Different Polities, Different Designs", *European Competition Journal*, (2007), 3(2):413-436.

³³ British, German and Dutch policy network models constitute centrepieces of the European policy network literature. For reviews of and comparisons between these different models see Tanja A. Börzel, "Organizing Babylon-On the Different Conceptions of Policy Networks", *Public Administration*, (1998), 76:253-273; Frans Van Waarden, "Dimensions and Types of Policy Networks", *European Journal of Political Research*, (1992), 21:29-52; David Marsh (Ed., 1998) *Comparing Policy Networks*, Open University Press, Buckingham; Firat Cengiz, "Antitrust Federalism in Comparison: Multi-level Enforcement of Competition Policy in the US and the EC", PhD Thesis submitted to the Faculty of Social Sciences of the University of East Anglia, Norwich, UK, August 2008.

Networks constitute an alternative type of organisation to both markets and hierarchies with their distinct characteristics of resource exchange.³⁴ Markets lack central control, and as a result, under the framework of markets, individual bargaining determines the nature of resource exchange and the outcomes of such exchange. Compared to markets, networks appear more structured, as under the framework of networks actors get involved in regular contacts with each other.³⁵ However, networks are not as centralised as hierarchies either, as they stand on a horizontal structure rather than a command mechanism. Within the context of networks, coordination between actors is sustained on the basis of consensus, not as a result of control exercised by the centre.³⁶ And such consensus is achieved through regular contacts and resource exchange between the actors involved.³⁷

Policy formulation and enforcement through networks may become complex and costly, as “[networks] involve neither the explicit criteria for the market, nor the familiar paternalism of hierarchy”.³⁸ Conventional top-down methods of hierarchical governance fail to regulate network relations, since in networks control does not correspond to “top-down” influence, but it is all about “finding and maintaining balance between different and at times opposing forces”.³⁹ The central problems of network governance are “handling complex interaction settings and working out strategies to deal with different perceptions, preferences and strategies of the various actors involved”, and methods of hierarchy cannot contribute to the achievement of such a balance.⁴⁰ Harmony does not occur in network structures automatically; on the contrary, “divergent, competitive or even antagonistic interests” appear as obvious characteristics of network organisations.⁴¹ Therefore, networks may raise costs, especially at the policy formulation stage, when conflict resolution becomes inevitable. However, that does not mean that network relations are always chaotic and antagonistic. On the contrary, like hierarchies and markets, networks also stand on a structure and on certain rules which regulate interactions between the actors involved. Nevertheless, such rules show unique characteristics in the context of networks. Network rules generally correspond to routinised forms of behaviour and they naturally emerge in time as the network continues to function rather than being predetermined by the centre as in hierarchies. Network rules are at times referred to as the “unwritten constitution” of networks⁴² and they are believed to reflect the past experiences of networks and the balance of interests between actors which is achieved through resolution of past conflicts.⁴³

Networks are complex and they should be managed effectively in order to achieve superior policy outcomes. Effective network management requires a common discourse based on mutual trust and loyalty and open communication shared by the actors involved. Unlike hierarchies, under the framework of networks no actor can impose its policy choices on others, but policy enforcement and formulation take place through constant cooperation and coordination.⁴⁴ In the establishment of such cooperation mutual trust and loyalty play key roles, as network members will positively respond to the requests of cooperation of other members only when they have a reason to believe that they will also

³⁴ Powell, supra note 26, pp.271-272; Franz Urban Pappi, Christian H.C.A. Henning, “Policy Networks: More Than a Metaphor?”, *Journal of Theoretical Politics*, (1998), 10(4):553-575, p.570.

³⁵ Powell, *id.*, pp.271-272.

³⁶ David Marsh, “The Development of Policy Network Approach”, in David Marsh (Ed.), supra note 33, 3-17, p.8.

³⁷ Van Waarden, supra note 33, p.31.

³⁸ Powell, supra note 26, pp.271-272.

³⁹ Kickert, supra note 31, p.195.

⁴⁰ W.J.M. Kickert (et. al.), “Introduction: A Management Perspective on Policy Networks”, in W.J.M. Kickert (et. al. Eds., 1999), *Managing Complex Networks: Strategies for the Public Sector*, Sage, London, 1-13, p.11.

⁴¹ Marin, Maytz, supra note 28, p.17.

⁴² Stephen Wilks, Maurice Wright, “Conclusion: Comparing Government Industry Relations: States, Sectors, and Networks”, in Stephen Wilks, Maurice Wright (Eds., 1987), *Comparative Government-Industry Relations: Western Europe, the United States and Japan*, Clarendon Press, Oxford, 274-313, at 305.

⁴³ J.J. Richardson, A.G. Jordan (1985), *Governing Under Pressure: The Policy Process in a Post-Parliamentary Democracy*, Blackwell, Oxford, at 23.

⁴⁴ Grahame Thompson, “Networks: Introduction”, in Grahame Thompson (et al. Eds.), supra note 24, p.171.

receive positive responses for their requests of cooperation in the future.⁴⁵ Secondly, continuous open communication and information exchange between actors are of crucial importance for the effective management of networks. Only through such communication can actors achieve full understanding of each others' perceptions and preferences regarding a common policy problem, and consequently reach consensus and take collaborative action to address the problem at issue.⁴⁶ This is also how actors build mutual trust and loyalty. As the network continues to function in time and produce collaborative solutions to common policy problems, actors are expected to realise the benefits of cooperation as opposed to individual action, commit to cooperation and build up mutual trust and loyalty.⁴⁷ In addition to these general characteristics, policy enforcement networks in particular require the consistent application of some specific management mechanisms in order to reach superior outcomes. These mechanisms, which are summarised below, practically ensure that interactions between network members in daily enforcement efforts reflect the network dynamics and that the common discourse based on mutual trust and open communication is respected and preserved.⁴⁸

1) Actor activation mechanisms: When the network faces an issue which requires the collaborative action of network members, all actors who control the essential resources for the resolution of the particular problem in question should be signalled and called to participate in the action taken by the network. For instance, in the context of competition policy, this would mean signalling and activation of all authorities whose markets are affected by an infringement, who are in a position to collect information to prove the infringement in question, who are able to impose the remedies to bring the infringement effectively to an end or who have substantial experience and expertise regarding the matter under consideration.

2) Interaction, communication and information exchange mechanisms: Enforcement actions taken by the networks should reflect the diversity of ideas and insights of the different actors and policy solutions which different actors embrace. Such a pluralistic enforcement style presupposes the existence of strong information exchange and interaction mechanisms whereby network members engage in open communication, fully comprehend each others' concerns and perceptions and take collaborative action based on consensus. For instance, in the field of competition policy, all authorities should be able to raise their concerns regarding a particular anticompetitive activity through extensive information and evidence exchange before the network takes an enforcement action. Information exchange and cooperation mechanisms are essential for network management in two respects. Firstly, through such channels, multiple authorities utilise their relative advantages in terms of practical enforcement efforts (such as proximity to the information and evidence) and orchestrate collective action to address antitrust violations effectively. Secondly, such channels give the network members the opportunity to voice their concerns and consequently, prevent emergence of conflicts between the actors in the short run and contribute to the generation of mutual trust and comity in the long run. As a result, through constant cooperation and information exchange, network relations become progressively less costly and complicated to manage.

⁴⁵ Andrew Hindmoor, "The Importance of Being Trusted: Transaction Costs and Policy Network Theory", *Public Administration*, (1998), 76:25-43; W.J.M. Kickert (et. al.), "Managing Networks in the Public Sector: Findings and Reflections" in, Kickert (et.al. Eds.), supra note 40, 165-191, p.176.

⁴⁶ Erik-Hans Klijn (et.al.), "Managing Networks in the Public Sector: A Theoretical Study of Management Strategies in Policy Networks", *Public Administration*, (1995), 73:437-454, p.441.

⁴⁷ Cengiz, supra note 32, p.418.

⁴⁸ This rather simplified summary is an adaptation from the Dutch "network management" model which appears as a suitable model among the European policy network models for the analysis of policy enforcement with its flexible nature applicable to almost any policy domain. This list is by no means exhaustive. For the original suggestions of this model regarding effective network management see Klijn (et. al.), supra note 46 and also individual contributions to Kickert (et.al. Eds.), supra note 40. See also Cengiz, supra note 33, pp.39, 40-43 for a more detailed analysis of management mechanisms.

3) Dispute resolution mechanisms: Disputes are hazardous to network management, as they seriously disturb the effectiveness of policy enforcement particularly in cases where they turn into deadlock situations that curb the incentives of network members to cooperate in the future. Therefore, in cases where information exchange and cooperation mechanisms fail to generate a consensus regarding the best enforcement strategy to be followed in an individual enforcement action or the best policy choice to be adopted in response to a particular issue that the members are facing, dispute resolution mechanisms should be initiated immediately. Those mechanisms could be informal such as open discussions and bargaining between the members or formal such as a particular platform where individual members could express their point of view.

4) Access to the policymaking stage: Enforcement networks generally come into existence due to mutual interdependence between actors in the pursuit of effective policy enforcement. For instance, in multi-level polities such as the EC, authorities of the higher level (European Commission in the EC example) benefit from the proximity of authorities of the lower level (NCAs in the EC example) to the information and evidence, whereas authorities of the lower level benefit from the superior expertise, experience and prestige of authorities of the higher level. However, under the dynamics of networks, the classical division between policymaking and enforcement stages becomes somewhat artificial. Good network management requires the existence of channels through which all network members gain more-or-less equal access to the policymaking stage, as otherwise the authorities would not have sufficient incentives to devote their resources to the enforcement of a policy which does not reflect the perspectives and preferences of members in any way.

The European Competition Network: the Network Structure

The first striking characteristic of the ECN from the perspective of network management is its centrally planned nature. Policy network models suggest that networks would emerge naturally between actors who are interdependent in terms of the resources they control. In the context of the ECN, the Commission's dependence on the NCAs' cooperation in the enforcement of EC competition policy played the key role in the formation of the network. Although some authors argue that a competition network existed even at the time of Regulation 17/62, this was an epistemic network comprising of irregular and *ad hoc* contacts between DG IV officials and officials of the strong NCAs of the time, such as the German Bundeskartellamt, but it was not a formalised enforcement network.⁴⁹ Repercussions of the individual exemption regime on the administrative capacity of the DG IV are well explored by the literature. As is forcefully explained by Goyder, at the time of Regulation 17/62 the Commission faced a flood of individual exemption applications and became a victim of its own success in grabbing such extensive enforcement power from the Council.⁵⁰ Most of the notified agreements required analysis of unexciting standard courses of conduct such as vertical restraints, and having its resources sucked by individual exemptions, the Commission could not realise its policymaking and enforcement potential by dealing with more influential and prestigious issues such as Community-wide cartels.⁵¹ In order to reduce its burden, the Commission invented the mechanism of comfort letters, e.g. *prima facie* and non-binding fast-track review of exemption applications, and

⁴⁹ David J. Gerber, "The Evolution of a European Competition Law Network", Claus-Dieter Ehlermann, Isabela Atanasiu (Eds., 2004), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Hart Publishing, Oxford 43-64, p.49; Stephen Wilks, "Understanding Competition Policy Networks in Europe: A Political Science Perspective", in the same publication, 65-79, p.74; Stephen Wilks, "Competition Policy: Challenge and Reform", in Helen Wallace, William Wallace and Mark A. Pollack (Eds., 2005), *Policy-making in the European Union*, 5th Ed., Oxford University Press, Oxford, pp.126-27, p.127.

⁵⁰ Dan Goyder, *supra* note 3, pp.40-44.

⁵¹ White Paper, *supra* note 16, para.44, On the privileged policymaking powers of the DG Comp in comparison to other DGs see Michelle Cini, "Administrative Culture in the European Commission: The Cases of Competition and Environment", in Nugent (Ed.), *supra* note 8, 71-88, pp.80-81; David J. Gerber, "Modernising Competition Law: A Developmental Perspective", *European Competition Law Review*, (2001), 22(4):122-130, p.126.

later the Council delegated to the Commission legislative powers for the enactment of block exemption regulations to exempt certain categories of agreements from Art.81(1) *en masse*.⁵² However, these mechanisms provided only partial solutions to the problem.⁵³ The forthcoming Eastern enlargement at the time of the Modernisation was expected to even exacerbate the enforcement deadlock.⁵⁴ In the 1999 White Paper, the Commission advertised the cooperation of the national level in the enforcement of EC competition policy, hence decentralisation, as its favoured solution, since unlike other policy options (such as limiting the scopes of Arts.81 and 82 through the adoption of a new interpretation of the “trade between the Member States test”⁵⁵) decentralisation would provide a structural and permanent solution to the problem.⁵⁶

The ECN came into existence as an outcome of the Modernisation to organise complex interactions and relations between the soon to become 28 authorities (including the NCAs and the European Commission) entrusted with the task of enforcing EC competition policy. Certainly, the NCAs enthusiastically agreed with the enhancement of their enforcement powers under the Modernisation.⁵⁷ And again, certainly, communications between the Commission and the NCAs and their mutual will played a certain role in the network design.⁵⁸ However, still, in many respects the Commission took some strategic decisions despite the difference of opinion of the NCAs and their strong resistance. For instance, the German Bundeskartellamt, arguably the most powerful and prestigious competition authority in Europe after the European Commission, was against the abolition of the individual exemption regime as such, but it favoured sharing the exemption authority between the Commission and the NCAs.⁵⁹ Likewise, many NCAs alongside the European Parliament strongly demanded that for the sake of legal certainty and reassurance of business, the work allocation rules of the ECN be set forth by the Modernisation Regulation itself and become legally binding and enforceable by the Community and national courts.⁶⁰ Nevertheless, in the end, relying on the argument of network flexibility, the Commission preferred designing the work allocation regime in the non-binding Network Notice.

Management rules of networks generally emerge naturally as the network continues to function and network members continue to exchange their resources under the framework of the network. These rules reflect routinised courses of conduct achieved through past cooperation experiences and compromises achieved through resolution of past conflicts. The ECN, on the other hand, came into existence as a highly juridified and regulated network with specific and detailed management mechanisms and cooperation rules predetermined by the Modernisation Regulation and the Network Notice of the Commission. The special constitutional status of competition policy in the EC and the weakness of common discourse between the competition authorities of Europe pre-Modernisation

⁵² Goyder, *supra* note 3, pp.47-52.

⁵³ *Id.*

⁵⁴ White Paper, *supra* note 16, paras.4-7, 21, 137.

⁵⁵ “Trade between the Member States” test constitutes the jurisdictional scope of EC competition law vis-à-vis national competition laws. Violations which affect trade between the Member States are dealt with by the Community competition law (and possibly by the national laws in parallel), whereas the ones which do not satisfy the test are dealt with by the national laws only. See the texts of Arts. 81 and 82 EC and also C-56/65, *Société La Technique Minière Ulm v. Machiembau*, [1966] ECR 235, p.249 for the settled jurisprudence of the European Court of Justice regarding this test.

⁵⁶ See conclusions of the White Paper, *supra* note 16, pp. 32-33.

⁵⁷ See in general European Commission, White Paper on Reform of Regulation 17, Summary of the Observations, 29 February 2000; available at http://ec.europa.eu/comm/competition/antitrust/others/wp_on_modernisation/summary_observations.pdf (accessed 19.02.2009).

⁵⁸ The Network Notice of the Commission in particular is prepared upon consultations with the NCAs.

⁵⁹ Ulf Böge, “The Discussion on the Modernisation of EC Antitrust Policy: An Update from the Bundeskartellamt’s View”, in Ehlermann, Atanasiu (Eds.), *supra* note 49, 67-73, p.68; Martina Müller, “The German View”, in José Rivas, Margot Horspool (Eds., 2000), *Modernisation and Decentralisation of EC Competition Law*, Kluwer, The Hague, 89-91.

⁶⁰ White Paper, Summary of the Observations, *supra* note 57, p.19. The Commission, on the other hand, explains its choice of determining management mechanisms by the Notice with the necessity for flexibility in network management. See remarks by Mario Monti, Panel Discussion: The Network Concept, Competition Authority Networks and Other Regulatory Networks, in Ehlermann, Atanasiu (Eds.), *supra* note 49, pp.5-6.

largely explain the choice of formalism in the design of the ECN. The Modernisation Project promised only an uncertain future, particularly for business, in the lack of any previous cooperation tradition between the competition authorities of Europe. The NCAs significantly differed in terms of their levels of experience of policy enforcement, resources, administrative capacities and independence from their national governments.⁶¹ Due to this diversity and the lack of a previous collaborative enforcement tradition, decentralisation posed certain risks to consistent enforcement of competition policy, a policy which enjoys a special constitutional status in the EC.⁶² Formalism in the network design came as a strategic safeguard against these risks in order not to leave any room for uncertainty in the relations between the competition authorities of Europe in the era of decentralisation.⁶³

Additionally, from the perspective of network management, the ECN appears atypical with its rather hierarchical structure where the Commission enjoys a distinguished managerial position.⁶⁴ The Modernisation Regulation grants the Commission some exclusive powers, which are not shared by the NCAs, such as finding on its own initiative that Arts.81 or 82 do not apply to certain practices when the Community interest so requires, even though the individual exemption regime has now been abolished.⁶⁵ Additionally, the Commission continues to hold its enforcement monopoly in a sense, as the Modernisation Regulation preserves one of the most controversial measures of the Regulation 17/62 and requires the NCAs to withdraw their proceedings when the Commission opens its own investigations in the same matter.⁶⁶ Again, like network formalism, the Commission's distinguished position is generally justified by the argument of legal uncertainty and the risk of inconsistent policy enforcement under decentralisation in the lack of a previous strong network discourse. Particularly, the prerogative of the Commission to relieve the NCAs of their powers of investigation is described as the "safety valve" of the entire network design.⁶⁷ At the inception of the Modernisation, the Commission was expected to use this power only in extraordinary circumstances, such as parochial and hostile enforcement of Arts.81 and 82 by the NCAs to protect their national economies, as abundant utilisation of such a drastic power would bruise the trust-based relations between the Commission and the NCAs and consequently could destroy the enthusiasm of the NCAs to participate in policy enforcement.⁶⁸

⁶¹ Celine Gauer, "Does the Effectiveness of the EU Network of Competition Authorities Require a Certain Degree of Harmonisation of National Procedures and Sanctions?", in Ehlermann, Atanasiu (Eds.), supra note 49, 187-201; Frédéric Jenny, "Does the Effectiveness of the EU Network of Competition Authorities Depend on a Certain Degree of Homogeneity within its Membership?", in Ehlermann, Atanasiu (Eds.), supra note 49, 203-210, p.208. On the special cases of Eastern European accession States which at the time had the least experience with the management of liberal economy and enforcement of competition law among the members of ECN see Katalin Cseres, "Multi-jurisdictional Competition Law Enforcement: The Interface Between European Competition Law and the Competition Laws of the Member States", *European Competition Journal*, (2007), 3(2):465-502 p.485.

⁶² At the inception of decentralisation these risks were voiced by academia, legal counsel and businesses in all relevant forums. See for instance Jacques H. J. Bourgeois, "Decentralised Enforcement of EC Competition Rules by National Authorities: Some Remarks on Consistency, Coherence and Forum Shopping" in Ehlermann, Atanasiu (Eds.), supra note 49.

⁶³ Cengiz, supra note 32, pp.423-24. See also Network Notice, supra note 22, para 1: "Together the NCAs and the Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition. *The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy.* It provides a framework for the cooperation of European competition authorities in cases where Arts 81 and 82 of the Treaty are applied and is the *basis for the creation and maintenance of a common competition culture in Europe*" (emphasis added).

⁶⁴ Due to the privileged position of the Commission within the ECN, Riley depicts Modernisation as a "masterstroke" where the Commission grabbed stronger powers of policymaking and enforcement under the mask of decentralisation; see Alan Riley, "EC Antitrust Modernization: The Commission Does Very Nicely-Thank You! Part 1: Regulation 1 and the Notification Burden", *European Competition Law Review*, (2003), 24(11):604-615, p.604.

⁶⁵ Modernisation Regulation, supra note 19, Art.10.

⁶⁶ *Id.*, Art 11(6).

⁶⁷ Comments of Mario Monti, Panel Discussion: The Network Concept, Competition Authority Networks and Other Regulatory Networks, in Ehlermann, Atanasiu (Eds.), supra note 49, p.8.

⁶⁸ Cengiz, supra note 32, p.420. By the Network Notice the Commission declared its intention to use this power only under certain circumstances which in general imply that there is a risk of inconsistent or parochial enforcement of Community competition rules. See Network Notice, supra note 22, para54. Nevertheless, under the rules of Network Notice the Commission still enjoys leverage in exercising its prerogative. For instance para.54 states that the Commission would open

Again, as a reflection of the hierarchical network structure, the network design foresees complex signalling and information exchange mechanisms both between the Commission and the NCAs and among the NCAs, which besides being ordinary tools of network management also provide the Commission with strong oversight and monitoring channels. The NCAs are required to inform the Commission and provide factual information both before initiating proceedings under Arts.81 or 82 and taking positive decisions imposing remedies in such investigations.⁶⁹ Such information could also be shared with the other NCAs⁷⁰ (although there is no obligation to do so) to support the work allocation regime of the network and make sure that multiple NCAs are not investigating the same suspected violation individually with the possibility of adopting conflicting decisions in the end. Through these information exchange mechanisms the Commission comes into full information regarding the facts before the NCAs, the enforcement strategy and legal and economic analyses they follow and the decision they intend to take. And consequently, the Commission gains the ability to intervene before the NCAs take any action which would run counter to the dynamics of EC competition policy as perceived by the Commission and the Community courts.⁷¹ Such intervention could take place either through individual soft communication with the NCA in question or, in extreme cases, the Commission could relieve the NCA in question from its authority of investigation by opening proceedings.

In terms of the practical aspects of network management, the ECN incorporates a formal case allocation regime. This regime aims to minimise the number of authorities involved in each investigation. At the outset of their proceedings, the NCAs signal each other and the Commission to spot cases which are of interest to multiple authorities and, to the extent that it is possible, they allocate such cases to a single well placed authority which stands closest to the centre of gravity of the violation in question and therefore has the ability to collect strategic information and bring the violation effectively to an end.⁷² In cases where more than one NCA shows an interest in the investigation, or for strategic purposes, such as evidence collection, the involvement of more than one NCA becomes necessary, the NCAs in question may form an enforcement group and take coordinated action under the lead of a single authority.⁷³ Even when one NCA is formally investigating a suspected violation, other NCAs' may be asked to utilise their fact-finding powers to collect evidence in their territory and communicate such evidence to the NCA investigating the case.⁷⁴ Formally, the work allocation regime works on a voluntary basis and the NCAs enjoy discretion as to whether to follow these rules and close their investigations on the basis that another NCA is investigating the same suspected violation.⁷⁵ However, the hierarchical network structure and the distinguished position of the Commission exerts certain pressure on the NCAs to do so, particularly since possible conflicts of work allocation between the NCAs is specifically mentioned by the Network Notice as one of the possible scenarios where the Commission could utilise its prerogative of opening its own investigation.⁷⁶

(Contd.) _____

its own proceedings also in cases where "there is a need to adopt a Commission decision to develop Community competition policy in particular when a similar competition issue arises in several Member States or to ensure effective enforcement" or when "the NCA(s) concerned do not object." Likewise the work allocation rule set forth in Network Notice para.14 declares the Commission the well-placed authority in cases where "one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States" which leaves only a marginal possibility of enforcement by the NCAs in high profile cases.

⁶⁹ Modernisation Regulation, *supra* note 19, Arts 11, 16; Network Notice, *id.*, paras 16, 26.

⁷⁰ Modernisation Regulation, *id.*, Art.11(3), (4).

⁷¹ Cengiz, *supra* note 32, p.421.

⁷² Network Notice, *supra* note 22, paras. 8, 16.

⁷³ Modernisation Regulation, *supra* note 19, Art.12; Network Notice, *id.*, para.26.

⁷⁴ Modernisation Regulation, *supra* note 19, Arts.12, 22(1).

⁷⁵ Modernisation Regulation gives the NCAs the authority to close their proceedings on the grounds that another NCA has dealt or is dealing with the same infringement. However it does not impose an obligation on the NCAs to do so. See Modernisation Regulation, *supra* note 19, Art.13.

⁷⁶ Cengiz, *supra* note 32, p.423.

As another interesting characteristic from the network management perspective, the ECN incorporates largely compulsory mechanisms of cooperation and information exchange. Cooperation between the NCAs and the Commission does not take place on a voluntary basis. First of all, when the NCAs investigate a violation under the national laws which fulfils the “trade between the Member States” test, they have no discretion but are required to open parallel proceedings under EC law.⁷⁷ Secondly, when investigating a suspected violation, the Commission may ask the NCAs to utilise their fact-finding powers to gather evidence and information in their respective territories and communicate such information to the Commission.⁷⁸ The NCAs are required to respond positively to such requests by the Commission.⁷⁹ At the first glance, network rules seem to incorporate discretion-based cooperation mechanisms in terms of relations between the NCAs *inter se* as the NCAs are not obliged to positively respond to similar requests of each other.⁸⁰ However, network dynamics suggest that under ordinary circumstances the NCAs would not refuse each others’ requests for cooperation either. First of all, an NCA which does not play by the rules and refuses requests for cooperation with no good cause may face the same type of retaliatory behaviour in the future and in very extreme cases it may even be excluded from the network. Secondly, if lack of communication between the NCAs leads to conflicting analyses, the Commission may always initiate its own proceedings and thereby punish all of the NCAs involved.

The ECN does not incorporate any strong dispute resolution mechanism. Apart from informal communications and discussions between the members of the network, the Advisory Committee on Restrictive Practices and Dominant Positions provides the only forum of dispute resolution. The Committee consists of representatives of the NCAs and the Commission.⁸¹ The Commission is under an obligation to consult the Committee before taking any positive decision in enforcement of Arts.81 and 82.⁸² In such cases discussions within the Committee may lead to a written opinion to which the Commission is required to give utmost account.⁸³ Likewise, the decisions of the NCAs may also be taken to the Committee, however, in such cases discussions do not lead to a formal written opinion.⁸⁴ Lack of a strong dispute resolution mechanism does not appear as a significant discrepancy from the network management perspective in the framework of the ECN. The ECN sits on a juridified and a hierarchical structure; it incorporates a formal work allocation regime which minimises the number of network members involved in each investigation; and it functions through largely compulsory cooperation mechanisms in order not to leave any room for antagonistic behaviour between the network members. Therefore, as a strategic choice, the entire network design pursues the aim of preventing conflicts to the possible extent, rather than accommodating diversity of preferences and producing policy outcomes based on consensus.

The Commission’s position within the ECN is further distinguished by its near monopoly over the design of EC competition policy. The essential connection between the policy planning and enforcement stages suggested by the network literature is not entirely reflected on the design of the ECN. Before the initiation of Modernisation, the Commission had enjoyed exclusive powers of enforcement and it had given direction to the Community competition policy under the supervision and control of the Community courts through its individual decisions in enforcement of Arts.81 and 82, through numerous guidelines and notices where it communicated its perceptions of interpretation of Community competition policy and finally, under delegated legislative powers from the Council, through block exemption regulations, where certain categories of anticompetitive agreements were exempted from Art.81 *en masse*. Additionally, under the general institutional dynamics of the EC, the

⁷⁷ Modernisation Regulation, *supra* note 19, Art 3(1).

⁷⁸ Modernisation Regulation, *id.*, Art.22(2).

⁷⁹ *Id.*

⁸⁰ Compare Modernisation Regulation, *id.*, Art.22(1) to 22(2).

⁸¹ *Id.*, Art.14(2).

⁸² *Id.*, Art.14(1).

⁸³ *Id.*, Art.14(5).

⁸⁴ *Id.*, Art.14(7).

Commission enjoys a right of initiative in which it brings legislative proposals to the Council and the European Parliament.⁸⁵ Moreover, its position not just as enforcer but also policymaker has also been recognised by the jurisprudence of the Community courts, which attributes eternal character to individual Commission decisions as reflections of Community competition policy unless they are overturned by the Community courts. Under such jurisprudence, neither national courts nor NCAs can take decisions in enforcement of Arts.81 and 82 conflicting with previous Commission decisions on the same matter.⁸⁶ The Modernisation package and the rules of network management have not made any change in such privileged access of the Commission to the policymaking stage.⁸⁷ Additionally, although the individual exemption regime has been abolished by the Modernisation Regulation, the Commission still enjoys an exclusive power to take decisions on its own initiative finding that Arts.81 or 82 do not apply to certain practices in cases where the Community interest so requires.⁸⁸ Certainly, the NCAs enjoy certain channels to voice their perspectives and thereby influence the position of the Commission in specific policy questions. For instance, the Commission has the duty to consult with the Advisory Committee before enacting block exemption regulations⁸⁹ and before taking positive decisions in the enforcement of Arts.81 and 82.⁹⁰ Likewise, green and white papers published by the Commission to receive public response before the initiation of legislative action and designing of soft-law measures provide significant sources of communication between the NCAs and the Commission. Under the network dynamics, the Commission is expected to give some account to NCA responses to its policy communications, as no actor would be interested in taking action in the enforcement of a policy which is contrary to its preferences and perceptions. Nevertheless, the Commission still enjoys a privileged access to the policymaking stage and, to the extent allowed by network dynamics, it enjoys the discretion as to whether to reflect the NCA perspectives on its final policy position.

In summary, the ECN came into existence as a rather unique network design. With its centrally planned nature, hierarchical structure and highly regulated and compulsory cooperation mechanisms the ECN is not only divergent from the basic network dynamics suggested by the policy network models but it is also atypical among the examples of networks between the Commission and national regulators in other policy fields.⁹¹ These unique characteristics of the network both reflect the distinguished position of the Commission as policymaker and enforcer in the field of competition policy which has been established since the foundation of the Community (hence, an example of path dependence), and they also emerged as strategic safeguards against the risks of decentralisation particularly in the lack of a strong former common discourse between the network members. In terms of the practical aspects of network management, the ECN satisfies the conditions of network management in general with its detailed actor signalling and activation, information exchange and cooperation mechanisms. Although the ECN lacks a strong dispute resolution mechanism, this does not appear a substantial weakness, as the entire network design itself aims to minimise conflicts rather than accommodate them.

⁸⁵ EC Treaty, Arts.251 and 252.

⁸⁶ C-344/98, *Masterfoods Ltd. v. HB Ice Cream Ltd.*, [2000] ECR I-11369, para.51; C-234/89, *Delimitis v. Henninger Bräu*, [ECR] I-935, para.41; C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, [2001] ECR-I 6297; Modernisation Regulation, supra note 19, Art.16(1),(2). The Commission declared that it “will normally not...adopt a decision which is in conflict with a decision of an NCA after proper information pursuant to both Article 11(3) and (4) of the [Modernisation] Regulation has taken place.” See Network Notice, supra note 22, para.57.

⁸⁷ At the inception of Modernisation the Commission clearly declared that “as the guardian of the Treaty” it would continue to have the exclusive possession of “ultimate...responsibility for developing and safeguarding efficiency and consistency” in European competition policy, see European Commission, Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Brussels, 27.9.2000, COM(2000) 582 final, p.14.

⁸⁸ Modernisation Regulation, supra note 19, Art.10.

⁸⁹ See e.g. Council Regulation 19/65/EEC of 2 March on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, *Official Journal of the European Communities* 036, p.0533-0535, Art.6.

⁹⁰ Modernisation Regulation, supra note 19, Art.14(1).

⁹¹ For comparison to other European regulatory networks see David Coen, Mark Thatcher, “Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies”, *Journal of Public Policy*, (2008), 28(1):49-71.

The European Competition Network: Initial Experiences of Network Management and Policy Enforcement

At the time of inception of the ECN, the general perception regarding its future functioning was largely sceptical. The choice of formalism in the design of management mechanisms was a natural precaution against the risk of inconsistent policy enforcement in the lack of a formal tradition of cooperation between the network members. However, in order to function effectively networks should enshrine a delicate balance between formalism and flexibility whereby management of the network would be adaptable to newly arising circumstances without jeopardising the established management mechanisms and consistency of policy enforcement.⁹² In the framework of the ECN, it was uncertain whether such balance was struck accurately and only the functioning of the network in practice would provide the necessary evidence as to whether, under such formalised management mechanisms, the network would still be able to show the necessary responsiveness to the policy problems it would face. Secondly, the ECN was a peculiar network in terms of its hierarchical structure and the predetermined managerial position attributed to the Commission. In any network mutual trust is the most essential element for the emergence and preservation of a cooperative style of relationship between network members. Under the hierarchical structure of the ECN, it was uncertain whether the NCAs would build that kind of trust and solidarity in their relations with the Commission, and whether in particular the well-established NCAs would agree to play a subordinate role to that of the Commission in the enforcement and design of EC competition policy.⁹³ Thirdly, effective functioning of a network would require a certain degree of harmony in the resources, powers, experiences and independence that network members enjoy. It was doubtful whether such harmony existed between the NCAs, particularly in the lack of harmonisation of national procedural standards.⁹⁴ In terms of resources and independence, NCAs of the Eastern European states were a particular matter for concern, as management of a liberal market economy and consequently competition enforcement was a considerably novel phenomenon in those states.⁹⁵ Accordingly, some authors argued that the ECN would follow a model of varied speed, where more resourceful and experienced NCAs would position themselves at the centre with continuous contacts with the Commission and privileged access to the policymaking stage leaving behind the less powerful NCAs which would form the periphery of the network.⁹⁶ Based on the data of intra-Community trade turnover, the number of multi-national companies incorporated in the Member States, and the geographic markets targeted in previous Commission decisions, it was predicted that the German, French, UK, Italian and Dutch authorities would be the most active members of the network.⁹⁷ Finally, lack of a strong dispute resolution mechanism particularly in conflicts of case reallocation was a matter of concern, and it was predicted that the NCAs would wrangle to assume jurisdiction for parochial reasons in cases with political dimension.⁹⁸

The ECN has been functioning practically for the last five years (since 2004). Therefore experiences with its management are still extremely limited. However, the initial experiences with competition

⁹² Imelda Maher, "Networking Competition Authorities in the European Union: Diversity and Change", in Ehlermann, Atanasiu (Eds.), supra note 49, 223-236, p.224.

⁹³ Suzanne Kingston, "A 'New Division of Responsibilities' in the Proposed Regulation to Modernise the Rules Implementing Articles 81 and 82 EC? A Warning Call", *European Competition Law Review*, (2001), 22(8):340-50, p.344; Ulf Böge, "The Commission's Position within the Network: The Perspective of the NCAs", in Ehlermann, Atanasiu (Eds.), supra note 49, 247-54, p.251.

⁹⁴ Gauer, Jenny, both at supra note 61.

⁹⁵ Riley, supra note 64, p.660.

⁹⁶ Wilks, supra note 49, p.133.

⁹⁷ Stephen Wilks, "Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?", *Governance*, (2005), 18(3):431-452, p.445; Michaela Drahos (2001), *Convergence of Competition Laws and Policies in the European Community*, Kluwer, the Hague, p.222.

⁹⁸ Silke Brammer, "Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation", *Common Market Law Review*, (2005), 42:1383-1424, p.1402. See also Imelda Maher, "The Rule of Law and Agency: The Case of Competition Policy", Chatham House, International Economics Programme, IEP Working Paper 06/01, p.13.

policy enforcement through this network imply that at least for the time being none of the above-mentioned sceptical hypotheses have been realised.

As the data presented in Table I show, NCAs assumed an activist role in enforcement right after the initiation of the decentralisation. The total number of official proceedings opened by the NCAs in enforcement of Arts.81 and 82 collectively far exceeds those of the Commission. In contrast, however, the number of positive decisions taken by the NCAs and communicated to the Commission each year is worryingly low. In 2004, NCAs managed to close only 16% of the investigations they opened with a final positive decision. Between the years 2004 and 2008 there has been a certain progress in the speed of the NCA investigations under Community law, with investigations closed with positive decisions reaching to 51.4% of the total investigations opened in 2007. Nevertheless, the empirical data show that unclosed investigations are building up a backlog in the dockets of the NCAs. Overall, during the last four years, network members collectively managed to close less than 40% of the investigations they opened.

Table I: Aggregate Number of Antitrust Investigations⁹⁹

	2004	2005	2006	2007	2008
Commission Investigations	101	22	21	10	10
NCA Investigations	200	181	144	140	149
Envisaged NCA Decisions	32	76	64	72	60
Percentage of Investigations Closed by the NCAs	16%	41.9%	44.4%	51.4%	40.2%

The gap between the formal investigations opened and positive decisions taken can be explained by two rival hypotheses. The first is that decentralisation simply pushed the burden of enforcement facing the Commission under the centralised enforcement regime to the national level, and the NCAs are facing a problem of resources in handling such a burden. The second is that the practices targeted by the NCA investigations are actually benign activities which do not constitute breaches of Arts.81 and 82 under the current interpretation of these provisions by the Commission and Community courts, and therefore the NCAs closed most of the investigations they opened in the later phases without taking any positive decision. Unfortunately, there is not enough substantive data available regarding the NCA decisions which would prove which one of these two hypotheses is correct. However, both hypotheses imply the existence of some systemic problems with the practical operation of the decentralised enforcement regime and functioning of the network. If the first hypothesis is true, that would cast serious doubt on the achievements of the entire Modernisation Project. It would simply mean that the scope of Community competition rules is too broad and neither the Commission nor the NCAs enjoy the resources required for effective enforcement of those rules. If this really is the case, redesigning the “trade between the Member States test” would have provided the necessary cure to the

⁹⁹ The data presented Table I are taken from the ECN’s website and are available at <http://ec.europa.eu/comm/competition/ecn/statistics.html> (visited February 20, 2009).

enforcement problems the Commission was facing under the centralised enforcement regime without a comprehensive decentralisation program being necessary. If the second hypothesis is true, that would imply that the network members lack a sufficient understanding of the dynamics of EC competition rules. If this is the case, it can be argued that the network failed in invigorating a mutual education process between its members regarding the essential elements of the policy enforced by the network.

The predictions regarding the most-likely-to-be active members of the network have more or less been realised. (Detailed statistical data regarding the investigations of NCAs are presented in Table II below.) However, the list of the most active NCAs is still surprising in two respects. Firstly, the UK authorities have been less active than originally assumed by the antitrust community. Furthermore, the statistical data show that the UK authorities appear among the NCAs which are experiencing some serious efficiency problems, as they managed to close only 8 out of 45 investigations they opened over the last five years.¹⁰⁰ Secondly, the Hungarian authority seems to have established itself as a strong enforcer of competition policy in Europe, and it plays the role of pace-setter among the competition authorities of the Eastern European states. There are also other indications that competition policy is building strong roots in this country. For instance, during the negotiation phase of the Lisbon Treaty, the Hungarian delegation played a key role in the revelation and – to a certain extent – prevention of the Sarkozy plan for relegating the constitutional status of competition policy in the Draft Treaty.¹⁰¹

Table II: Investigations per NCA (as of February 20, 2009)¹⁰²

Member State	Number of Investigations	Number of Envisaged Decisions
France	162	51
Germany	104	42
Hungary	67	15
The Netherlands	62	28
Denmark	53	25
Italy	45	32
Spain	45	14
United Kingdom	45	8
Belgium	32	5
Sweden	28	12

¹⁰⁰ The reason might also be the more complex and demanding nature of violations targeted by the UK authorities compared to the other NCAs' investigations. There is not enough substantive data available at the moment to conduct a conclusive comparison between performances of different NCAs.

¹⁰¹ Initially the Draft Treaty made a specific reference to "free and undistorted competition" in its Preamble. The French delegation and particularly the French President Nicolas Sarkozy himself campaigned for the removal of this reference. In the end a compromise was reached on the incorporation of a specific Protocol on Competition to the Draft Treaty. (Protocol No 27 on the Internal Market and Competition attached to the Lisbon Draft Treaty, 09.05.2008 OJ C115/309). See BBC News, 22.June.2007, *Competition Policy to Remain in Place*, at <http://news.bbc.co.uk/1/hi/business/6231684.stm> (visited February 20, 2009).

¹⁰² The data presented in Table II are taken from the ECN's website the address of which is given in supra note 99.

Table II (continued)

Portugal	25	7
Greece	24	17
Poland	20	8
Austria	19	6
Finland	16	8
Czech Republic	12	6
Slovenia	12	5
Ireland	10	1
Slovakia	9	7
Bulgaria	9	4
Lithuania	7	3
Estonia	7	2
Latvia	5	2
Romania	3	-
Cyprus	1	-
Luxemburg	1	-
Malta	1	-

Overall however, there is no data proving that the network has actually followed a varied speed model, as despite the variance of activism in enforcement, network members played more or less equally influential roles in the activities of policy learning and design, which will be discussed below.

Most interestingly from the perspective of network management, the Commission has not yet utilised its power of relieving the NCAs from their authority of investigation. As a result, it can be argued that the communication channels between the NCAs and the Commission have been working effectively, and contrary to the original predictions, the hierarchical network structure has not prevented the emergence of mutual trust and cooperation between the Commission and the NCAs and has not resulted in a revolt at the national level where the NCAs protested against the managerial position of the Commission by disobeying the network rules. However, there are some logistical problems in terms of communication between the Commission and the NCAs. Currently, the practice of the ECN Unit of the Commission is to review all envisaged NCA decisions communicated to the Commission. Officials of the Unit are discontented with the resources required by such revision given the large number of decisions communicated, and they are anxious that the revision of NCA decisions would replace the individual exemption notifications in terms of the resources required.¹⁰³

¹⁰³ Comments by DG Comp's ECN Unit Official at the FIDE Congress 2008, May 30, 2008, Linz.

Again contrary to what was presumed at the inception of the ECN, there has not been any instance of conflict between the network members about case allocation during the last four years. There have been a few instances in which cases were collectively reallocated by the NCAs to the Commission.¹⁰⁴ In those cases, it was the NCAs and not the Commission who initiated the case reallocation process. In other words, the work allocation regime has been functioning effectively, and the dynamics of the regime are fully understood and respected by the network members, and also presumably by the complainants who were successful in targeting the well placed competition authorities under the ECN's work allocation regime.

In terms of cooperation and the coordination of investigations, the network has produced only inconclusive results so far. Cooperation in enforcement seems to continue to take place on a vertical dimension with NCAs providing technical assistance to the Commission in its enforcement efforts, and consulting with the Commission officials regarding the problems they face in enforcement of Community competition rules. Instances of cooperation in which the NCAs jointly investigated the same violation or provided each other with evidence have been extremely rare.¹⁰⁵ In other words, horizontal cooperation within the network has not yet reached the desired level. Lack of horizontal cooperation in the ECN can be explained by two different hypotheses. The first is that the network has not been operational in stimulating stable and continuous trust-based cooperation between the NCAs. The second is that the NCAs are mainly handling cases with national and local impact only and labelling the violations which had previously been dealt with under national law as "Community cases" given that now they have a positive duty of enforcement of Community competition rules. Therefore, they simply do not require the assistance of other NCAs in the investigations they conduct. Since the national officials have been in constant communication in terms of policy-learning and design in multiple forums, the second hypothesis appears more realistic. This hypothesis could also explain the backlog of investigations at the national level. If this really is the case, then immediate revision of the work division between the Community and national laws and the redesigning of the scope of "trade between the Member States" test appear crucial for the effective enforcement of competition policy in Europe.

Another interesting fact from the perspective of network management is the choice for informality in communication by both the Commission and national officials. Instead of utilising the formal channels of communication designed by the rules of the network, actors prefer to utilise informal channels, such as e-mails and phone calls, as informal communication is less costly and less time consuming.¹⁰⁶ Moreover, the written responses of the Commission to the envisaged NCA decisions and any other communication between the members are not open to the parties under investigation.¹⁰⁷ Such informality renders the network extremely opaque. It raises certain problems of accountability as under such opacity it becomes extremely difficult to observe the relative roles played by network members and their contributions to the investigations and the final decisions. Additionally, the block of access of the parties under investigation to Commission communications jeopardises the due process standards particularly in those Member States where the NCA taking the final decision has judicial characteristics.¹⁰⁸

The ECN was designed largely as an enforcement network and under the original rules of network management, the NCAs were only granted limited access to the policymaking stage. Surprisingly, however, during the last five years the ECN served also as a forum for policy discussions, and its most

¹⁰⁴ See e.g. Commission Press Release, Memo/05/63, 24 February 2005 for the referral of a case in the flat glass sector collectively by several NCAs to the Commission.

¹⁰⁵ Only the Danish, Spanish and UK authorities have collected information on behalf of and communicated information to other NCAs. See Heribert Franz Koeck, Margit Maria Karollus (Eds., 2008), *The Modernisation of European Competition Law: Initial Experiences with Regulation 1/2003* (hereinafter "FIDE 2008 Report"), FIDE XXIII Congress Linz 2008, Congress Publications Vol.2, Vienna, pp.50, 303.

¹⁰⁶ See individual national reports in FIDE 2008 Report, *id.*

¹⁰⁷ Eric Gippini-Fournier, Institutional Report, in FIDE 2008 Report, *id.*, p.446.

¹⁰⁸ For the Irish Experience see FIDE 2008 Report, *id.*, p.177.

remarkable achievements have taken place not in policy enforcement, but in policy design and learning. Firstly, after the inception of the ECN, the process of voluntary harmonization of national procedural rules under the Community model has been accelerated. In the vast majority of the Member States the investigative powers of the NCAs have been aligned with those of the Commission and the individual exemption regimes under national laws have been abolished.¹⁰⁹ Secondly, national officials have been in constant communication with each other for policy discussion in multiple forums. The Director General of DG Comp of the Commission and the heads of the NCAs come together in annual Director General Meetings. These Meetings have been particularly operational in the review of the European doctrine and practice regarding the abuse of dominance.¹¹⁰ Apart from communications at the managerial level, the national and Community officials meet in the ECN Plenary Meetings, six Working Groups dealing with specific policy issues, and 13 sectoral sub-groups dedicated to the discussion of competition issues in specific markets.¹¹¹ The most remarkable achievement of these forums has been the harmonisation of national and Community leniency programmes. At the inception of the Modernisation, disparities between the national procedural standards cast doubts on the effective enforcement of competition policy. Lack of a harmonised European-wide leniency regime was a matter of particular concern, as in the lack of it applicants had to approach all NCAs operating a national leniency programme, and in the end the strictest standards prevailed because the applicants came forward only if they could comply with the standards of the strictest programme.¹¹² Since the creation of the ECN, there has been a rapid increase in the number of the NCAs operating a leniency programme.¹¹³ Additionally, in 2006 an ECN Model Leniency Programme was introduced. This Programme was based on discussions and the exchange of experiences that have taken place in the ECN Plenary and the ECN Working Group of Leniency.¹¹⁴ The model reflects the former positive experiences of the Commission and the NCAs and it brings together particular elements of previous national and Community leniency regimes which have produced success. For instance, the marker system, which protects the leniency applicants place in the queue for the period in which the applicant gathers the actual information necessary for formal application, was introduced to the Model due to the previous positive experiences of some NCAs.¹¹⁵ Both the Community and national leniency programmes have recently been revised and aligned with the ECN Model.¹¹⁶

As a result, initial experiences with the management of the ECN have been largely positive. Overall, the ECN functioned in a less fluctuating and more stable manner than originally presumed by academia and has produced consistent outcomes both in terms of policymaking and enforcement. However, despite such positive experiences, there seem to be some systemic problems as well. Particularly, the backlog of investigations at the national level, the unsatisfactory level of horizontal cooperation and the essential opacity in the communication mechanisms cast certain doubts on the achievements of the network. Additionally, the network has been functioning only for a limited time, and initial experiences are not sufficient to come to a solid conclusion regarding the success of network management. Most substantially, the ECN has not yet faced a crisis. Mutual trust and solidarity between the network members and their commitment to cooperation have not yet been tested by an experience involving significant connections to national political forces and national economies. Effective network management, above all, means effective crisis management and in particular the craftsmanship of a network manager appears in its success in initiating interaction and organising

¹⁰⁹ See individual national reports in FIDE 2008 Report, *id.*

¹¹⁰ European Commission, Report on Competition Policy 2005 (Published in conjunction with the *General Report on the Activities of the European Union-2005*) SEC(2006)761 final, para.201.

¹¹¹ *Id.*, paras.202-206.

¹¹² Celine Gauer, Maria Jaspers, "Designing a European Solution for a 'One Stop Leniency Shop'", *European Competition Law Review*, (2006), 27(12):685-92, p.686.

¹¹³ See the list of NCAs operating a leniency programme at:

http://ec.europa.eu/comm/competition/antitrust/legislation/authorities_with_leniency_programme.pdf (visited February 20, 2008).

¹¹⁴ Gippini-Fournier, *supra* note 107, p.403.

¹¹⁵ Gauer, Jaspers, *supra* note 112, p.691.

¹¹⁶ See individual national reports in FIDE 2008 Report, *supra* note 105.

mediation between the network members at times when those members pursue divergent ends and interests in a specific policy matter.¹¹⁷ Therefore, in order to confidently comment on the success of network management in European competition policy and the capabilities of the Commission as a network manager, above all, it needs to be seen how the network would handle such a crisis. Nevertheless, there are reasons to doubt whether such a crisis would emerge under the framework of the ECN, as after all, with its hierarchical structure and predetermined formalised cooperation mechanisms, this network is strategically designed to prevent conflict not to mediate it.

Conclusions

Competition policy enjoys a special constitutional status in the EC and it played a significant role in the integration of national markets particularly during the foundation period of the European Single Market. The centralised enforcement regime under Regulation 17/62 and the paramount position of the Commission both as a policymaker and enforcer stemmed from the political motivation to establish a strong and uniform competition policy in the light of the economic integration objective.

Decentralisation of the enforcement of EC competition policy was a cultural revolution in many respects and it took place as a response to transformations taking place just before the millennium both in the field of EC governance in general and in the field of competition policy. The ECN came into existence as a part of the Modernisation Programme in order to protect the consistency of policy and to regulate relations between the competition authorities of Europe in the era of decentralisation. With its centrally planned nature, hierarchical structure and juridified and compulsory management mechanisms, the ECN did not reflect the network dynamics suggested by the political science literature and it was rather atypical among the European regulatory networks. In one sentence, the network was designed to prevent conflicts rather than to accommodate diversity and to produce policy outcomes based on consensus. Therefore, at the time of its inception, predictions regarding the future functioning of the ECN were largely sceptical.

The ECN is now about to complete its fifth year in operation. Initial experiences with the management of and policy enforcement through this network suggest that none of those sceptical predictions have actually been realised. The NCAs have shown a great enthusiasm for policy enforcement right from the outset; there has not been any significant example of dispute between the members; the work allocation regime has functioned effectively; and perhaps most importantly, the Commission has not yet utilised its prerogative of obliging the NCAs to close their investigations by opening its own proceedings. Likewise, although having been planned as an enforcement network originally, the ECN has also been operational in invigorating policy discussions and policy learning between its members with visible effects on the design of the EC competition policy.

Despite such positive outcomes in general, nevertheless, there is certain evidence of weaknesses in the management of the ECN and consequently in policy enforcement through this network. First of all, empirical evidence shows that NCAs are experiencing some efficiency problems in the investigations under EC competition law. It should be further investigated whether the NCAs are simply facing serious resource scarcities or whether the jurisdictional scope of EC competition rules proves overbroad under the current interpretation of the “trade between the Member States” test. Secondly, the level of practical cooperation between the NCAs in individual investigations has not reached a satisfactory level. Again, it should be investigated whether such a low level of practical cooperation stems from the application of EC competition rules strictly to national markets or the network management mechanisms as they stand and perhaps even the national procedural rules prove too rigid to allow effective interagency cooperation. Last but not the least, there is a certain tendency of opacity in network management which causes accountability and due process problems particularly given that

¹¹⁷ Kickert (et. al.), supra note 40, p.172.

as a network entrusted with the task of enforcing competition policy, decisions taken within the ECN significantly affect the consumer, and eventually citizen welfare. These weaknesses should be acknowledged and addressed in order to strengthen the effectiveness of network management and consequently, policy enforcement. Ultimately, the greatest responsibility in the investigation of the causes of these systemic problems and in the design of the strategies to overcome these problems will fall to the network manager, the European Commission. As the Commission is due to present a report to the European Parliament and the Council regarding the initial experiences with the decentralised enforcement regime, it appears to be a particularly good time to open these issues to discussion and to look for the solutions.

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