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Independence, Interdependence and Legitimacy: The
EU Commission, National Competition Authorities, and
the European Competition Network

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Abstract

It is nearly ten years that the EU's antitrust enforcement has been decentralised by Regulation 1/2003. This paper is a small contribution taking stock of how this process has fared. After setting out a position on the discussion of two oft used benchmarks for assessing competition agencies (independence and legitimacy), we turn to evaluate the Commission and national competition authorities. While the Commission is now a well established enforcer, a number of channels serve to oversee national competition authorities: measures adopted in response to the economic crisis allow the Commission to recommend modifications to competition law statutes; the case law of the ECJ, in particular by reference to the principle of effectiveness, reduces the scope for national policy choices; and the European Competition Network appears focused on securing convergent outcomes and procedures. Perhaps the ultimate paradox of these centralising tendencies is how local national antitrust enforcement has remained.

Keywords

Regulation 1/2003, European Competition Network; National Competition Authorities, independence, legitimacy, interdependence

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INDEPENDENCE, INTERDEPENDENCE AND LEGITIMACY: THE EU COMMISSION, NATIONAL COMPETITION AUTHORITIES, AND THE EUROPEAN COMPETITION NETWORK

*Giorgio Monti**

Introduction

For many years, enforcement of competition law in the European Union had been largely a matter for the European Commission, with Member States' enforcement of national competition law lagging somewhat behind. Since the mid-1980s, a number of factors led to an increased level of competition law enforcement by the Commission,¹ and then to a galvanisation of national laws and national competition authorities.² At present each national competition authority (hereinafter NCA) is obliged to apply EU competition law in situations where what is suspected is an infringement of Articles 101 and 102 TFEU (viz. restrictive practices and abuses of a dominant position),³ which means that there are at least twenty-eight NCAs plus the European Commission.⁴ Presently, the design of the NCAs is again in a state of flux in a number of Member States, as a result of the economic crisis: governments see cost-savings in merging competition authorities with other regulatory bodies (e.g. consumer bodies and utilities regulators).

The purpose of this essay is to examine this large number of enforcement bodies within the framework of three concepts. The first two may be treated as a pair: independence and legitimacy. These are well-known criteria by which the enforcement of law by administrative agencies is assessed; the third notion, interdependence, is a phenomenon of increasing salience in the context of global governance, and here it refers to the relationship among the various competition authorities in the EU.⁵

The essay is structured in the following way. First, we discuss the notions of independence and legitimacy in general terms and elicit how these may be applied to the work of competition authorities. Second, we consider how well the Commission and NCAs score by reference to these benchmarks. In the third part of the paper we introduce a discussion of interdependence and how far this affects our study of each competition authority's independence and legitimacy. In large part this paper is a survey of the issues, however some general arguments are developed, in particular the essay makes the following key points. First, independence is contingent on a political choice about how markets should work, and it is that choice which matters most; concomitantly because independence is a political choice, the competition authority has to play a careful enforcement strategy when applying the rules in sensitive sectors. Second, there is an increasing trend to measure the output legitimacy of competition authorities, even if the methodologies for doing this are disputed; but what appears to be most relevant (at least to agencies) is their reputation for good work. Third, the role of National Competition

* Professor of Competition Law, European University Institute. This essay is based on lectures given at the Twenty-third Session of the Academy of European Law in July 2012.

¹ L. McGowan, 'Safeguarding the Economic Constitution: the Commission and Competition Policy' in N. Nugent, *At the Heart of The Union – Studies of the European Commission* (Basingstoke, Macmillan Press, 2nd ed, 2000) 151-3.

² Enlargement of the EU led accession states to introduce laws that mimicked the EU norms, more established Member States reformed their competition rules as a result of a general policy of economic liberalisation (e.g. Italy and France) and others considered it convenient to align national laws to European ones in the name of legal certainty (e.g. the UK). See, generally, D.J. Gerber *Law and Competition in Twentieth Century Europe* (Oxford University Press, 1998) ch.10.

³ Article 3, Regulation 1/2003, [2004] OJ L1/1

⁴ In some Member States there is even more than one authority, for example the UK where national regulators in certain economic sectors have powers to enforce competition law that are concurrent to those of the NCA.

⁵ On this phenomenon generally, see A-M Slaughter *A New World Order* (Princeton University Press, 2004).

Authorities in the new enforcement network is characterised by significant control by the European institutions: the ECJ and the Commission have found ways of requesting modifications to the design and work of NCAs in the name of effective enforcement. Fourth, the main reasons for creating the European Competition Network (allocating cases and sharing information) have not been the principal ways in which interdependence has evolved. Instead, the ECN serves as a policy network where two types of discussion occur: first how to ensure convergent policy among the NCAs; second how to best address certain recurring legal/economic issues. The ECN bolsters the independence of NCAs (for Member States will find it harder to resist a policy initiative that is supported by the network), but at the same time it is a further centralising force in its search for convergence in enforcement; furthermore the ECN's legitimacy is under scrutiny because its decisions lack transparency and channels of accountability.

1. Independence and legitimacy

1.1 Independence

An experienced commentator has recently noted that there is 'little controversy about the necessity to ensure the independence of competition authorities' law enforcement activities both from government and from private business interests.'⁶ Why the certainty? Competition law enforcement can have a disparate range of effects. For example: firms facing structural overcapacity may agree to coordinate the closure of their plants, which may be seen either as harmful collusion, or as a socially responsible way of mitigating the need for industry to adjust to changed economic circumstances; a merger between two supermarkets may pose no harm to competition because prices are not expected to rise, but it may damage local shops and small farmers. It might then be argued that the diversity of interests that a competition authority affects as a result of its decisions makes it necessary that it is able to act independently of all those who are potentially affected by its actions. However, this is a little too simplistic, for it will be obvious that the authority will have to make decisions based on how the firms' actions affect the various interests at play and it is tricky to see *ex ante* how an independent agency should be the best placed body to trade off divergent interests. Furthermore, the authority needs information on how markets work, which can often only be obtained by the market participants, including those whose behaviour is being challenged. In addition, competition enforcement may affect employment prospects and so the exercise of such powers may be of concern to government. Given the vast range of interest groups affected, and the economic significance of market regulation, the independence of competition authorities is not self-evident.

To begin with, rather than speaking of independence (from government, or from business or consumer interests), we are better off speaking of an authority's appropriate degree of dependence. The authority cannot do whatever it wishes, but must of necessity be constrained in some ways by the markets (e.g. the authority cannot overhaul the way markets work);⁷ and by the state (who provides the authority with its mandate and budget). It follows that when certain authors speak of agency independence, they mean operational independence: government gives a competition agency a mission, and the agency implements this mission in each instance independent of government and industry. This also explains why some support a narrow mission for independent agencies: they should not be put in a position to

⁶ F. Jenny 'Competition Authorities: Independence and Advocacy' in I. Lianos and D.D. Sokol *The Global Limits of Competition Law* (Stanford, Stanford University Press, 2012) p.166. This view is shared by many, suffice it to refer to A. Mateus 'Why Should National Competition Authorities be Independent and How Should they Be Accountable?' (2007) 3(1) *European Competition Journal* 17.

⁷ However in some cases it tries to do so. See G. Monti 'Restraints on Selective Distribution Systems' (2013) 36(4) *World Competition* 489.

make ‘political’ decisions.⁸ However, it is also plausible to suggest that if the mission for the authority is wide-ranging we might expect the agency to be more closely monitored by the government.⁹ For example, if the agency is told to remove restrictions to consumer welfare, one may legitimately insulate the agency from state control and expect it to base its rulings on this narrow ground, ignoring other consequences; conversely if the agency is instructed to look after ‘the well-being of the European Union’¹⁰ then it may be legitimate to expect more government oversight in the decision-making process because of the range of interests that need to be balanced in determining what conduct to permit and what conduct to forbid.

One justification for a competition authority’s independence is its comparative advantage. For example, John Vickers has suggested that since competition authorities have a comparative advantage in promoting competitive markets, but no comparative advantage in achieving other public policy goals, then this makes a case for insulating them from other policy concerns. The point is justified because while a competition authority will act regularly against restrictions of competition, it will only act in the pursuit of non-competition interests sporadically, for example few mergers raise issues of employment policy. In this view, employment policy is best left to someone who can engage in a more systematic appraisal of that other policy concern and who is more likely to be better informed.¹¹ The point about informational advantage can be easily remedied by changing the composition of the authority, or affording it the power to obtain what information it may consider relevant to assess the conduct that is up for review. The ad hoc nature of non-competition considerations may be true generally, but not if the competition authority were to announce, for example, that it will enforce the cartel prohibition by taking into consideration the environmental impact of certain agreements.¹² This policy stance would then serve to stimulate solutions to ameliorate the environment that could complement other legislative measures. In other words, if the competition authorities’ choices on non-competition grounds are well reasoned and consistent with other aspects of government policy, then there is no reason to conclude that a competition authority has a comparative advantage in looking exclusively at the effects on competition. And if we wish to integrate a wider range of considerations in competition decisions, then a closer relationship with the state may be warranted.¹³

A more convincing reason for independence has to do with commitment.¹⁴ By establishing an independent agency the state has made a credible commitment to a particular economic order, and this creates stability, facilitating investment, knowing that the state will not meddle. This is particularly important if the jurisdiction in question had tolerated anticompetitive practices in the past: creating an independent agency is a powerful statement about change in the economic constitution. It is also said that this insulation removes lobbying and rent seeking by business and other interests.¹⁵ Indeed, it has been shown that the single most important feature of a competition system that serves to stimulate

⁸ In some legal systems this is based upon the principle of legality, by which it is for the legislator to confer tasks to the agency and according to some it cannot delegate powers that give too much policy discretion to the agency. S. Lavrijssen and A. Ottow ‘The Legality of Independent Regulatory Agencies’ in Besselink, Pennings and Prechal (eds.) *The Eclipse of the Legality Principle in the European Union* (Kluwer Law, 2011) pp. 73-95.

⁹ W.E. Kovacic ‘Competition agencies, independence, and the political process’ in J. Drexler, W. Kerber and R. Podszun (eds) *Competition Policy and the Economic Approach* (Edward Elgar, 2011) p. 292.

¹⁰ For this wide characterisation of the role of competition law, see Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I- 527 para 22.

¹¹ J. Vickers ‘Central banks and Competition Authorities: Institutional Comparisons and new Concerns’ (BIS Working Papers N.331, November 2010) p.16.

¹² This is an approach presently under discussion by the Dutch competition authority.

¹³ See for example W.E. Kovacic ‘Competition Agencies, independence, and the political process’ in J. Drexler, W. Kerber and R. Podszun (eds) *Competition Policy and the Economic Approach* (Edward Elgar, 2011) pp.293-295 analysing the role of the Federal Trade Commission in this optic.

¹⁴ See generally A. Roberts *The Logic of Discipline* (Oxford University Press, 2010) ch.6.

¹⁵ Mateus (above n.6) p.21.

foreign investment is the perception that the rules are applied by an independent authority in a matter which is fair and susceptible to judicial review.¹⁶

In sum, we should start with the view that no agency is completely independent: a degree of dependence is inevitable. The degree of dependence an agency holds is contingent upon a political choice. This choice may be motivated by a commitment to a particular economic policy: if a state commits to a policy where market actors should be free unless they harm economic welfare then the agency will be more independent of the state than if the state commits to a policy where markets are regulated taking the public interest into consideration. Therefore, the position taken by mainstream authors that independence is self-explanatory reflects a prior choice to insulate competition agencies from political interference through a narrowly defined mandate, which in turn expresses a choice about the role of the state in markets; on the contrary, independence it is not a natural state of affairs but a means to an end.¹⁷

Having set out the nature of the concept of independence, we now turn to trying to identify what factors allow us to find the degree of independence an agency enjoys. As a preliminary point, it is important to note that most scholars have measured formal independence, but less work has been carried out to measure independence in practice, and as we intimate with some examples below, there may well be a dissonance between formal and actual independence. Furthermore, it is well-established that some agencies may not appear independent when one considers the statute that establishes them but may develop significant degrees of independence over time. The best example is the Antitrust Division of the US Department of Justice: it is part of the executive branch and its head may be dismissed by the President; however in practice it normally exercises its powers largely independently of executive branch to which it belongs. Likewise the German Bundeskartellamt is under the supervision of the Minister of Economics but few doubt its independence.¹⁸

There is a broad consensus as to what to look for when identifying the degree of formal independence of authorities.¹⁹ Rather than elaborating on each factor, we survey them by identifying the nature of the threat to independence along with anecdotes to illustrate this threat.

The first set of criteria pertains to the way in which members of the authority's board are selected, by whom they are chosen, and what their terms of employment are. The risk here is that the government of the day selects persons who are likely to toe the government's line, so some mechanism to guarantee an impartial appointment is important. Concomitantly, the terms of appointment should insulate the board members from retaliation if they make unpopular choices: their terms should be fixed, non-renewable and they may only be removed for clearly specified and serious misconduct. Thus when the head of an NCA does not have their term in office renewed because he had rowed with the government, in particular as a result of his aggressive policies against former state-owned enterprises, then this raises questions irrespective of the formal terms of appointment.²⁰ It is to be borne in mind that board members should also be independent of business; in this context we may note that when Neelie Kroes was nominated as Commissioner for Competition, the European Parliament

¹⁶ M.A. Dutz and M. Vagliasindi 'Competition Policy Implementation in Transition Economies: An Empirical Assessment' (2000) 44 *European Economic Review* 762.

¹⁷ Similarly, S. Wilks and I. Bartle 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25 *Western European Politics* 148, 152.

¹⁸ Article 51 Act Against Restraints of Competition. The political dimension of the BKA's powers is explored in R. Wesseling *The Modernisation of EC Antitrust Law* (Hart, 2000) pp.171-173.

¹⁹ Most scholars apply the typology developed by F. Gilardi 'The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors' (2005) 11(4) *Swiss Political Science Review* 139.

²⁰ C. Hanretty and C. Koop 'Shall the law set them free? The formal and actual independence of regulatory agencies' (2013) 7(2) *Regulation & Governance* 195, recounting the non-renewal of the head of the Portuguese NCA. See also the concern expressed over the non-renewal of the Director general of the Office of Fair Trading in 2000: K. Brown K 'Keeping Watchdogs on a Short Leash: The Government's Approach to Competition Has Increased Suspicions That It Will Not Tolerate Truly Independent Regulators' *Financial Times* (10 March 2000) p.23.

noted that her connections to industry were improper; however she was appointed but chose to abstain from taking decisions early on in her tenure when firms that she had been involved in were under scrutiny.²¹

The second criterion is about the budget. First, one can look to where the funding comes from: if the state pays for the agency, this creates a clear risk that funding can be used as a means to secure certain results from the agency. Bill Kovacic for example tells of a specific episode in the US where the two Federal antitrust agencies (the Federal Trade Commission and the Department of Justice) agreed to withdraw a policy proposal for the sharing of work between them in view of fears that the government would cut funding if this went ahead.²² That said, there are also risks if funding comes from private sources. For instance, if funding is based upon merger filings, the money can dry up in a recession, and if money comes from cartel fines this creates the risk of adverse selection, whereby the authority pursues cases by following the money. Accordingly, no source of funding is immune from risks, but an agency can counteract the risks of political meddling by communicating clearly the economic value that the agency has as a way of reminding the state of its commitment to competitive markets, and also to gain social consensus with respect to its activities.²³

The final criterion is the relationship between the authority and the state. This asks how far the choices of the authority are reviewed *ex ante* and *ex post* either by the executive or by parliament: whether individual decisions may be overturned by politicians, or whether the authority has to secure approval for its activities. The risk is more poignant than that pertaining to the composition of the authority because here politics can interfere much more directly into the work of the authority. That said, a number of European countries have provisions that allow, in well-defined circumstances, for politics to trump the competition analysis. These statutory exclusions may be problematic for the independence of the agency only insofar as its powers become so limited that they are not worthwhile: however if this is the case then the state's commitment would also be undermined, so what one normally finds are specific statutory exclusions for certain sectors.²⁴ More worrying is if the state affects enforcement policy directly by specifying enforcement priorities, or indirectly by setting out performance targets which then lead the agency towards a certain modality of enforcement. Some commentators take the view that because of the significant powers a competition authority can wield against large and politically salient business interests, some political pressure in guiding the agency's powers is inevitable so that the game agencies must play is twofold: regulating markets well and negotiating alliances to ensure that its output is supported by politicians.²⁵ A good example of this may be seen in the Commission's fining policy: in the early cases fines were relatively low, not least because businesses did not perceive cartels to be harmful, but the fines were then increased gradually as the legitimacy of the Commission's fight against cartels grew.²⁶ Furthermore agencies are now

²¹ M. Cini 'Pragmatism Prevails: Barroso's European Commission' (2005) Chatham House Briefing Paper EP BP 05/01; M. Ruuda 'Competition Commissioner to hand over five cases' euobserver.com 25.11.04 (<http://euobserver.com/economic/17843>).

²² Kovacic (above n.13) p.301.

²³ L. Berti and A. Pezzoli *Le Stagioni Dell'Antitrust* (EGEA 2010) p.69.

²⁴ For example, M. Libertini 'I fini sociali come limite eccezionale alla tutela della concorrenza: il caso del "Decreto Alitalia"' (2010) *Giurisprudenza Costituzionale* 474 discussing a specific episode where antitrust law was suspended to ensure that a merger in the airline markets was authorised. Similarly, in the UK a special piece of legislation was passed to authorise bank mergers in the name of financial stability, see The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008 (SI 2008/2645).

²⁵ See generally, F. Rourke *Bureaucratic Power in National Politics* 2nd ed (Boston, Little Brown, 1972).

²⁶ On the Commission's cartel policy generally, see C. Harding and J. Joshua *Regulating Cartels in Europe* 2nd ed (Oxford: Oxford University Press, 2010).

eager to point to the beneficial effects of their cartel policies as a way of legitimising the penalties they impose and their regulatory activity.²⁷

As intimated above, the risks to agency independence ultimately affect the basis upon which the state made a commitment to competitive markets, so it is in the interest of the state not to tinker too much with the agency's choices. Conversely, agency members know that retaining their current degree of independence, or securing more of it, may require that they tread delicately when matters are politically sensitive. As a British regulator has put it, 'if a regulator expects to be politically independent, then he had better adopt some of the habits of politicians.'²⁸ This conclusion is not to suggest despair about imperfect independence; rather it is to capture the political reality where competition policy choices are made, and this is obviously a greater concern in countries where the culture of competition was a latecomer.²⁹

1.2 Legitimacy

A common way of classifying criteria by which to measure legitimacy is to distinguish inputs and outputs: we can judge the procedures by which decisions are taken and reviewed, or the outcomes caused by the intervention of a competition authority. One aspect of legitimacy is accountability and several have taken the view that there is an 'inherent tension' between independence and accountability.³⁰ However, accountability also serves to strengthen independence in the long run: if the public are informed and satisfied about the performance of the agency, then its role is legitimised and it has more capacity to operate, and if the authority's decisions are informed by views of stakeholders (e.g. consumers and market actors) then the competition authority gains legitimacy, even if its autonomy is thereby reduced somewhat.³¹

When considering input legitimacy, one criterion is that the agency acts in a manner that is procedurally proper. In this context, three issues have been the subject of debate in the EU. The first is that because competition authorities have police-like powers to seize documents, to question individuals, and to impose large penalties, that these powers must be exercised having regard to the rule of law. In this respect, one will find an evolving jurisprudence that clarifies the boundaries of the authority's powers. The second aspect that has been discussed is whether it is appropriate that the authority that carries out the investigation should also be empowered to reach decisions, or whether the agency should act as a prosecutor and prove its case in front of a judge. From a legal perspective, the motivation for this discussion is Article 6 of the European Convention on Human Rights.³² From an economic perspective the discussion is based upon concerns that the prosecutor/decision maker can have a confirmation bias by which once it begins an investigation it will have strong incentives to find an infringement.³³ The third concern is related to the second: in case that the agency is empowered to reach decisions, how satisfactory is the degree of judicial overview? These three debates have featured prominently, in particular when assessing the performance of the European Commission as an antitrust

²⁷ For example, in all recent cartel decisions by the Commission, the harm to consumers caused by the cartel and remedied by the antitrust intervention is noted, see for example Commissioner Almunia's statements in Antitrust: Commission fines producers of wire harnesses €141 million in cartel settlement Europe (IP/13/673 10/07/2013); in the case of Italy this may be seen in the shift towards safeguarding the consumer interest by prioritising certain cases, see L. Berti and A. Pezzoli *Le Stagioni Dell'Antitrust* (EGEA 2010) pp.100-101.

²⁸ Cited in A. Roberts *The Logic of Discipline* (Oxford University Press, 2010) p.106.

²⁹ Berti and Pezzoli (above n.23) considering the development of competition policy in Italy.

³⁰ W.E. Kovacic 'Competition Agencies, independence, and the political process' in J. Drexler, W. Kerber and R. Podszun (eds) *Competition Policy and the Economic Approach* (Edward Elgar, 2011) p.291.

³¹ Roberts (above n.28) p.115.

³² For a good discussion, see R. Nazzini 'Administrative enforcement, judicial review and fundamental rights in EU competition law: A comparative contextual-functionalist perspective' (2012) 49(3) *Common Market Law Review* 971.

³³ D.J. Neven 'Competition economics and antitrust in Europe' (2006) 21 (48) *Economic Policy* 471.

authority.³⁴ These debates do not need to be repeated yet again, what is perhaps worthy of comment here is that in spite of these concerns, the legitimacy of the Commission as a competition authority remains quite high. In part this is explained by the fact that the Commission regularly updates its procedures in light of what it perceives as best practices and judgments of the European Courts.

Turning to output legitimacy, there has been a development in the way in which authorities account for their performance. The conventional way is by issuing a report of their activities, which is discussed in Parliament. How these reports could be designed to give the best account of the agency's performance is not at all clear. One approach could be to indicate how many cases have been taken. Some studies have used this as a proxy for the quality of an agency's performance.³⁵ The advantage of this approach is that it allows one to compare across jurisdictions, but there are risks in ascribing too much significance to numbers: not only are numbers affected by range of factors (e.g. the procedures in place (states with more costly procedures may prosecute less frequently), budgets, the state and the size of the economy), but it can be perverse to evaluate an agency's performance simply by the numbers of cases it handles because it pushes the agency to conclude as many cases as possible, simply to hit a target. Accordingly there is a trend towards trying to measure the impact of competition enforcement by looking at the welfare effects of antitrust enforcement.³⁶ Again, here one might consider relying on proxies (for example, for cartel cases one could look to the size of the fine: fines are calculated using fairly stable criteria based on seriousness and economic impact, thus a larger fine suggests greater welfare loss). Alternatively some agencies have tried more refined approaches, for example DG Competition has estimated the consumer benefits of its enforcement, and estimated that its 2001 cartel cases led to benefits of €2.8 billion to €4.2 billion, while its merger interventions left to benefits between €4 billion and €5.8 billion.³⁷ These measurements capture the direct effects of antitrust enforcement, however they do not measure two kinds of indirect effect: first the deterrent effect of enforcement (economic theory teaches us that this is a function of the size of the penalty and the likelihood of being caught) and second the dynamic efficiency effects of competitive markets, which some take to be much greater than the direct effects of antitrust law.³⁸

One should not assume that competition authorities always report on success: in 2005 DG Competition released a study on merger remedies. Remedies are often agreed between the Commission and the parties to a merger so that the competition concerns that the Commission identifies are resolved and the merger is allowed to go ahead. For example, the parties to the merger agree to divest certain assets. The study found that in 24% of the sample the remedy had only been partially effective in removing the competition concerns and may even have reduced the competitiveness of the firms that were divested, in another 7% of cases the remedy was ineffective, while in 57% the remedy was effective.³⁹ The result of this study was a strengthening of the Commission's remedies policy and so this reflexive approach may be welcomed;⁴⁰ on the other hand proving one's fallibility is also risky because it

³⁴ See generally, I. Van Bael *Due Process in EU Competition Proceedings* (Kluwer 2011).

³⁵ See M. Guidi M. Guidi 'Does Independence Affect Regulatory Performance? The Case of National Competition Authorities in the European Union' EUI Working Paper RSCAS 2011/64.

³⁶ M. Bergman 'Quis Custodiet Ipsos Custodes? Or Measuring and Evaluating the Effectiveness of Competition Enforcement' (2008) 156 *De Economist* 387.

³⁷ DG COMP *Management Plan, 2012*. Available at: <http://ec.europa.eu/dgs/competition/>. The method for guessing the benefits of cartel investigations is to estimate the extra prices charged by cartels, multiply this by the number of units and the number of years the cartel was expected to operate for had the Commission not intervened. Similarly for mergers the question asked is what the price increase would have been had the merger been allowed, and how many units would have been sold.

³⁸ G. Nicoletti and S. Scarpetta 'Product market reforms: macro-linkages and effects on growth' in A. Mateus (ed) *Advances in Competition Law and Economics* (Kluwer, 2007).

³⁹ The study was unable to determine the effect in the rest of the sample. DG Comp *Merger Remedies Study* (2005) available at http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf.

⁴⁰ The review was started in 2007, and the result was the Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C267/1.

damages the reputation of the agency. The importance of this reputation was evidenced starkly by a set of appeals against Commission merger decisions in 2002 where the General Court quashed the approach taken by the Commission.⁴¹ These led to significant changes within DG Competition to institute procedures that are designed to ensure that the analysis of mergers is more economically robust and can withstand legal challenge.⁴² The speed with which DG competition responded to these two instances where its failures were exposed shows the importance that credibility has in competition law enforcement.

Indeed, in competition law circles, it appears that one of the major sources of legitimacy is the rating provided by a private institution and published in the *Global Competition Review*, notably DG Competition ranks among the elite agencies and the UK, French and German NCAs are singled out as the other elite agencies in Europe. This status gives the agencies credibility and influence globally, as well as vis-à-vis the national political environment.⁴³ This rating process is not quite about testing for input legitimacy in the conventional sense (even if most of the questions asked are about the processes of the competition authority) nor specifically about outputs either. Nevertheless, prestige matters.

2. Independence and legitimacy of EU competition enforcers

2.1 The European Commission

Having just discussed the values of independence and legitimacy, it may come as a bit of a surprise to discover that the EU's principal competition enforcer is the European Commission. This body has been described as a 'political and administrative hybrid'⁴⁴ in that its tasks include both the promotion of the general interests of the Union (by for example, initiating proposals for legislation) and at the same time the oversight of the application of the Treaties and of Union Law.⁴⁵ And while Commissioners are persons 'whose independence is beyond doubt' and the Commission as a body 'shall be completely independent' and thus take no instructions from any Government or other entity, it is also the case that members of the Commission are proposed by the Member States according to a rotation system, the vast majority of Commissioners are senior national politicians, there is an informal national quota system for recruitment in the bureaucracy, and ultimately the competences of the Commission are delimited by Member States.⁴⁶ At first blush, the Commission does not appear to

⁴¹ Case T-342/99 *Airtours Plc v Commission* [2002] ECR II-2585; Case T-301/01 *Schneider Electric SA v Commission* [2002] ECR II-4071; Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381. See B. Vesterdorf 'Standard of Proof in Merger Cases: reflections in the Light of Recent Case Law of the Community Courts (2005) 1(1) European Competition Journal 3.

⁴² For example, the Merger Task Force was disbanded, a new procedure was created whereby a draft decision is tested by a devil's advocate panel of officers that were not involved with the case and test the validity of the economic arguments, and a chief economist was appointed, along with a team of economists to boost the authority's capacity to handle complex economic theories. See A. Winkler 'Some Comments on Procedure and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of EC Merger Control?' in F. Lévêque, H.A. Shelanski (eds) *Merger Remedies in American and European Union Competition Law* (Edward Elgar, 2003).

⁴³ A brief summary of the 2013 report of this report is available here: http://www.autoritedelaconurrence.fr/doc/gcr_rating13.pdf. See M. Maggetti 'The Media Accountability of Independent Regulatory Agencies' (2012) 4(3) *European Political Science Review* 385, looking also at media perception, and generally on reputation and global governance, see A.M. Slaughter *A New World Order* (Princeton University Press, 2004) pp.36-64.

⁴⁴ N. Nugent *The European Commission* (Basingstoke, Palgrave, 2001) p.326. The best discussion remains that by L. Laudati 'The European Commission as a Regulator: The Uncertain Pursuit of the Competitive Market' in G. Majone (ed) *Regulating Europe* (Routledge, 1996).

⁴⁵ Article 17(1) and (2) TEU.

⁴⁶ Article 17(3) and (5) TEU. See also A. MacMullen 'European Commissioners 1952-1995: National Routes to a European Elite' in N. Nugent (ed) *At the Heart of the Union* (Basingstoke: Macmillan Press, 1997); A.A. Ellinas and E. Suleiman *The European Commission and Bureaucratic Autonomy* (Cambridge: Cambridge University Press, 2012).

be well suited to decide competition cases on the basis of the orthodox view of independence that we sketched above, which explains why since the 1990s, when the enforcement of competition law had gained in prominence, it was inevitable that there would be calls for establishing a European cartel office.⁴⁷ These calls have subsided today, but before we explore why this may be so, it is worth discussing the practice of competition enforcement by the Commission in closer detail to test its independence and legitimacy.

It should be borne in mind that while decisions in individual cases are voted by the College of Commissioners, the bulk of the work is carried out by the Directorate General for Competition (hereinafter, DG COMP) and the Competition Commissioner. First, the power to take some decisions that precede a final ruling (e.g. to initiate proceedings, to reject complaints, to order the supply of certain information from parties being investigated, to issue a statement of objections⁴⁸) are given to the Commissioner for competition, and some are delegated by that person to the Director General.⁴⁹ Second, in the vast majority of cases the College defers to the DG COMP's proposed course of action. This is evidenced by the fact that most competition decisions are agreed by written procedure, which reduces the scope for discussing the wider policy ramifications of a proposed decision.⁵⁰ Written procedures are said to be for uncontroversial cases where sufficient consensus has been achieved by the relevant cabinets beforehand; disagreements require an oral hearing. Having said that, collaboration is expected among Commission departments in the procedure leading up to a decision, which is an avenue for reaching agreement on how to handle non-competition considerations silently.⁵¹ Furthermore, the Commission has also explained that when the oral procedures are used, this is an indication that the issue at stake is of 'economic or political importance.'⁵² In these cases it is inevitable that there will be instances where political considerations are aired expressly and may be decisive.⁵³

However, before the Commission reviews the proposed decision of DG COMP, the work of the directorate-general is reasonably well insulated from politics and private interests. In the first instance a case arrives at the doors of DG COMP through a variety of sources: notification by the parties (merger notifications are compulsory if the merger has an EU dimension, and parties may confess to having infringed EU competition law on the basis of the Commission's leniency policy), complaints from third parties, own-initiative investigations, or the result of re-allocation where the case had originally begun in an NCA but it is decided that the Commission is the best-placed authority. At this first stage there is some risk of lobbying from complainants who may press for their case to be given

⁴⁷ S. Wilks and L. McGowan 'Disarming the Commission: The Debate over a European Cartel Office.' (1995) 32(2) *Journal of Common Market Studies* 259.

⁴⁸ There is a special procedure when it comes to the statement of objection: the President must also agree to it being issued, and any other Commissioner concerned about the case may seek a meeting with the President and the Competition Commissioner, however it is also said that other services cannot veto the issuance of a statement of objections as this would risk the impression that non-competition considerations were taken into account. DG TREN (dealing with transport) however may raise issues of political salience for consideration. Antitrust manual of Procedures - Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (2012) Section 2.2

⁴⁹ The legal basis for this is Commission Decision of 24 February 2010 amending its Rules of Procedure [2010] OJ L55/60 Article 13. A comprehensive list of the acts which the Commissioner for competition has been empowered to adopt, and those which have been sub-delegated to the Director general for Competition is found in Antitrust manual of Procedures - Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (2012) Sections 2.2 and 2.3. However, note that the Commissioner may, in consultation with the President, decide that in view of the political sensitivity or the importance of the matter, that this is a decision of the College of Commissioners.

⁵⁰ Commission Decision of 24 February 2010 amending its Rules of Procedure [2010] OJ L55/60, Article 12

⁵¹ Commission Decision of 24 February 2010 amending its Rules of Procedure [2010] OJ L55/60, Article 23

⁵² Antitrust manual of Procedures - Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (2012) Section 2.1, paragraph 19.

⁵³ For one early example in merger control, see G. Monti *EC Competition Law* (Cambridge University Press 2007) ch.1 tracing the political debates over a merger of aircraft manufacturers.

priority, as well as from parties notifying their transaction pleading for favourable treatment. Here there are some risks of DG COMP being the subject of improper pressure for the following reasons: first many cases are settled through mechanisms which leave little scope for judicial review, which creates risks of both overly aggressive and insufficiently robust enforcement; second the DG has considerable discretion with respect to the choice it makes as to which cases merit investigation. That said, it operates with a degree of transparency, for example all commitments proposed by parties are market-tested, and this kind of accountability prevents some risks of improper influence.⁵⁴

In the second stage, that of investigation and adjudication, the officers of DG COMP remain relatively immune from improper interference, and a number of mechanisms are in place to fend off political interference: first the Council of Ministers plays a limited role, because the Treaty provisions and the Merger Regulation leave the detailed work to DG COMP; second the Commission has published a number of soft law notices describing how the Commission carries out its tasks. For present purposes, the value of these soft law documents is that they pre-commit DG COMP to a specific mode of analysis, departure from which may be challenged in Court. As a result, it is harder for industry or national governments to put pressure to deviate from these guidelines. Before a decision is taken the draft is circulated via the Advisory Committee, which contains representatives from national competition authorities, but it is not a place where local political pressure can be exercised, not least because of the deep cooperation networks among the competition authorities which make this an epistemic community that is largely in agreement about the best way to enforce competition law.⁵⁵ Accordingly it is only when DG COMP's recommended course of action is discussed by the College of Commissioners that politics arrives to affect some decisions.

Given the above, DG COMP's legitimacy 'seems now to be firmly entrenched.'⁵⁶ This is because it has secured significant policy and operational independence from the Commission, which is in turn a result of a successful enforcement policy since the mid-1980s. Success brought it legitimacy, which in turn made it possible to delegate it more policy independence. Similarly, the Commission as a whole has turned more market-friendly over time. Perhaps one telling example of this is the policy on crisis cartels. In earlier economic downturns the Commission was sympathetic to the needs for industry to restructure and so tolerated cartels among competitors which were designed to reduce over-capacity gradually, allowing all firms to survive economically. In the current crisis, however the Commission has taken a much tougher line, rejecting the political case for exemption.⁵⁷ These developments explain why calls for an independent EU-wide cartel agency have subsided: the Commission acts as if it was such an agency already.⁵⁸

2.2 National Competition Authorities

Under Regulation 1/2003 Member States have an obligation to designate an authority responsible for the application of Articles 101 and 102, and for all Member States this seems to be the same authority that applies national competition law. The design of this authority in the hands of the Member States,

⁵⁴ Commitments are based on Article 9 of Regulation 1/2003. For discussion, see F. Wagner von Papp 'Best and Even Better Practices in the European Commitment Procedure after *Alrosa*: The Dangers of Abandoning the 'Struggle for Competition Law' (2012) 49 *Common Market Law Review* 929.

⁵⁵ This has been noted by a number of scholars, see S. Wilks 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?' (2005) 18(3) *Governance* 431.

⁵⁶ M. Cini 'Administrative Culture in the European Commission: the Cases of Competition and Environment' in N. Nugent (ed) *At the Heart of the Union* (Basingstoke: Macmillan Press, 1997), p.84

⁵⁷ This is particularly evident in the amicus curia brief sent to the Irish courts in the Beef Industry Development Society case (http://ec.europa.eu/competition/court/amicus_curiae_2010_bids_en.pdf). As a result of this opinion, the parties withdrew their request for exemption of a crisis cartel.

⁵⁸ Obviously as noted above, some continue to press for more procedural reforms, see for example I. Forrester 'Due process in EC competition cases: A distinguished institution with flawed procedures' (2009) *European Law Review* 817.

the sole requirement stipulated by EU Law is that the national competition authorities are able to ensure effective compliance with the obligations of Regulation 1/2003.⁵⁹ Nothing is said about independence. This is unusual given that in the regulatory frameworks for electronic communications and energy considerable legislative efforts were expended to ensure the independence of regulatory authorities. Initially, independence was from market participants, in this context the ECJ identified a principle of equality of opportunity among competitors and concluded that this would not be satisfied if a market player was also in charge of regulating markets.⁶⁰ Subsequently the current versions of the directive empowering national regulatory authorities in electronic communications also provide that regulators should have political independence.⁶¹

In the absence of specific guidance the degree of formal independence among the NCAs is quite varied. In spite of these variations many competition authorities consider themselves to be independent.⁶² The most comprehensive study to date is that carried out by Mattia Guidi, who has quantified the degree of independence of each NCA (at the extremes, the least independent is the Estonian NCA, the most independent is Italy's NCA).⁶³ His findings are fascinating because the degree of independence does not seem to be correlated to the degree of market liberalism of the economy, although mixed economies are more likely to have more independent authorities than states which are either liberal or based on coordination.⁶⁴ Conversely the longer a Member State has been party to the EU the more independent the authority is, although it is not clear why this should be so because as we noted the EU has not formally requested the institution of independent authorities.⁶⁵ Guidi has also argued that the more independent NCAs are also more active. This is an important finding because it justifies the delegation of decision making to the NCA: what we lose in democratic control we gain in improved performance.⁶⁶

It is beyond the scope of this essay to discuss each NCA in terms of independence and legitimacy. It will come as no surprise that most agencies are generally said to be independent but states have retained powers to intervene in certain sectors or policy domains where a political decision is warranted, and that the resources and outputs of different agencies varies.⁶⁷ Here we analyse two issues, first the additional advocacy function of NCAs, and second degree to which the design of NCAs is affected by the European Courts and the Commission.

While the Commission may occasionally identify regulatory failures at national level (especially through the state aid rules), its normal way of proceeding against these is by deploying its antitrust powers or its limited legislative powers. On the other hand, NCAs have varying degrees of power to

⁵⁹ Regulation 1/2003 [2003] OJ L1/1, Article 35. This latitude is explained in recital 35 as recognition of the 'wide variation which exists in the public enforcement systems of the Member States'.

⁶⁰ Case C-18/88 *RTT v GB-INNO-BM* [1991] ECR I-5941, para 25.

⁶¹ Directive 2009/140/EC, [2009] OJ L 337/37 Article 1(3).

⁶² See for example the results of this OECD survey <http://www.oecd.org/daf/competition/2485827.pdf>

⁶³ M. Guidi 'Delegation and Varieties of Capitalism: Explaining the Independence of National Competition Agencies in the European Union' (2013) *Comparative European Politics* (advance on line publication).

⁶⁴ The author draws on the tripartite classification in P. Hall and D. Soskice *Varieties of Capitalism* (Oxford University Press, 2001).

⁶⁵ It does not appear to be a feature of the Europe Agreements either, even if for Member States that joined the EU in 2004 one finds a pattern of informal convergence to the EU standards, see C.S. Cseres 'The impact of Regulation 1/2003 in the new Member States' (2010) 6(2) *Competition Law Review* 145

⁶⁶ M. Guidi 'Does Independence Affect Regulatory Performance? The Case of National Competition Authorities in the European Union' EUI Working Paper RSCAS 2011/64. Although as we noted above, measuring performance by counting cases is problematic.

⁶⁷ For a comparative analysis of some NCAs, see P-A Buigues and R. Meiklejohn 'National Competition Authorities in France, Germany, and the United Kingdom: Resources, Independence, and Enforcement' *Competition Policy International Antitrust Chronicle* (April 2013).

engage in competition advocacy.⁶⁸ That is to say, advising government of anticompetitive regulation. It is said that in some countries where the switch to competitive markets has been recent an antitrust agency might spend 50 per cent of its resources on advocacy, because the major entry barriers are caused by regulation rather than private restraints.⁶⁹ In addition to the powers conferred by national legislation, it should be recalled that the Court of Justice has also held that if national legislation authorises, facilitates or requires infringements of Articles 101 and 102, then the national court may disapply these rules that contribute to a restriction of competition.⁷⁰ These powers lead us to ask to what extent they impact upon our discussion of the NCA's independence. On the one hand, it may be argued that a structurally independent NCA lacks the requisite information base, or appropriate contacts with government so that its views might be heard more effectively if it were less independent; on the other hand its independence is vital for a dispassionate appraisal of policy initiatives.⁷¹ Thus, the effective use of these powers requires the same kind of delicate political judgment noted earlier in this essay.

Turning to the role of the EU in shaping NCAs, the legislator's silence has not deprived the ECJ from having a say in the design and the powers of NCAs. The Court's most significant intervention to date is found in its *VEBIC* judgment, which has had a direct impact on the design of the Belgian competition authority and may well have even wider consequences. The judgment stems from a simple case against a price-fixing cartel, but the point of law that was considered went to the heart of the way the Belgian law had designed the NCA.⁷² The Belgian antitrust rules were reformed in 2006, in part to take into account obligations under Regulation 1/2003 and in part to ensure that the procedures complied with fundamental rights obligations. The legislation established the Belgian Competition Council, which is an administrative court. The Council includes within it the 'auditoraat' that is in charge of receiving complaints and drafting a report for the Council, who then makes the final decision. In essence, the institutional design separates the prosecutor and adjudicator, a solution that ensures compliance with Article 6 ECHR. Decisions of the Belgian Competition Council may be appealed to the Brussels Court of Appeals, but in this appeal the NCA is not entitled to lodge written observations before the appellate court. This makes sense because it would be unusual for a lower court to make further written observations to the appellate court. Instead, the Minister responsible for the Economy may make a written statement in support of the NCA's decision, even if this does not seem optimal as he will not normally have enough information to comment on this. The Brussels Court of Appeal was unsure whether the absence of a respondent in appeals against an antitrust decision of the NCA meant that the national procedures were incompatible with EU Law. The Court of Justice agreed that the Belgian procedures were unsatisfactory: it feared that if the NCA did not have an opportunity to defend its decision, then the appellate court 'might be wholly "captive" to the pleas in law and arguments' of the appellants, and this risk, which was compounded because of the complex legal and economic issues at stake in antitrust law, 'is likely to compromise the exercise of the specific obligation on national competition authorities under the regulation to ensure the effective application of Articles 101 and 102 TFEU.'⁷³

The immediate effect of this case has been to require a redesign of the Belgian legislation, to ensure that the competition authority is able to participate in appeal procedures as respondent. The ECJ in fact

⁶⁸ Perhaps the most powerful are those provided to the Italian NCA. For a discussion see M. Clarich 'I Poteri di Impugnantiva dell'AGCM ai Sensi dell'Art 21 BIS della L.N. 287/1990' (2013) *Concorrenza e Mercato* 865

⁶⁹ Jenny (above n.6) p. 167

⁷⁰ Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055.

⁷¹ OECD 'Competition Advocacy: Challenges for Developing Countries' (undated, available at: <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/32033710.pdf>).

⁷² On Guidi's scale (above n.66) the then Belgian NCA was ranked 15th, and was also in the bottom half in terms of decision envisaged.

⁷³ Case C-439/08 *VEBIC* [2010] ECR I-12471, para 58

suggested that it would be appropriate for the state to designate one body within the NCA that may act as respondent, which (at the time of writing) appears to be what is being proposed. More important, however, is the long term effects of the ruling of the ECJ. As mentioned, the Court ruled that national procedures may be incompatible with EU law when they make competition enforcement ineffective. What other national procedures might be challenged using this approach? Potentially the field is quite broad, it could range from challenging the funding of the authority (insufficient funds preventing effective enforcement), or procedural choices that are made either by the legislator or by the agency (e.g. capping penalties, and the design of leniency policies could all hinder the deterrent effect of antitrust law and so make enforcement less effective either by over deterring or under deterring). In fact recently in *Schenker* the Court held that a national leniency programme must not ‘undermine the requirement of effective and uniform application of Article 101 TFEU’⁷⁴ It reminded the NCA that immunity from fines should only be awarded in exceptional cases, for instance when the cooperation is ‘decisive in detecting and actually suppressing the cartel.’⁷⁵ This is certainly not the last time that the Court will pronounce itself on the adequacy of national rules, and some limiting principles will need to be found. Presently, the balance between national procedural autonomy and effectiveness seems to have swung decisively towards more emphasis on the latter.

The Commission has also found a mechanism to prod Member States to reform national competition law as a result of the economic crisis. Two examples will suffice to illustrate the two legal grounds upon which this intervention is justified. A number of Member States have received financial assistance from the Commission but these were conditional upon a number of reforms: in identifying these, competition law has featured. For example in relation to Ireland, the Commission noted three concerns: first that there had been a number of sectors that had not yet been opened to competition; second that the judges deciding competition cases brought via the civil law route could not impose sanctions, third that because public enforcement is always criminal, the higher standard of proof makes enforcement more difficult.⁷⁶ Ireland duly complied and reformed parts of its competition statute.⁷⁷ The second legal basis for intervention is the European Semester: this is a policy initiative whereby the Commission may review the proposed government policies and where Member States perceived at risk may be subjected to in depth reviews. In the case for Spain, the reform of the competition authority was seen as an important part of the measures to combat the crisis. The new legislation provides that there is a single authority governing competition and the regulation of network industries. The Commission reminded the government of the importance that this new authority should be ‘effective autonomous and independent’.⁷⁸ It also expressed certain concerns, in terms of financing, the role of ministries in issues pertaining to network industry regulation, and the early termination of the mandate of some board members.⁷⁹ It is even reported that the Commission

⁷⁴ Case C-681/11 *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others*, Judgment of 18 June 2013, para 47

⁷⁵ *Ibid* para 49.

⁷⁶ http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp76_en.pdf

⁷⁷ Competition (Amendment) Act 2012. The new Act increases the penalties for infringers, even if in the past the Irish courts had seldom imposed the highest penalties available; it allows the NCA to enter into binding commitment decisions, which is significant because in Ireland only the courts may declare acts of undertakings anticompetitive so often the NCA does not wish to engage in costly litigation to secure compliance, binding commitments allow the NCA to enforce the law more effectively. However, the new law does not provide for civil penalties, which may undermine the willingness of the NCA to act in certain cases where it considers imposing a criminal sanction disproportionate.

⁷⁸ http://ec.europa.eu/europe2020/pdf/nd/idr2013_spain_en.pdf.

⁷⁹ Commission Staff Working Document Assessment of the 2013 national reform programme and stability programme for Spain SWD(2013) 359 final, pp.30-31 (available at: http://ec.europa.eu/europe2020/pdf/nd/swd2013_spain_en.pdf).

threatened infringement proceedings,⁸⁰ and Spain responded to these concerns by ensuring greater independence of the new authority from government.

These developments, considered cumulatively, undermine the independence in the design and the operation of NCAs, in the name of effectiveness of Union Law. To some this might appear an overly intrusive stance, but one which is difficult to resist. Perhaps one strong ground for resistance can be found by reference to fundamental rights. That is to say, a Member State whose competition laws are challenged as ineffective and thus in breach of EU Law may be able to justify this by pleading that its rules are designed to respect the fundamental rights of the parties, and so successful enforcement needs to be put to one side.

3. Interdependence

3.1 Managing multi-level enforcement

As indicated above, national and European competition laws had begun to converge in two respects: first the substantive rules became aligned, as well as the methods by which competition assessments were carried out; secondly both the Commission and NCAs grew in prestige and the role of competition enforcement increased since the 1990s. It should be borne in mind that this was so for the application of Articles 101 and 102 TFEU only. A different story is found in the field of merger policy: the Commission has exclusive competence in very large mergers, but the majority of transactions are scrutinised at national level. The main reason for this is that Member States wish to safeguard the option of taking non-competition factors into account in politically sensitive cases.⁸¹

In the context of Articles 101 and 102 TFEU, the Commission considered that the system of enforcement could be improved, in the following respects: first the Commission considered that it was overburdened by precautionary notifications, which meant it was unable to prioritise its enforcement policy; second NCAs were empowered to apply EU competition law, but were unable to apply Article 101(3) TFEU as a way of exempting agreements, which exacerbated the Commission's workload and made NCAs less effective enforcers of EU competition law. Third, it was not clear which cases were best allocated at national level and which at EU level. The General Court established certain criteria by which the Commission could determine which cases had a Union-wide interest but this made only a marginal impact on the situation.⁸² Soft law notices that articulated criteria for decentralised enforcement did not succeed in achieving a better work balance between the Commission and NCAs. The anticipated accession of ten new Member States is said to have made the Commission worried about its ability to cope with the concomitant increase in notifications.⁸³ Therefore the Commission proposed a major legislative change, which is now found in Regulation 1/2003.⁸⁴

⁸⁰ C. Gonzalez-Paramo and S. Salvador 'The new National Commission on Markets and Competition' International Law Office 20 June 2013, available at: <http://www.internationallawoffice.com/newsletters/detail.aspx?g=a3dc4651-069e-438c-9e78-f44fd0c6a055>

⁸¹ However this kind of protectionism may well fall outside the internal market rules. For a brief discussion, see G. Monti *EC Competition Law* (Cambridge University Press, 2007) pp.300-307.

⁸² Case T-24/90 *Automec v Commission (Automec 2)* [1992] ECR II-2223.

⁸³ I find this line of argument deeply unconvincing: if one looks at the statistics on enforcement it appears that the Commission, already from 1999 had begun to become more efficient in managing notifications and at selecting enforcement priorities. There was no meaningful change in its enforcement policy from 2004, when Regulation 1 came into force. This means that the reasons for reform lie elsewhere. See G. Monti 'EU Competition Law from Rome to Lisbon – Social Market Economy?' in C. Heide-Jorgensen, C. Bergqvist, U. Neergard and S.T. Poulsen (eds) *Aims and Values in Competition Law* (DJOF Publishing, 2013) pp.49-51. See also, concurring, W.P.J. Wils 'The Years of Regulation 1/2003 – A retrospective' (2013) 4(4) *Journal of European Competition Law and Practice* 1, who in fact notes that since 2004 the Commission has not been able to pursue more antitrust enforcement. According to Wils in the mid-2000s DG COMP was re-organised so that the rapid response mechanisms developed in the context of mergers were

The major changes that are relevant for this discussion are the following: Article 1 abolishes the system of notification and exemption, so that parties must assess for themselves whether their arrangements comply with competition law. Article 3 requires NCAs to apply EU competition law in parallel with national competition law in those cases where the practice in question has an effect on trade within the EU, and (for the most part) prohibits the NCA from applying stricter national competition law.⁸⁵ These two moves make NCAs and the Commission equals in certain respects. Based on this the Regulation then provides for a mechanism whereby enforcement is coordinated when cases arise. This is found in Article 11 and also in a Joint Statement of the Council and the Commission on the functioning of the network of competition authorities.⁸⁶ In brief, NCAs inform the Commission (and also each other via the network) of cases that they initiate, which allows for a discussion on re-allocation should one of the other authorities be better placed to handle the case in question. This allows for each case to be handled only by one authority. Undertakings benefit because by and large each NCA will apply the law in a comparable manner, and there should be only one decision to worry about.

3.2 Two Narratives of Regulation 1

The first narrative is that this Regulation is a success, but there are two lines of argument about why it is so. According to the Commission, this is because it serves to decentralise enforcement and thereby to strengthen it. At first blush, the success may be seen by numbers: between 1 May 2004 and 31 December 2012 NCAs reported 1334 investigations and 646 envisaged decisions, while in that period the Commission reported 228 investigations and 88 decisions.⁸⁷ While the Commission's work rate has not increased significantly, NCAs that had tended to apply national competition law, are now applying EU law with increased frequency. Let us not misread these numbers: they do not indicate more antitrust enforcement (NCAs would have earlier applied national law, and recall that for many Member States national laws were fairly similar to the EU rules): the numbers only indicate more application of EU competition law, but this is only because NCAs have a duty to apply it, when applying national law would, in many cases have had probably the same effects. The other sign of success is that cooperation among the authorities has been smooth and fruitful. That is to say, few cases have been re-allocated and there has not been any notable legal challenge against the operation of the network. Furthermore, relations among competition authorities have remained good.⁸⁸

There is however a more cynical response to the success of Regulation 1: it is successful because it centralises power in the hands of the Commission, while appearing to decentralise enforcement.⁸⁹ The evidence supporting this story is easy to find. First large cases (involving three or more Member

(Contd.) _____

spread to other cases. S. Wilks 'Competition Policy' in Wallace, Pollack and Young (eds) *Policy-Making in the European Union* 6th ed (Oxford, 2010) p.147.

⁸⁴ [2003] OJ L1/1. For a critical assessment see R. Wesseling *The Modernization of EC Antitrust Law* (Hart, 2000).

⁸⁵ The exceptions are merger law and stricter national rules regulating unilateral conduct, see Article 3(2)-(3) Regulation 1/2003.

⁸⁶ Joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities, 2002 (15435/02 ADD 1).

⁸⁷ W.P.J. Wils 'The Years of Regulation 1/2003 – A retrospective' (2013) 4(4) *Journal of European Competition Law and Practice* 1. Note that the numbers of decisions are not comparable: the NCAs report envisaged decisions, while the Commission reports final decisions. Therefore the NCA number may be inflated.

⁸⁸ Communication from the Commission to the European Parliament and the Council, *Report on the functioning of Regulation 1/2003* COM(2009) 206 final; *Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003* SEC(2009) 574 final.

⁸⁹ S. Wilks 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?' (2005) 18(3) *Governance* 431.

States) are said to be best handled by the Commission,⁹⁰ so many NCAs may well end up applying the law to national agreements. This is also strengthened by the fact that some NCAs do not make express provision for fining undertakings for anticompetitive effects in other Member States, which makes the need for Commission enforcement in multi-jurisdictional infringements even more important to ensure deterrence.⁹¹ Second, the Commission will also take cases that raise new issues and so it has the main role in devising policy.⁹² Third, the envisaged decisions of NCAs are reviewed by the Commission, and this has two consequences: the Commission may try and ‘correct’ an NCA’s approach informally, and it may even withdraw the case from the NCA at this late stage. This places an NCA under some pressure to ensure that it complies with the Commission’s approach. Unfortunately there is very little evidence on which cases are moved to the Commission, so it is difficult to assess the significance of this power, but it is reported that informal discussions have led to NCAs changing their approach in some cases.⁹³ Furthermore, the ECJ has also played a role in limiting the powers of NCAs. In *Tele 2* the question arose whether after an investigation on a suspected abuse of dominance the Polish NCA was empowered to issue a declaration that in its view there was no infringement of competition law. The power to make this kind of decision is not found in Regulation 1, and the ECJ ruled that it could not be implied. This means that only the Commission has the power to make declarations that a practice does not infringe competition law. This kind of decision may be desirable for parties for it provides them with legal certainty, also against other NCAs. But the ECJ took precisely the opposite view: because the Commission may wish to revisit the behaviour in question, the NCA may not be allowed to declare certain conduct compatible with competition law.⁹⁴ This judgment is further evidence that the Commission remains first among equals and is able to dictate policy in this field. This is also strengthened by the publication of Notices interpreting almost every substantive aspect of EU competition law, which according to one Advocate General bind NCAs insofar as they must give reasons for departing from them.⁹⁵ On this basis, competition enforcement is re-centralised.

A second, and related, narrative is the extent to which the success of the new system is compatible with the rule of law, in particular because much of the cooperation rests upon informal arrangements. It is beyond the scope of this essay to review the risks comprehensively.⁹⁶ We can return to two of the issues that we touched on above to offer a glimpse of the kinds of considerations at stake: first may one NCA revisit a case after one NCA has analysed it and decided not to move further? And may NCAs divide a cartel investigation among each other? Both of these questions raise the issue of *ne bis in idem*, which we find in the Charter of Fundamental Rights. Here we have a tension between effective enforcement of competition law (which suggests that multiple prosecutions are a good thing) and fundamental rights (which protect a party from multiple prosecutions). The issue has been addressed obliquely by the ECJ in *Toshiba*.⁹⁷ This concerned a parallel investigation of a cartel by the Commission and the Czech NCA. However here the NCA was dealing with conduct that had taken

⁹⁰ Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43 paragraph 14 (hereinafter Network Notice)

⁹¹ See for example the position of the British NCA: OFT’s guidance as to the appropriate amount of a penalty (OFT 423, September 2012), paragraph 2.10

⁹² Network Notice (above n.90) paragraph 15.

⁹³ Commission *Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003* SEC(2009) 574 final paragraphs 250-259, noting that the Commission has so far preferred to advise NCAs under Article 11(4) and it would thus appear that NCA compliance has meant there was no need to engage the powers in Article 11(6).

⁹⁴ Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA* [2011] ECR I-3055.

⁹⁵ Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* Judgment of 13 December 2012, Opinion of Advocate General Kokott.

⁹⁶ See S. Brammer *Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law* (Hart, 2009); D. Reichelt ‘To what extent does the co-operation within the European Competition Network protect the rights of undertakings?’ (2005) 42 *Common Market Law Review* 745.

⁹⁷ Case C-17/10 *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* judgment of 14 February 2012.

place before the Czech Republic joined the EU and so there was no question of *ne bis in idem* on the facts: the two agencies were not reviewing the same facts. Nonetheless the indication from the judgment is that, within the EU, competition authorities may be free to agree to split up the investigation of an infringement provided each authority's action is designed to protect a different interest (so for example the French NCA could address the effects of the cartel in France, while the German NCA the effects of the same cartel in Germany).⁹⁸ According to some, this interpretation of *ne bis in idem* fails to protect the essence of the right in question, which is precisely to avoid a defendant being embroiled in two legal disputes where the same evidence is reviewed. Similarly with the re-prosecution of an infringement it may be argued that the point of the *ne bis in idem* right is to discipline the authority to complete a thorough investigation once, rather than reserving the freedom to revisit a suspected infringement multiple times. Therefore, in this context some of the procedures provided for in EU Law might need to be revisited. In particular, the Commission's Notice on case allocation, which foresees the possibility of parallel investigations,⁹⁹ and the judgment in *Tele 2*, which foresees the possibilities of repeated prosecution may need to be revised if one adheres to the policy underpinning the principle of *ne bis in idem*.¹⁰⁰

It is also worth noting that the ECN as such has no legal personality so determinations by NCAs within its ambit cannot be challenged, which leads us to a second general issue, that of accountability. If two NCAs decide to split a cartel investigation among them, the undertaking has to challenge both NCAs for their action, but it cannot challenge the ECN, which is merely a place where ideas are exchanged. This according to some may be problematic: suppose that the ECN discuss a particular policy line to be taken in applying Article 102, and then one NCA acts upon this: is it right that only the NCA is made accountable and not the Network for designing, or at least contributing to design, that policy?¹⁰¹

3.3 The Transformation of the European Competition Network

Originally the ECN was only expected to carry out two tasks: to serve as a focal point for the re-allocation of cases and for sharing information. However, neither of these tasks has taxed the ECN: the reports available suggest that few cases have been re-allocated (while on the other hand some NCAs have tipped off others about infringements) and the sharing of information regarding specific cases has been infrequent. The information that is more usually requested is on how to handle a case, in view of legal and economic difficulties. This has led the ECN to engage in two other types of activity: in coordinating procedural issues, and in serving as a forum to discuss specific issues. In other words, it has become involved in policy-making.

The most prominent success in this respect is said to be on harmonising leniency programmes. As is well-known, leniency programmes have been very successful mechanisms by which competition authorities discover cartels: the fear of another cartel member submitting a leniency application (by which it receives immunity from fines and exposes the other cartel members to increasingly high fines) can lead to a race to submit leniency applications. In the EU, a particular problem arises now that any NCA or the Commission may take a cartel infringement case, so parties should notify in every Member State. To make these multiple notifications easier to manage the ECN members have agreed on a Model Leniency Programme, which has now been implemented by almost all NCAs. On the one

⁹⁸ This has already happened, see Commission Staff Working Paper (above n.93) paragraph 223, where the Belgian and German competition authorities acted against a cartel on the basis that the first authority only addressed the effects of the cartel in its jurisdiction.

⁹⁹ Network Notice (above n.90) paragraphs 5-13

¹⁰⁰ See generally G. Monti 'Managing Decentralized Antitrust Enforcement: Toshiba' (2014) 51(1) Common Market Law Review (forthcoming)

¹⁰¹ See F. Cengiz 'Multi-level Governance in Competition Policy: the European Competition Network' (2010) 35 European Law Review 660, 673.

hand of course this is a second-best solution: it would have been better to have agreed on a single leniency policy for the entire EU, with one notification binding any NCA; however this may have required legislative intervention and taken too long to materialise.

The ECN Model Leniency Programme appears to be, for the most part, a copy of the Commission's leniency policy.¹⁰² Accordingly, contrary to those who see the ECN as a potential site for exchanging information about best practices, here the Commission's approach had the upper hand. This may be in part qualified by noting that the ECN Programme allows individual NCAs to offer more generous leniency programmes, however these will have to comply with EU Law and must not undermine the effectiveness of competition law enforcement.¹⁰³ Furthermore, the ECN also monitors NCAs and checks the extent to which they have complied with the model, and has issued a study on the process of convergence among all NCAs, reporting where NCAs have not yet modified their policies to match the ECN model.¹⁰⁴ There are no sanctioning powers, but reputation and the importance of being perceived to be a collaborative member of the club can be sufficiently coercive forces to compel harmonisation.¹⁰⁵

So far we have suggested that the ECN, as a policy-making governance network, seems to focus on ensuring harmonisation, often using the Commission's policy as the model towards which to converge. On the other hand, there is anecdotal evidence that meetings of the ECN provide both the occasion and the springboard for sharing know how about how to handle cases (e.g. on questions of how to define a market) and here it is plausible to say that the ECN facilitates experimentation and opportunities for mutual learning.¹⁰⁶ However this aspect of the ECN's work is not visible, so it is hard to judge how often this takes place and whether on the other hand, some agencies (for instance those that are better funded and have high international prestige) take a leadership role in guiding the more junior agencies. Furthermore, it should be noted that one area that has so far remained immune from convergence relates to penalties other than fines. Some Member States impose criminal penalties for certain competition law infringements, others impose pecuniary sanctions on individuals, or disqualify directors.¹⁰⁷ Having said that, in the Commission's assessment of Ireland's competition policy it was noted that criminal enforcement of all cases undermines the effectiveness of the agency for it will likely prosecute fewer cases given the higher standards of proof.¹⁰⁸ Thus again, effectiveness may become the key that transforms national procedures towards a single model.

It remains to be seen whether in other fields the ECN manages to evolve into a network that encourages diverse applications of competition law with a view to reflecting on how to best handle certain competition puzzles.¹⁰⁹ Should it mature in this way, there would be some tension between this kind of experimentalist governance and the hierarchical governance mechanism found in Regulation 1/2003 and some judgments of the Court.

¹⁰² ECN Model Leniency Programme (revised November 2012) available here: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf

¹⁰³ See *Schenker* (above).

¹⁰⁴ This document (undated) is available at the ECN website: http://ec.europa.eu/competition/ecn/index_en.html

¹⁰⁵ G. Majone, 'The Credibility Crisis of Community Regulation' (2000) 38(2) *Journal of Common Market Studies* 273, 297-8.

¹⁰⁶ See for example the results of a survey carried out by the European Institute of Public Administration, summarised by M. Kekelekis 'The European Competition Network: It Does Actually Work Well' EIPASCOPE 2009/1.

¹⁰⁷ See for example A. Ezrachi and C. Beaton-Wells (eds.) *Criminalising Cartels: A critical interdisciplinary study of an international regulatory movement* (Oxford: Hart, 2011).

¹⁰⁸ See discussion in section 2.2 above.

¹⁰⁹ Supporting this approach, see Y. Svetiev 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?' in C. Sabel and J. Zeitlin (eds) *Experimentalist Governance in the EU* (Oxford, 2012).

4. Conclusions

Competition authority design is undergoing major fluxes: in the days of the golden age of competition law (1990-2008) governments in the EU amended the rules to foster greater independence, confident of their commitment to free markets. The role of policy networks has now strengthened the NCAs so that their legitimacy is no longer in question. Therefore, when crisis struck in 2008, agencies were unanimous in stating that competition law enforcement was part of the solution to the crisis, and this message was not denied by governments. At the same time, the sovereign debt crisis has led many Member States to redesign independent authorities, and many NCAs now share their offices with national regulatory authorities and consumer protection authorities.¹¹⁰ This may yield a range of outcomes: there may be less competition enforcement if the multi-tasking agency prioritises other kinds of enforcement tools; conversely there may be more holistic analysis of the issues, for example the agency may be better placed to see the implications of its competition decisions on consumers, or understand the anti-competitive effects of consumer regulation. It is also possible that the commitment to competition by the agencies is reduced when they are forced to consider other policy dimensions in their role as utilities regulators. On the other hand, the pull of the ECN as a network of enforcers sharing and valuing a regulatory vision may neutralise the effects of these mergers of independent regulators.

Multi-tasking agencies then will face the same challenge of retaining independence and finding legitimate space. As argued in this essay, their independence is based on a commitment to market-based policies by the state setting up the agency and reinforced by transnational networks: globally successful agencies are hard to shut down when their effectiveness is praised by authoritative outsiders, and when reputation and results are the key benchmarks of success. Only a legitimate challenge to today's market order would call into question the role of independent competition authorities today.¹¹¹

On the other hand, the principal threat to the independence of National Competition Authorities operating in the EU stems from their interdependence. As indicated above the ECJ and the Commission have mechanisms to police the application of competition law by NCAs, both in terms of institutional design and in discrete cases. This is reinforced by what appears to be the prevailing ethos of the ECN: convergence and coherent enforcement.¹¹² Together, these dynamics make it less easy for NCAs to experiment. This is a matter of regret because to the extent that NCAs are, in large parts, operating credible enforcement policies, it would not hurt to loosen the reins of centralised control and opt for a less controlled policy of decentralised enforcement, tolerating divergent outcomes in the name of learning what the best approach is.

¹¹⁰ W.E. Kovacic and D.A. Hyman, 'Competition Agency Design: What's On the menu?' (2012) 8(3) *European Competition Journal* 527, providing a very general overview of the challenges.

¹¹¹ And apparently, this is not yet present, see A. Wigger & H. Buch-Hansen 'Explaining (Missing) Regulatory Paradigm Shifts: EU Competition Regulation in Times of Economic Crisis' (2013) *New Political Economy* 1.

¹¹² K. Dekeyser transcript of 'The European Competition Network: What It Is and Where It's Going' 19 April 2005 (The Antitrust Source, July 2005) available at: http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jul05_FullSource7_28f.authcheckdam.pdf

