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GLOBAL GOVERNANCE Programme

# EXPLORING THE TRANSNATIONAL CIRCULATION OF POLICY PARADIGMS

*Law Firms, Legal Networks and the Production of Expertise in the Field of Competition Policies*

*Edited by*

Julie Bailleux and Antoine Vauchez

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Published in Italy, July 2014
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu/RSCAS/Publications/
www.eui.eu
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## Abstract

This ebook brings together political scientists and legal scholars with a view to explore the transformations that affected the rather stable institutional settlement of EU competition law - and in particular the emergence of a transnational field of competition policy - since the 1990s. Beyond its insistence on “transnational fields” and the on-going conflicts and competitions that structure its dynamics, the book also suggests a new entry: the power-knowledge nexus that considers the production as much as the import-export of ideas, theories and “models” about competition policies as one essential lever through which these battles are fought.

## Keywords

EU competition policy; EU competition law; Power-knowledge; Experimentalist governance; European Competition Network; Global antitrust; Modernization

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# Introduction[*]

While competition policy has been for quite some time now an established domain of research in legal scholarship[1], it was not until David Gerber's (first) book that a broad inter-disciplinary literature actually emerged[2]. The past decade has seen the emergence of an impressive body of interdisciplinary literature with political scientists, sociologists and eventually historians opening a cross-disciplinary and comparative conversation on competition policies[3]. The recent edited volume by Kiran Patel and Heike Schweiter on the *Historical foundations of EU competition law* marks an important step in this regard as it offers the first fine-grained inter-disciplinary attempt to bring together a narrative of individual - collective agency in the history of competition policy and an account of the dynamics of legal and judicial change[4]. The book provides the richest synthesis to date of the early battles and critical junctures that shaped EU competition policy, from the very first antitrust provisions of the European Community of Coal and Steel to the mid-1980s period. However, because of its periodisation, the book stops right before the moment when the rather stable institutional settlement of EU competition law actually entered a phase of tremendous changes. This ebook brings together political scientists and legal scholars with a view to explore some of these transformations and in particular the emergence of a transnational field of competition policy since the 1990s. Beyond its insistence on "transnational fields" and the on-going conflicts and competitions that structure its dynamics, the book also suggests a new entry: the power-knowledge nexus that considers the production as much as the import-export of ideas, theories and "models" about competition policies as one essential lever through which these battles are fought.

## 1. The transatlantic début of competition policy

Up until recently, the transnational component of antitrust policy was essentially structured by an intense circulation of ideas across the Atlantic. While the role of the American lawyers and statesmen in drafting the ECSC treaty's resolutions on competition policy is well known, recent contributions have also documented the role of German-American networks in shaping and making sense of Regulation 17/62[5]. However, much remains to be done in order to understand how transatlantic

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[*] This ebook orginates in a Workshop entitled "Exploring the Transnational Circulation of Policy Paradigms. Law Firms, Legal Networks and the Production of Expertise in the Field of Competition Policies" organized on 21 June 2013 at the European University Institute. The editors would like to thank in a particular way the Global Governance Program (its research strand on "Modes of governance") and Miguel Maduro for their continuous support to this project. We would like to thank also Giorgio Monti who took an active part to our discussions.

1 See the ongoing Ph.D research by Mélanie Vay, « Droit et économie dans la construction des services d'intérêt général européen. Approche socio-historique », Doctoral student, Université Paris 1-Sorbonne.

2 David Gerber, *Law and Competition in the XXth century. Protecting Prometheus*, Oxford, Oxford University Press, 2001.

3 In particular: H. Buch-Hansen (2008), *Rethinking the History of European Level Merger Control. A Critical Political Economy Perspective*, CBS PhD Series, 26; A. Wigger (2008), *Competition for Competitiveness: The Politics of Transformation of the EU Competition Regime*, PhD Dissertation, Department of Political Science, Faculty of Social Sciences, VU University Amsterdam; Hubert Buch-Hansen and Angela Wigger, *The Politics of European Competition Regulation: A Critical Political Economy Perspective* (London : Routledge , 2011); Michelle Cini and Lee McGowan, *Competition Policy in the European Union* , 2nd edn (Basingstoke : Palgrave , 2009); Lee McGowan, 'Theorising European Integration: Revisiting Neofunctionalism and Testing its Suitability for Explaining the Development of EC Competition Policy?' , in *European Integration Online Papers* 11 (2007). Laurent Warlouzet, 'The Rise of a European Competition Policy, 1950–1991: A Cross-Disciplinary Survey of a Contested Policy Sphere', in *EUI Working Papers*, RSCAS 2010/80; And the very rich bibliography presented in the contributions to this volume.

4 Kiran Patel, Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law*, Oxford, Oxford University Press, 2013.

5 Brigitte Leucht, 'Transatlantic Policy Networks and the Creation of the first European Anti-trust Law: Mediating between American Anti-trust and German Ordo-liberalism', in Wolfram Kaiser, Brigitte Leucht, and Morten Rasmussen (eds), *The History of European Union: Origins of a Trans- and Supranational Polity, 1950–1972* (London : Routledge,

networks have contributed to structure the field of competition policy in Brussels. In his recent book, *L'Union par le droit*, Antoine Vauchez has pointed at the fact that the first practitioners of EC competition policy in Brussels had actually been Americans. Between 1958 and 1965, all major Wall street law firms opened 'satellite offices' in Brussels close on the heels of the rapid increase of American corporations' investments in Europe: Baker & McKenzie (1958), Cleary Gottlieb (1960), Simmons and Simmons (1962), Archibald (1963), Coudert Brothers (1965), not to mention of course the very special relationship that Cleary Gottlieb maintained with the High Authority all along the 1950s that originated in the friendship between George Ball and Jean Monnet[6]. While they were up until then based in Paris for the most part, in part due to the presence of the International Chamber of Commerce, these US law firms saw the European Economic Community as a "new Eldorado" to quote one of the central players of that time. The unexpected success of Competition Commissioner van der Groeben in securing an ambitious supranational regulation for articles 85-86 of the Treaty of Rome (Regulation 17/62) as much as the strong support received from the European Court of Justice in the *Consten & Grundig* case (1966) were viewed as a form of confirmation that "an American-style market" would emerge there. While the venue proved less momentous than what had been hoped for, resulting in most American branches closing down their offices by the end of the 1970s, Wall Street lawyers nevertheless left a lasting footprint on the then-emerging European field of competition law. Part of it relates to the fact that the experience had lasted enough for them to actually co-opt and train a first generation of European competition lawyers who would then act as their "representatives" in Brussels. Belgian lawyers like Jean-Pierre de Bandt, Michel Waelbroeck, Walter van Gerven, Ivo van Bael, etc… actually all started their long professional careers in the field as lawyers in US law firms. Since they could take advantage of this portfolio of American and English clients, and benefit from what they called their "geographic advantage" close to the headquarters of the emerging European Communities, they would soon become the field's repeat players. Interestingly, these Euro-lawyers were in a position to create the first law firms specialized in EC competition law at the turn of the 1960-70s: one around former students and current professors of the Catholic University of Louvain forming the Bandt Van Hecke & van Bael law firm, and the other one around former students and current professors of the Université libre de Bruxelles with Michel Waelbroeck. Theses firms remains among the main sponsors and recruiting agents for future generations of EU competition lawyers, at least up until the late 1980s when a new wave of American and English law firms got interested in the perspectives of the 1992 Single European Market agenda.

Despite the failure of US law firms to set profitable permanent satellites in Brussels in the 1970s, the "transatlantic network" never quite disappeared; quite the contrary: even if it took on new forms and conduits, it played a pivotal role both in the advent and in the framing of what is referred to as the "modernisation" of the EU competition policy – that is, of its recent transformation towards the more decentralized, more efficiency-based and free market-oriented competition model of the United States[7]. Indeed, the genealogy of this metamorphosis can be traced back to the hub of transatlantic connections that emerged through the Annual Fordham Competition Law Institute Conferences (FCLI) initiated in 1974 by Barry Hawk[8], a young American law professor at Fordham who

*(Contd.)*

2009), 56–73; and Brigitte Leucht and Mel Marquis, "American Influences on EEC Competition Law. Two Paths, How Much Depedence?", in Kiran Patel, Heike Schweitzer, *op. cit.*

6 Antoine Vauchez, *L'Union par le droit. L'invention d'un programme institutionnel pour l'Europe*, Paris, Presses de Sciences Po, 2013 (forthcoming at Cambridge University Press : *Brokering Europe. Euro-lawyers and the Making of a Transnational Polity*).

7 D. Gerber (1999), "The United-States – European Union Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective", *New England Law Review*, Vol. 34, pp. 123-124; and D. Gerber (2007), "Two Forms of Modernization in European Competition Law", *Fordham International Law Journal*, Vol. 31, pp. 1235-1265.

8 Law professor at Fordham University School of Law since 1968, Barry Hawk was also a partner of Skadden, Arps, Slate, Meagher & Flom from 1989 to 2009. During his long career, along with the direction of the FCLI and his private practice as a lawyer, Barry Hawk also served as consultant to the Commission's Legal Service and to the OECD, and has been deeply committed in the American Bar Association Antitrust Section

specialised in international and EC antitrust, which quickly became the annual *rendez-vous* of the nascent antitrust community. For the past 40 years, the FCLI, sponsored by dozens of leading law firms, and bringing together over 400 participants annually, has been recognized as one of the leading events in international antitrust[9]. From the 1980s onward, academics, legal practitioners and members of administrative and judicial competition authorities from both sides of the Atlantic would meet in this New York-based hybrid setting. This transnational forum where American and European competition experts belonging to different segments of the antitrust field could meet can be depicted as a *lieu neutre*[10] within which a "conventional wisdom" about how antitrust provisions should be implemented and which global standards should be embraced was progressively elaborated. This triggered a critical import-export of instruments and paradigms across American and European judicial, administrative and political arenas which still remains to be studied[11]. Browsing the Fordham conference proceedings, one gets the sense that, as early as in the 1980s, at a time when a major part of DG IV officials still embraced the traditional European ordoliberal credo, the first lineaments of "modernisation" -from private enforcement to the need for a "more economic approach"- were actually debated and diffused transatlantically through the conduit of this "Fordham network"[12].

## 2. The Global Turn in the Field

Ever since the mid-1980s, however, a number of important political and professional changes have prompted a move away from the rather circumscribed set of transatlantic networks to a broader transnational field of competition policy. While the EU-US duopoly still tends to dominate competition policy[13], the professional market for expertise and consultancy in the area has extended and complexified dramatically over the past 25 years. The transformation started in Western Europe in the 1980s in the wake of the pro-market agendas and with the success of new public management reforms that prompted the creation of a multitude of regulatory agencies in the field of economics and finance. While the *Bundeskartellamt,* created in 1958, had long remained the only regulatory agency in the field of competition, countries like France (1986), the Netherlands (1989), Italy (1990), and many others, created their own independent body. While change occurred later in England, with Labour ascending to power, and with the enactment of the Competition Act 1998, this reform followed

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9 Besides the Annual Conference, the FCLI established in 2006 a training centre for antitrust and competition law officials, judges, and policy-makers from around the world that consists in summer sessions of courses taught by judges, authority staff, and academics with experience in competition law enforcement and which is specially open to participants from more recent competition regimes.

10 Luc Boltanski, Pierre Bourdieu, "La production de l'idéologie dominante", *Actes de la recherche en sciences sociales*, Vol. 2, n° 2-3, juin 1976, pp. 3-73.

11 See however Julie Bailleux's ongoing research project: "Law Beyond States: Transnational Jurist Networks in the Making of a Global Rule of Law. The Case of the Globalization of Competition Law ».

12 See, for example, I. Forrester and C. Norall (1984), "The Laicization of Community Law – Self-Help and the Rule of Reason: How Competition Law is and Should Be Applied", in Barry Hawk, ed., *Fordham Competition Law Institute: International Antitrust Law and Policy 1983*, Juris Publishing, pp. 305-346; C. Bright (1996), "Deregulation of EC Competition Policy: Rethinking Article 85 (1), in Barry Hawk, ed., *Fordham Competition Law Institute: International Antitrust Law and Policy 1994*, Juris Publishing, pp. 505-527; P. Massey (1997), "Reform of EC Competition Law : Substance, Procedure and Institutions", in Barry Hawk, ed., *Fordham Competition Law Institute: International Antitrust Law and Policy 1996*, Juris Publishing, pp. 91-123; A. Pera and M. Todino (1997), "Enforcement of EC Competition Rules: Need for a Reform ?", in Barry Hawk, ed., *Fordham Competition Law Institute: International Antitrust Law and Policy 1996*, Juris Publishing, pp. 125-148; or M. Siragusa (1998), Rethinking Article 85: Problems and Challenges in the Design and Enforcement of the EC Competition Rules", in Barry Hawk, ed., *Fordham Competition Law Institute: International Antitrust Law and Policy 1997*, Juris Publishing, pp. 271-296.

13 D. Gerber (1999), "The United-States – European Union Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective", *New England Law Review*, Vol. 34, pp. 123-143 ; K. Hamner (2002), "The Globalization of Law: International Merger Control and Competition Law in the United-States, the European Union, Latin America and China", *Journal of Transnational Law and Policy*, Vol. 11, Spring, pp. 385-405.

the same lines: reducing the scope for intervention by the ministerial authority, granting investigatory powers to a new agency, and introducing a decentralized system of sanctions. This first wave was followed by at least two others: one in Central and Eastern Europe in the 1990s, and, more recently, one in former developing countries such as Brazil, China, South Africa and Indonesia ; etc. As Mel Marquis points out in his paper, in the 1990s alone, over 60 new competition laws were adopted, thereby opening a whole new market for policy advisers and professional experts. Beyond national cases, there is a whole scene of bilateral and regional agreements that emerged where competition regulations took on an important role alongside the more traditional trade provisions. Marquis notes that, since the 1990s, a new generation of agreements (TACPs –trade agreements with competition provisions) has developed, to which one should add Europe's Neighbourhood Policy (EuroMed countries and Eastern Europe or Central Asia) and the recent wave of *regional* initiatives in Central and Latin America as well as in Africa.

Undoubtedly, there is a good deal of policy convergence across continents with the remarkable streamlining of the vocabulary and institutional arrangements used across the nearly hundred countries that have adopted new competition regulations; there is no denying the fact that the transformation of European Union competition policy towards a more free market-oriented competition model marked a *rapprochement* to the American model: as the promoter of the reform, commissioner Mario Monti indicates: "if there was ever a gap between both systems, it disappeared on 1 May 2004"[14]. However, this should not overshadow the fact that the definition of antitrust global standards has simultaneously triggered an increasing competition across both sides of the Atlantic. As various papers presented here show, this competition has been waged in part through the conduit of international organizations. Up until the late 1990s, the leading international player in the field was the so-called Committee of Experts on Restrictive Business Practices created in 1961 in the framework of the OECD. With the emergence of a global market for antitrust expertise, new international organizations have contested the OECD's dominance as the global standard-setter in the field. As pointed out by Pablo Iglesias-Rodríguez in his contribution to this volume, the push for change initially came from the European Commission and its Competition Commissioner in the 1990s, Leon Brittan, who championed an increasing role for the WTO in antitrust enforcement. In 1996, he launched an initiative to promote supranational governance in international antitrust that resulted in a counter-move by the US government which pushed for a competing global initiative grounded on the formation of a strictly *voluntary* and *non-binding* network of competition enforcers (which became the ICN). Given the lack of political momentum of the WTO, and the failure to maintain competition as part of trade law discussions during the Doha round, the ICN has been a much more successful international venue (for interesting developments on this, see Marquis in this volume).

Simultaneously, a growing number of transnational arenas specialized in antitrust and competition law have emerged around lawyers, judges, scholars, and government officials involved in the area of antitrust and competition law. Beside the Annual Conference on International Antitrust Law and Policy of the Fordham Competition Law Institute described *supra*, one should also mention the Global Competition Forum of the International Bar Association (IBA-GCF), and the Annual Competition Conference of the Antitrust Section of the IBA. The former used to hold Annual Competition Conferences in Fiesole, and a Global Competition Forum (CGF). Whereas the Antitrust Section has existed since the beginning of the 1970s, the GCF was founded in the beginning of the 1990s. At that time, the IBA teamed up with the World Bank to develop what was then a fledgling institution, the Global Forum for Competition Law which itself had been launched several years earlier by the Japan Foundation, the Canadian Competition Bureau, and the University of Toronto. Often organizing joint-meetings with organizations such as the International Competition Network, the World Bank, UNCTAD, APEC, or national agencies of developing countries, the GCF was conceived as a global

[14] In A. Wigger (2008), *Competition for Competitiveness: The Politics of Transformation of the EU Competition Regime, op. cit.*

meeting place for discussions of competition law issues gathering economists, lawyer, academics, practitioners and national and international policy-makers with a view to defining common standards.

As a consequence of these very rapid changes, a whole world of competition regulators and practitioners has emerged that brings together not only civil servants or agency employees, but also representatives and advisors of private actors, lobbyists, lawyers and, increasingly economic consultants called upon to provide arguments and theories to support the particular claim of the parties before the enforcement authorities or in court. What makes this meso-level activity interesting to study is the fact that individual trajectories often cut across the dividing lines of the field and generate unnoticed forms of coordination and mainstreaming across seemingly opposed institutions and groups[15]. Actors in the field certainly differ on a variety of issues: the respective importance of law and economics, the more or less apolitical institutional setup of national regulatory or enforcement authorities, the respective role of courts and agencies, and the respective role of the various international organizations' fora (WTO, UN, etc…), resulting in a large variety of possible institutional arrangements for supranational law and governance in the field of competition. Yet they share a number of commonly agreed-upon sets of problems, clusters of ideas and groups of solutions and, ultimately, beliefs starting with the intrinsic value of competition policy and a related reluctance to use it for other possible goals (market-building, industrial policy, etc…). As a result, although the field is getting more and more complex, and though it is characterized by an increased "polyarchy", it has remained very much centred around a limited set of issues; these are essentially two: first, the "convergence" debate that spurred the increasing fear of fragmentation and conflict across countries and regional entities with different standards and models; and second, the "enforcement" debate that emerged with the development of global or regional standards and the related issue of concrete local implementation.

## 3. Reflexive Politics

One essential way through which conflicts across professionals, institutions and countries have been waged is knowledge and expertise: few policy fields have produced as many competing "schools of thought" (e.g., Chicago vs. Ordoliberals), "theories of implementation" (governance, etc…) and "national or regional models" (German, American, the EU), etc… Various contributions to this edited volume point in that direction and show how one of the essential strategies for diffusing one's own national and professional model has been to engage in scientification/universalization strategies. "Doctrines" of convergence (setting global standards) or enforcement (crafting implementation techniques) have become the battleground where all actors in the field tend to meet. Just as professions use abstract knowledge in order to strengthen their "jurisdiction"[16], States, competition regulators and experts have intensively used increasingly sophisticated scientific arguments to secure their position, strengthen their institutional capabilities and expand their influence. Even private actors, as they engage in cases before regulating authorities, have invested more and more in the scientific battleground of competing economic models and theories, enlisting more and more frequently economists in addition to lawyers to support their cause. The *Outokumpu* case (2012) presented by Yane Svetiev very nicely exemplifies this increasing invocation of "objectivity" and "scientificity": when this Finnish company decided to challenge the European Commission's decision about the anticompetitive effects of its acquisition of a German steel company, it did so by nominating a three-man panel of independent and well-respected economic scholars who were asked to review the data and assess the appropriateness of the economic model on which the European Commission had

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[15] See Antoine Vauchez, "Communities of International Litigators" in Cesare Romano, Oxford *Handbook of International Adjudication*, Oxford, Oxford University Press, 2014, p. 655-668; and Antoine Vauchez, Bruno de Witte (eds), *Lawyering Europe. European Law as a Transnational Social Field*, Oxford, Hart Publishing, 2013.

[16] See Andrew Abbott's classic *System of professions. Essay on the Division of Expert Labor*, Chicago, Chicago University Press, 1989.

grounded its decision. In other words, scientification (i.e., the rise of scientific methodology and that of experts) has been one essential by-product of the increasing competition: a reflexive sub-field of intellectual production on global antitrust has progressively emerged where "ideas merchants and paradigm peddlers" (Mel Marquis) abound.

While one should certainly not over-emphasize the autonomy of these expert settings, as an important share of its members are extra-academic professionals (high civil servants for the Commission, law firms, national policy makers, etc…), it is however the case that a whole "technology of expertise" (Michele Everson) has emerged: its first trope runs along the unity/diversity line from the stylization of national or regional "models" of competition (and the practical and cultural conditions for their successful transplant elsewhere) to the stimulation of "isomorphic processes" across these countries in order to achieve greater degrees of "substantive, procedural, institutional and intellectual convergence across jurisdictions"... ; its second trope regards the conditions of implementation and the crafting of new enforcement mechanisms through harmonizing legislation or policy coordination, etc.

## 4. The 2003 Reform as a Laboratory

The overhaul of EU competition policy and the implementation of the new Regulation 1/2003 is the perfect laboratory to observe *in concreto* these new knowledge-power dynamics. We would be reminded first of all that competition policy is not only a European policy in the context of the European Union: it is arguably one of its most consolidated *success stories,* and as such a defining model –if not a policy recipe - for the emergence of Europe's supranational powers and institutional capabilities: it is on this ground that the Court and the Commission have established one of the most widespread and exclusive domains of competences ever since the 1960s. It is not hard to imagine that this move from a centralized/top-down type of regulation (through *ex ante* notification of restrictive agreements to DG IV) to a decentralized/bottom-up system of enforcement (*ex post* cartel control through "whistle-blowing" by individuals and companies has been an epochal change in terms of institutions, dynamics, types of knowledge, etc. One essential lever through which change occurred was actually through the unsettling of the previous knowledge settlement of EU competition law essentially centred around a legal approach and the related emergence of a "more economic approach" championed by Competition Commissioner Mario Monti[17] and the rise of economists in competition policy domain. The implementation of the Regulation confirmed this increasing competition over types of knowledge. Drawing on a content-analysis of French and British regulatory agencies' decisions, Andy Smith is able to point to an overall albeit differentiated "increase in neo-classical micro-analysis" (in particular through particular notions such as "damage to the economy"). While economists have dominated the definition of competition policy in England for a long time, in France things have long been different. Although the rise of economic analysis remains limited at the *Autorité de la concurrence*, the creation in 2007 of a Chief Economist position has opened the door to new theories and paradigms.

This new knowledge settlement also includes what could be coined a "more political science approach" that draws extensively today on the vocabulary of new modes of governance to shape the issue of "decentralized enforcement". As the question of implementation has become central in the new system, institutional techniques for policy coordination across national regulatory agencies and incentives for the broad inclusion of private and non-private actors within the "governance system" have become crucial. Against "principal – agent" theories, Basje Bender provides in this volume an in-depth analysis of the relevance of the "experimentalist governance" paradigm which precisely values deliberation, peer review and reporting as techniques that can enable the formation of a common epistemic community of national and European competition regulators. These new enforcement

[17] M. Monti, "EU Competition After May 2004", *International Antitrust Law & Policy*, 2003, p. 403-413.

theories suggest forms of co-production under the stewardship of the European Commission: the revised Model Leniency Programme for the detection of cartels officially presented by the European Commission at the end of 2012 as a co-production of national agencies and DG Competition devised by working groups, can be presented as one concretization of these new techniques of "decentralized enforcement". With the creation of the European Competition Network in 2004, the European Commission has engaged in a form of "strategic functionalism": through the conscious design of informal exchanges and the setting of sector-specific working groups (on energy, food, etc…), the European Commission has been trying to generate "cross-fertilization", "mutual learning", diffusion of "best practices", trust, and ultimately policy convergence across national administrative agencies, etc. What remains however in the blind-spot of these repeated attempts to manufacture an integrated transnational epistemic community of competition regulators in Europe is the risk of policy capture that these incentives may favor. In a context where courts and independent agencies have become the key regulators keeping political control at bay, transnational communities of professionals form the very "infrastructure" of the field, with an increasingly critical role in policy formulation and rule-making. This has raised fears over risks of doctrinal and methodological capture of the policy by these networks. As Yane Svetiev rightly points out, independence from political control actually means increasing dependence on transnational networks of professionals : "to the extent that there is a cohesive and fairly monolithic competition epistemic community also on the private actor side, it could be precisely this community that is filling the political vacuum". Far from being not definite answers, these points rather open new research questions that could lead to empirical projects on the formation, socialization, professional cultures and institutional identities of the various actors of this field of competition policy.

## 5. Presentation of the papers

The two first contributions of the volume investigate the modernized system of EU competition law enforcement using the conceptual framework of experimentalist governance.

Basje Bender describes very precisely the functioning of the European Competition Network and wonders to what extent cooperation between DG Competition and NCAs within the ECN follows an experimentalist logic. Based on semi-structured interviews, her paper sheds new light on the role played by DG Competition within the network. *Inter alia* she stresses the fact that the latter might not be "the hierarchical control tool that it may have seemed" at the outset. On his side, Yane Svetiev exposes the conditions under which private actors (law firms, consultants, companies and their counsellors...) interacting with competition agencies could improve the "experimentalist character" of the new EU competition policy enforcement system - that is, the conditions in which it could lead to policy innovation and learning - by participating in individual cases and in policy formulation and rule-making. Meanwhile, Bender and Svetiev draw our attention to the different cooperation sites set up throughout the implementation process of the Modernisation reform, and to the different ways through which the circulation of policy concepts and the elaboration of "best practices" and common standards occur.

While both these contributions focus mainly on what could be depicted as the "formal cooperation infrastructure" of the European field of competition policy, Andy Smith questions the actual circulation of competition policy paradigms. Based on "initial data on change or reproduction in the government of restrictive practices during the 2000s", his paper suggests that, despite an overall growth of the influence of Chicago-school doctrine in France and the UK, important differences in the government of inter-firm competition remain between these two countries, and that this increased doctrinal influence cannot be apprehended bluntly as an expression of a more general "Europeanization" phenomenon.

The last two papers of the volume explore the broader global field of competition policy. Nowadays, about one hundred countries have a competition policy and competition institutions, and in

recent years an increasing number of intergovernmental/inter-agency fora dedicated to the discussion, negotiation, and adoption of multilateral rules of competition have emerged. The papers focus on the competitive dynamics that have emerged among international actors and institutions to impose, at the global level, their own definition of what competition policy implies (paradigms, techniques, norm and institution design…). Investigating the rationale for the creation of the International Competition Network in the early 2000s, Pablo Iglesias-Rodríguez analyses this organisation as "a product of the OECD launched as a reaction to the threat of a shift of power in the definition of competition law and policy"; this threat being embodied by the emergence in the 1990s of institutions such as the World Trade Organization Working Group on the Interaction between Trade and Competition Policy or the United Nations Conference on Trade and Development Intergovernmental Group of Experts on Competition Law and Policy, which claimed responsibility for being the new global standard setter in this policy area. In the same vein, but revealing quite a different picture of the field, Mel Marquis conducts an in depth analysis of what could be depicted as a series of different battlegrounds where two traditionally 'dominant' actors (the United States and the European Union) struggle for global influence in an evolving constellation of actors.

# Experimentalist Governance in the European Competition Network

Basje Bender*

This contribution discusses the European Competition Network (ECN) through the theoretical perspective of experimentalist governance. Regulation 1/2003 introduced considerable changes to the enforcement of EU competition policy; most notably the abolition of the centralized cartel notification and the involvement of national competition authorities (NCAs) in enforcement of EU competition law. Also, a network (the ECN) was set up as a tool for cooperation and coordination between NCAs and the European Commission's DG Competition, and between the NCAs amongst each other. Experimentalist governance considers decision-making under conditions of strategic uncertainty, polyarchy and interdependence. It can been defined as a 'recursive process of provisional goal-setting and revision based on learning from the comparison of alternative approaches to advancing them in different contexts.'[1] In other words, it is a process that allows for institutionalized learning (both top-down and bottom-up) on the basis of discretion. Such learning may take place in policy networks, depending on the hierarchical character of the network, the possibility for in-depth peer review and the periodic revisability of the rules and goals.

Traditionally, competition policy has been one of the most established and most centralized policy areas in the EU. It does not seem a likely case for experimentalist governance, because discretion and therefore the possibilities for learning from diversity have been relatively limited. However, the top-down structure of EU competition policy is increasingly challenged by uncertainty and heterogeneity, as will be explained below. And since it proves difficult to sensibly capture the complex dynamics of EU competition enforcement after the introduction of Regulation 1/2003, it seems worthwhile to explore in more detail to what extent the ECN functions as a network with experimentalist features. Previous work by Svetiev, who also contributes to this working paper volume, suggests that the modernized system of EU competition enforcement and the ECN indeed offers scope for experimentalism. Both the design of the Model Leniency Programme (MLP), the ECN's first output, and the practice of commitment decisions have been analysed through an experimentalist lens.[2]

This paper will build upon the existing research on experimentalism in EU competition policy by exploring to what extent cooperation between DG Competition and the NCAs in the ECN follows an experimentalist logic. The contribution of the paper is twofold: on the one hand, it will use an innovative analytical framework to address modernization of EU competition policy and more specifically the working of the ECN; on the other hand, it will attempt to shed light on practices that are to a large extent not public, as the operation of the network is closed to non-members. In terms of materials, main points of reference are modernization Regulation 1/2003 and supporting documents;[3] the report on the functioning of Regulation 1/2003;[4] and DG Competition's manual of procedure.[5] In

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1 Sabel C., and Zeitlin, J., 'Experimentalist Governance,' in David Levi-Faur (ed.), *The Oxford Handbook of Governance*, Oxford: Oxford U.P., 2012, p. 169-183: 169.

2 Svetiev, Y., 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?' in C. Sabel and J. Zeitlin (eds.), *Experimentalist Governance in the European Union*, Oxford: Oxford U.P., 2010, p. 79-120 ; Svetiev, Y., 'Beyond Law v. Economics: Competition Policy as a Learning Platform', Working paper, 2011 ; Svetiev, Y., 'Settling or Learning through Commitment Decisions?' Working paper, 2012.

3 European Commission, Notice on cooperation with the Network of Competition Authorities, 2004; European Council and European Commission, Joint Statement on the Functioning of the Network of Competition Authorities, 2004, available at: http://ec.europa.eu/competition/ecn/joint_statement_en.pdf.

4 European Commission, Report on the Functioning of Regulation 1/2003 - Communication to the European Parliament and the Council, 2009; European Commission, Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, 2009.

addition, the paper is based on secondary literature and fifteen semi-structured interviews conducted with staff from DG Competition and NCAs in the period between September 2012 and June 2013.[6]

## 1. Modernization of competition policy

Before 2004, policy-making and enforcement of EU competition policy largely took place at the central level: they were dominated by the Commission's DG Competition (previously DG IV). NCAs enjoyed limited room for manoeuvre. This was first of all because of the supremacy of European competition law, which has preference over national (competition) law. European courts ruled that the parallel application of national competition law may not obstruct the uniform application of European competition law.[7] What is more, NCAs must disapply *any* national legislation that is incompatible with European competition rules.[8]

EU competition law was in principle considered sufficiently precise, clear and unconditional to confer obligations and rights upon citizens in national legal orders: both the cartel prohibition (the current Article 101 TFEU) and the prohibition of abuse of dominance (the current Article 102 TFEU) had direct effect.[9] Regulation 17/62, which concerned the implementation of the two prohibitions, however partially limited this direct effect in practice. Regulation 17/62 gave the Commission an exclusive competence to rule on the exemption provision for cartels by establishing a notification procedure at the central level. NCAs therefore had only a marginal role to play in the development of the European cartel regime. Although notification was not required for abuse of dominance cases (which concern mainly unilateral behaviour) this provision was less frequently applied than the cartel prohibition.[10] Pre-2004 competition policy in the EU was therefore basically a top-down model of policy-making and enforcement.[11]

A large-scale substantive and procedural modernization of competition policy that started at the end of the 1990s challenged some, though not all elements of this architecture. Substantive reforms of competition enforcement were aimed at increasing the focus on consumer welfare and economic effects of EU competition policy. Competition enforcement was to be less legal and static (with *per se* abuses) and more economics-based.[12] On the procedural side, implementation Regulation 17/62 was replaced with Regulation 1/2003. The new regulation established an *ex post* system of cartel control, where detection mainly occurs through the encouragement of whistleblowing (leniency policy). Regulation 1 also obliges NCAs to apply EU competition provisions alongside their national laws in national cases with a community dimension (cases 'which may affect trade between member states'),

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5 European Commission, Antitrust Manual of Procedures: Internal DG Competition Working Documents on Procedures for the Application of Article 101 and 102 TFEU, 2012, available at: http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf

6 Interviews have been conducted with officials from DG Competition and from competition authorities in France, Germany, the UK, Finland, Sweden, the Netherlands, Spain, Hungary, Romania, and the Czech Republic.

7 Case 14/68, *Walt Wilhelm,* para. 4.

8 See Case C-198/01 *Consorzio Industrie Fiammiferi v. AGCM*, para 49-50.

9 For Article 101(1) TFEU Case 127/73, *BRT*; for Article 102 TFEU Case 155/73, *Sacchi*.

10 The abuse of dominance prohibition when applied was initially also used to tackle mergers (before the merger regulation came into force). For mergers, competence allocation between the Commission and the NCAs is now based on turnover rates (see Regulation 139/2004). State aid was and is exclusively applied by the Commission.

11 See for example Wesseling, R., *The Modernization of EC Antitrust Law*, Hart Publishing, 2000.

12 The more economic approach does not only imply an enhanced use of economic modeling, but potentially also strengthens roles for both industry and consumers, which can become more involved in detection and the enforcement. As the paper mainly focuses on the relationship between the NCAs and DG Competition, this issue will not be further discussed here.

in most cases creating a double legal basis for decisions.[13] Potential conflicts and case allocation were to be resolved through the ECN, a network of all NCAs plus DG Competition. Whereas the more economic approach applies to all areas of competition policy, including mergers and state aid,[14] Regulation 1/2003 only covers the cartel prohibition (Article 101 TFEU) and the abuse of dominance prohibition (Article 102 TFEU).

It has been argued that, by allowing NCAs to apply EU law, the new system of enforcement entailed a risk that the competition rules would be applied differently throughout the EU, creating significant legal uncertainty.[15] On the other hand, it was feared that the regulation would not be decentralization at all, but rather centralization in disguise or a 'coup' on the part of DG Competition, attempting to tighten its grip on the NCAs.[16] Also, a rich body of literature emerged on modernized EU competition policy as a system of new governance,[17] multi-level governance[18] or networked governance.[19] The current dynamics in EU competition policy in any event seem difficult to characterize from the more traditional governance viewpoint of EU governance modes. Following Wallace, previously competition policy fell in the 'community mode' of governance - which basically is exhaustive, top-down harmonization. It was proposed that modernized EU competition policy fits mostly in the 'regulatory' mode of governance, but also has characteristics of the 'community' and the 'coordination' mode.[20] The regulatory mode of governance means foremost an important role for agencies, but is inherently difficult to describe as a coherent policy mode.[21]

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13 In practice, many cases will have a Community dimension. Most members states apply in these instances a double legal basis (national and EU law), although the Italian competition authority bases these cases exclusively on EU law.

14 See, in particular, the new merger regulation (139/2004) and the state aid action plan (2005).

15 See Brammer, S., *Horizontal Aspects of the Decentralization of EU Competition Law Enforcement*, KU Leuven (dissertation), 2008, p. 16-19; Venit, J., 'Brave new World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty', *Common Market Law Review*, 40/3, 2003, p. 559-564 for an overview of the discussion. A significant part of the working papers at the 2000 EC Competition Law and Policy Workshop in Florence was also devoted to the issue of consistency: see Ehlermann and Atanasiu (eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, 2001.

16 See Wilks, S., 'Agency Escape? Decentralization or Dominance of the European Commission in Competition Policy,' *Governance*, 18(3), 2005, p. 431-452; and Riley, A., 'EC Antitrust Modernization: The Commission Does Very Nicely – Thank you! Part 1 and 2', *European Competition Law Review*, 24, 2003, p. 604-615 and 657-672; but also, from a 'critical' political science perspective, Wigger, A. and Nölke, A., 'Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: the case of Antitrust Enforcement', *Journal of Common Market Studies*, 45/2, 2007, p. 487-513; Wigger, A., *Competition for Competitiveness: The Politics of Transformation of the EU Competition Regime*, Vrije Universiteit Amsterdam (dissertation), 2008; Buch-Hansen. H., and Wigger, A., 'Revisiting 50 years of market-making: the neoliberal transformation of European Competition Policy', *Review of International political Economy*, 17(1), 2010, p. 20-44; Buch-Hansen, H., and Wigger, A., *The Politics of European Competition Regulation. A Critical Economy Perspective*, New York: Routledge/RIPE, 2011; and, from a new governance perspective, Lehmkuhl, D., 'On Government, Governance and Judicial Review: the Case of European Competition Policy', *Journal of Public Policy*, 28 (1), 2008, p. 139-159; Lehmkuhl, D., 'Cooperation and Hierarchy in EU Competition Policy,' in: Tömmel and Verdun (eds.), *Innovative Governance in the European Union*, 2009, p. 103-119.

17 Lehmkuhl, ibid.

18 Cengiz, F., 'Multilevel Governance in Competition Policy: The European Competition Network, *European Law Review*, 35, 2010, p. 660-677.

19 Maher, I., 'The Rule of Law and Agency: The Case of Competition Policy', Chatham House International Economics Programme WP 06/01, 2006 ; Maher, I., 'Regulation and Modes of Governance in Competition Law: What's New in Enforcement?' *Fordham International Law Journal*, 31/6, 2007, p.1713-1740 ; Maher, I., 'Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network' *Comparative European Politics*, 7/4, 2009, p. 414-434 ; Wilks, S., 'Agencies, networks, Discourses and the Trajectory of European Competition Enforcement,' *European Competition Journal*, 2007, p. 437-464; De Visser, M., *Network-based Governance in EC Law*, Oxford: Hart Publising, 2008.

20 Wallace, H., 'An Institutional Anatomy and Five Policy Modes', in: Wallace, H., Pollack M. and Young A., *Policy-Making in the European Union*, (6th ed.) Oxford: Oxford U.P., 2010, p. 95-97; Wilks, S., 'Competition Policy: Towards

The involvement of NCAs in EU competition policy, and more in particular the working of the ECN, is therefore not something that can easily be explained by or included in more traditional ways of conceptualizing EU policy-making. In this contribution I argue that the two main fears on the ECN, i.e. lack of consistency and centralization in disguise, should be nuanced. Direct application of central rules by NCAs in national contexts not only brings a risk of jeopardizing legal certainty and/or strengthening EU control, but allows for a third possibility: to engage in discussions with national peers on enforcement and policy issues in an 'experimentalist' manner. Such discussion can be facilitated in particular through the ECN.

## 2. Experimentalist governance

When discussing experimentalist governance, a terminological clarification seems useful to start out with. The term 'governance' here intends to capture decision-making processes in the broadest sense, and therefore not necessarily points at either a move away from government, or a move away from hard law solutions. 'Experimentalism' is used to characterize processes that 'provoke doubt about their own assumptions and produce on-going readjustment through comparison'.[22] In this context, reference is made to the work of John Dewey, where experimentalism refers not to *experiments* but rather to *experience*.[23] Experimentalist governance, in short, can be thought of as institutionalized learning from contextualized experience.

Sabel and Zeitlin propose that an experimentalist policy cycle consists of four elements, although these should not be regarded as fixed.[24] What is more, experimentalism is not necessarily a matter of conscious design: it can also arise more spontaneously.[25] The four elements in an ideal-typical experimentalist policy cycle are the following. First, actors establish broad framework goals together at the central level; second, lower-level units have discretion in achieving the goals; third, lower-level units must regularly report on performance, for example through institutionalized peer review; and fourth this feeds back into the cycle by revision and readjustment of the goals.[26] In EU policy-making, the Open Method of Coordination closely follows such an ideal-typical experimentalist policy cycle. Goals are established at the EU (central) level, but broad enough to leave discretion at member state level; usually there are fora for review and learning in place.[27] However, an experimentalist logic is possible in any context where regulations allow for flexibility, combined with structures to learn from contextualized implementation.

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an Economic Constitution?' in: Wallace, H., Pollack M. and Young A., *Policy-Making in the European Union*, (6th ed.) Oxford: Oxford U.P., 2010, p. 152-153.

21 Wallace proposes the regulatory mode as a system with Commission as an architect of objectives and rules, the Council as a forum for agreeing minimum standards, the ECJ as means to ensure that the rules are applied evenly, the EP as a way to prompt consideration of non-regulatory factors, and generally many possibilities of stakeholder involvement. Wallace, 'An Institutional Anatomy and Five Policy Modes', cited, p. 95-97.

22 Sabel C., and Zeitlin, J., 'Experimentalist Governance,' in David Levi-Faur ed., *The Oxford Handbook of Governance*, Oxford: Oxford U.P., 2012, p. 170.

23 See for John Dewey, *Logic: The Theory of Inquiry* (1938).

24 Brasset, J., Richardson, B. and Smith, W., 'Private Experiments in Global Governance: Primary Commodity Roundtables and the Politics of Deliberation', *International Theory*, 4/3, 2012, p. 367-399.

25 De Búrca, G., 'Stumbling into Experimentalism: The EU's Anti-discrimination Regime' in C. Sabel and J. Zeitlin (eds.), *Experimentalist Governance in the European Union*, Oxford: Oxford U.P, 2010, p. 215-236.

26 Sabel and Zeiltin, 'Experimentalist Governance,' cited; Sabel C., and Zeitlin, J., 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union,' *European Law Journal*, 14(3), 2008, p. 271-327; and Sabel C., and Zeitlin, J., 'Learning from Difference: the New Architecture of Experimentalist Governance in the EU,' in C. Sabel and J. Zeitlin (eds.) *Experimentalist Governance in the European Union*, Oxford: Oxford U.P, 2010, p. 1-28.

27 This is for example the case with the CIS (Common Implementation Strategy) for the Water Framework Directive (2000/60).

In terms of scope conditions, both strategic uncertainty and polyarchy are considered to be favourable circumstances for the rise of experimentalist solutions. Interdependence is a contributing factor to experimentalism, although usually not included as a separate scope condition.[28] Without strategic uncertainty and polyarchy, experimentalist governance is unlikely:

> 'in the absence of strategic uncertainty, actors are convinced that they know how to pursue their ends, so joint exploration of possibilities is superfluous (…). In the absence of polyarchy, one actor is dominant, or there is a struggle for dominance, and the powerful prefer to impose outcomes, rather than pursue them comparatively with others.'[29]

Therefore, situations where there is no dominant actor and actors are unsure of what their goals are, or how they should achieve them, are expected to be favourable to the emergence of an experimentalist logic. Such a situation challenges a principal-agent model, which presumes that principals know in advance what the desired outcome is, delegate to agents and may take back the delegated powers if necessary. Under conditions of uncertainty, polyarchy and interdependence, hierarchy is expected to break down, because the principal cannot exhaustively regulate from the central level or take back the tasks given to agents. A strict separation between policy-making (by the principal) and enforcement (by the agent) is in such a situation increasingly hard to maintain.

Experimentalist governance shares a number of features with new governance literature: it is similar in the idea of a broad inclusion of actors (including private/non-state actors) and the idea of policy-making that is bottom-up and flexible. It is however distinctive in other ways. Firstly, part of the new governance literature presumes that new governance exclusively generates soft law.[30] That is not necessarily the case for experimentalism where, most importantly, the rules have to be flexible and adjustable. In some cases this will result in soft law solutions, which may be more suitable for such purposes. However it is by no means excluded that the rules in an experimentalist system can consist of hard law, such as regulations with relatively open norms, which then can be further interpreted at a lower level. Secondly, experimentalism more fundamentally departs from the premise of hierarchy than much of the new governance literature. In a situation with high levels of complexity (uncertainty), polyarchy and interdependence, the assumption is that a principal cannot delegate in a sensible way, as it will depend on input from agents to determine its goals. Experimentalist governance rejects a shadow of hierarchy (which proposes that new governance is effective because there is a credible threat of government intervention)[31] and argues that principals cannot sensibly threaten to take back delegated tasks. Actors are forced to both identify and solve problems together: interests are constantly redefined. Finally, experimentalism has a strong emphasis on continuous institutionalized revision (instead of occasional review, or review only in cases of apparent failure) and on learning from contextualized implementation.[32]

It should be emphasized that a deliberative governance architecture like experimentalism raises a number of democratic concerns. The rules it generates are not subjected to democratic control in a traditional way, and arguably leave rulemaking in the hands of a technocratic elite.[33] But as

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[28] But see: De Búrca, G., Keohane, R. and Sabel, S., 'New Modes of Pluralist Global Governance', 2013, forthcoming, available at: http://www2.law.columbia.edu/sabel/papers/de%20Burca,%20Keohane,%20Sabel.pdf

[29] Sabel C., and Zeitlin, J., 'Experimentalism in the EU: Common Ground and Persistent Differences', *Regulation & Governance*, 6/3, 2012, p. 412.

[30] Héritier, A. and Lehmkuhl, D., 'The Shadow of Hierarchy and New Modes of Governance: Sectoral Governance and Democratic Government', *Journal of Public Policy*, 28, 2008: 1-17; Héritier, A. and Rhodes, M. eds., *New Modes of Governance in Europe. Governing in the Shadow of Hierarchy*, Basingstoke: Palgrave Macmillan, 2011.

[31] Ibid.

[32] Sabel, *Beyond Principal-Agent Governance: Experimentalist Organizations, Learning and Accountability*, cited: 19-20.

[33] Sabel C., and Zeitlin, J., 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union,' 2008, cited: 312-313; and Sabel C., and Zeitlin, J., 'Learning from Difference: the New Architecture of Experimentalist Governance in the EU,' 2010, cited : 17-18.

deliberation is open to public scrutiny, experimentalism may open possibilities for new forms of dynamic accountability. The legitimacy of an experimentalist system is mainly generated through mechanisms of transparency and contestation, and therefore by throughput (or process) rather than input or output legitimacy.[34] By subjecting technocratic procedures to peer review and reporting, actors are obliged to justify their choices and therefore accountable – though not necessarily through traditional democratic representation.[35]

## 3. Scope conditions

Below I will explore to what extent the scope conditions strategic uncertainty and polyarchy, which are considered to favour the emergence of an experimentalist design, are present in EU competition policy. An increase of these scope conditions is expected to challenge hierarchical governance structures and favour the emergence of an experimentalist design. It should be emphasized that the focus is mainly on the cartel and abuse of dominance prohibitions. Mergers and state aid are not covered by Regulation 1/2003 and not explicitly addressed here.

### *3.1. Strategic uncertainty*

At a first glance, EU competition policy seems to be characterized by a high degree of certainty rather than uncertainty. The policy was for a long time the exclusive domain of lawyers, who strongly emphasized the necessity of legal certainty and the necessity not to deviate too much from precedent.[36] DG Competition developed a large body of competition-related experience and case law over the years, on which NCAs can build. The white paper on modernization read indeed:

> '[a]t the time when the interpretation of Article [101(3)] was still uncertain and when the Community's primary objective was the integration of national markets, centralised enforcement of the EC competition rules by the Commission was the only appropriate system. (…) *As law and policy have been clarified*, the burden of enforcement can now be shared more equitably with national courts and authorities, which have the advantage of proximity to citizens and the problems they face' [emphasis added].[37]

However, competition policy is not static. Enforcement of cartels has seen the introduction of leniency and private enforcement, two trends that originated in US practice.[38] More substantively, as mentioned above, competition policy is increasingly applied in a more economic manner. Where this is less of an issue in cartel cases, where many practices are still prohibited irrespective of their effect, in abuse of dominance cases the economic effects of the behaviour increasingly play a large role in enforcement.

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[34] Schmidt, V., 'Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput' *Political Studies*, 61/1, 2013: 2-22.

[35] 'Professionals (…) must frequently explain why their actions differ from those of peers (…). Experts and interests, in other words, must justify themselves, again and again, in public (…). Contrast this idea (…) in particular with the conventional presumption that fully certified professionals are qualified to make complex decisions on the basis of their own informed judgment alone, and are answerable to colleagues only if there is suspicion of negligence. Experimentalism thus seems more like a machine for disrupting potential conspiracies (…) than a scaffolding for erecting them.' Sabel, C., *Beyond Principal-Agent Governance: Experimentalist Organizations, Learning and Accountability*, Wetenschappelijke Raad voor het Regeringsbeleid, 2004.

[36] This became clear for example in the dicussion surrounding the new merger regulation (139/2004) where the main concepts from the old regulation were maintained as to keep previous case law usable.

[37] European Commission, White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, cited above: under [4] and [8].

[38] Leniency has been introduced in most EU member states following the 2006 Model Leniency Programme; for private litigation, a draft directive was proposed in June 2013.

DG Competition gave broad guidance on (its own) enforcement practice of abuse cases in 2009.[39] Abuse is inherently more varied in its appearance than a cartel: it may in principle assume almost any form, and therefore by nature it is hard to regulate it exhaustively at central level. An abuse may consist of high pricing (exploitative), low pricing (predatory pricing and rebate schemes) or a combination (margin squeeze); but it may also consist of a refusal to supply or deal, or of selling two products together (tying and bundling). Abusive conduct is therefore never abusive in the abstract: whether or not conduct is abusive highly depends on the context. In terms of sanctions, this not only assumes a broad toolkit of the competition authorities,[40] but also that their role may be positive (regulatory). The sanction may be not only an obligation to terminate the infringement, but instead an obligation to (positively) engage in some kind of behaviour (e.g. giving access to a network or a patent, granting interoperability). There is thus a growing pressure on competition authorities to come up with more flexible solutions, such as commitment decisions, that directly involve the regulated environment.[41] This is all increasingly relevant, as the number of Article 102 (abuse) decisions is rising, as is the number of decisions based on Article 102 and Article 101 taken together. The abuse of dominance provision is developing as a means of ensuring competition in oligopolistic markets - more in particular to ensure competition on liberalized markets. Abuse of dominance is also increasingly an issue in high tech markets, where refusal to licence intellectual property under certain circumstances may amount to an abuse.[42]

### *3.2. Polyarchy*

As discussed above, in the pre-modernization era DG Competition was clearly in a strong position. This was not only due to the notification requirement and the supranational nature of the rules; it also was the result of a situation where there were simply not many active NCAs. At the time of the Treaty of Rome, only Germany had a competition regime in force (the Bundeskartellamt was established in 1958). It was in the mid-1980s that most of today's NCAs became operational: this was for example the case for the Netherlands (establishment of NMa and Mededingingswet in 1998), Italy (establishment of AGCM and national competition law in 1990), Belgium (establishment of Raad voor de Mededinging and Wet tot Bescherming van de Economische Mededinging in 1991), and France, (the Conseil de la Concurrence was given sanctioning powers in 1986). These NCAs built up notable experience and reputation in their own right: these are most notably the UK, German and French authorities, who together with DG Competition and the US authorities are rated as the 'elite' authorities worldwide.[43]

In addition to the increase of competition enforcement in the old member states, the number of member states (and thus of NCAs) also rather dramatically increased from 16 to 27 (now 28) in the 'Big Bang' enlargement rounds of 2004 and 2007. Not only did enlargement make a notification procedure at the central level practically impossible - indeed, Commission workload was a main motivation for the abolishment of the procedure - but it also changed the position of DG Competition in the system in a broader sense. At the very least we may say that the increased number of

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[39] European Commission, Guidance on enforcement priorities in applying Article 82 to abusive exclusionary conduct by dominant undertakings, 2009.

[40] At Community level, an infringement of competition provisions was traditionally followed by an order to terminate the conduct and/or a fine (Article 3 and 15, Regulation 17/62).

[41] Svetiev, Y., 'Settling or Learning through Commitment Decisions?', Working paper, 2012.

[42] See Case COMP/C-3/38.636 (*Rambus*), which concerned abusive royalties for DRAM patents (concluded with commitments); Case COMP/C-3/37.792 (*Mircosoft*), where Microsoft was required to disclose interoperability information; see also the Statements of Objections sent to Samsung in December 2012 and to Motorola in May 2013 (both involving abuse of patent rights).

[43] By the Global Competition Review (2013).

competition authorities in the EU will make it more difficult for DG Competition to unilaterally impose (uniform) measures - presumed that it would even want to do so.[44]

At present, even though EU law is supranational, it should be remembered that there are a number of areas where member states do have discretion. This is mainly in the area of sanctions,[45] as this touches upon national procedural autonomy. Regulation 1/2003 also leaves explicit freedom to NCAs to pursue stricter national legislation in the area of abuse of dominance.[46] NCAs can set their own priorities in terms of enforcement and may include other policy goals than consumer welfare.[47] Also, and perhaps most importantly, national variations may occur where sector specific regulations are in force. Sectoral rules are not exhaustively harmonized at EU level, and there are significant differences between member states. Although the ECJ ruled that obligations from sectoral regulation cannot be used as a defence under competition rules,[48] competition policy does not always provide clear guidelines for enforcement, in particular for abuse cases, as has been discussed above.

As is also discussed elsewhere in this volume, competition policy is characterized by strong epistemic dynamics.[49] Quite apart from the external and formal 'check' of the courts, there is a more informal discussion ongoing between authorities and between authorities and practitioners. DG Competition therefore does not operate in a vacuum, as has been pointed out in other work,[50] and can be subject to pressure from the (enlarged) epistemic community. On the other hand, strong epistemic dynamics may result in less diversification in practice than would be possible in theory.

## 4. Learning in the ECN

In the light of the increased strategic uncertainty and polyarchy in EU competition policy, in the following will be explored to what extent this has resulted in a more experimentalist governance architecture. The focus will be on the relation between NCAs and DG Competition in the ECN, and therefore particularly follow up the increased polyarchy - not so much addressing strategic uncertainty, which has been the focus of other work.[51] Within the ECN, I make a distinction between case-specific (4.1) and non case-specific mechanisms (4.2) and then discuss contestation and transparency (4.3): the latter are fundamental to an experimentalist architecture, as they guarantee effective control mechanisms.

### *4.1. Case-specific mechanisms*

Regulation 1/2003 foresees various procedures for mutual intervention in individual cases. NCAs have to notify the start of new cases, which have to be communicated to the other ECN members in a virtual

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44 The double legal basis for national decisions under Regulation 1/2003 in itself has been a case in point; although DG Competition would have preferred a single (EU) legal basis, NCAs resisted this.

45 Article 5 Regulation 1/2003.

46 Article 3(2) Regulation 1/2003.

47 Article 3(3) Regulation 1/2003.

48 Case C 280/08 P *Deutsche Telekom vs. Commission*.

49 Waarden, F. van and Drahos, M., 'Courts and (Epistemic) Communities in the Convergence of Competition Policies', *Journal of European Public Policy*, 9(6), 2002: 913–34.

50 Kassim, H. and Wright, K., 'Revisiting Modernisation: the European Commission, Policy Change and the Reform of EC Competition Policy', UEA, Norwich: ESRC Centre for Competition Policy Working Paper, 2007: 07-19.

51 Svetiev, Y., 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?', cited; Svetiev, Y., 'Settling or Learning through Commitment Decisions?', cited.

environment:[52] NCAs are required to upload a limited summary of the case in English. For NCAs, this communication should occur at the time of the first formal investigative measure.[53] Importantly, the quality of the summary and accuracy of the information depends upon input of the NCAs. DG Competition is not required to upload case information upon the first investigative measure. This system looks, *prima facie*, particularly suited to ensure smooth case allocation between national authorities and as a tool to detect cases where information exchange can be useful. Both practices are facilitated through Regulation 1/2003,[54] but in practice neither seem to take place often.[55] This is remarkable, because it was expected beforehand that case allocation was going to be a major issue in the ECN.[56]

NCAs also have to notify their final decisions to DG Competition before adoption.[57] In principle, NCAs should send a draft decision. This draft is considered by the Commission's legal service and a case handler from DG Competition, and the recommendations from these sides are communicated back to the NCA by DG Competition's ECN unit. Sometimes there is also direct contact between case handlers. The ECN unit tends to communicate more serious comments over the phone. In general however, comments are made in writing via e-mail; these internal communications are confidential and cannot be invoked in national procedures.[58] DG Competition's advice is often welcomed and used to 'strengthen' the national case: the final decision remains the responsibility of the NCA. Although eventually DG Competition has the competence to take over a case from an NCA,[59] in the 689 cases that have been notified between May 2004 and August 2013, this has never occurred.[60] It therefore seems an ultimate remedy, and in any case not meant for frequent intervention.

For DG Competition, prior to taking a decision, the opinion of the advisory committee is mandatory (though not binding).[61] This committee already existed under Regulation 17/62 but was incorporated into the ECN by Regulation 1/2003: what is new is that it can also be used for national decisions (though this has not occurred in practice). The committee consists of representatives of the NCAs, who discuss DG Competition's draft decision before it is sent out for adoption. In most cases meetings tend to be short, and the opinion is adopted by unanimous agreement. NCAs are not obliged to attend, and therefore it should be kept in mind that many meetings are not fully representative of all the ECN members.[62] In terms of the possibility for the NCAs to influence the Commission decision, this seems to be limited in practice. Although the non-binding nature of the opinion not necessarily reflects the extent of the pressure of this mechanism, in practice the (public version of the) opinion is unanimous agreement with the proposed decision. This may be due to short preparation time for the attending parties;[63] interviewees also pointed out that the Advisory Committee meetings occur in such

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52 See also Kassim, H. and Wright, K., 'Network Governance and the European Union: The case of the European Competition Network', Draft paper for Arena workshop Oslo, 2009: 7.

53 Article 11(3) Regulation 1/2003.

54 Article 12 Regulation 1/2003; Article 13 Regulation 1/2003.

55 See e.g. Dekeyser, K., and Jaspers, M., 'A New Era of ECN Cooperation: Achievements and Challenges with Special Focus on the Leniency Field', *World Competition*, 30/1, 2007 : 7.

56 E.g. Brammer, S., *Horizontal Aspects of the Decentralization of EU Competition Law Enforcement*, KU Leuven (dissertation).

57 Article 11(4) Regulation 1/2003.

58 See Article 27(2) of Regulation 1/2003, stating that correspondence between ECN member are internal documents not accessible to parties.

59 Article 11(6) Regulation 1/2003.

60 http://ec.europa.eu/competition/ecn/statistics.html

61 Article 14 Regulation 1/2003.

62 Depending on the resources of the NCA and the case in question; the travel expenses are paid by the Commission.

63 Svetiev, Y., 'Beyond Law v. Economics: Competition Policy as a Learning Platform'. Working paper, 2011.

a late stage of the proceedings (just before sending the decision to the College of Commissioners for final adoption) that changes in the draft would involve a significant amount of work that is not considered feasible at this stage. In other words, although the advisory committee may be a useful 'check' on the Commission and an occasion to make an official policy statement by NCAs, it does not or very seldom result in a negative opinion or fundamental changes of the decision. In practice possible concerns of NCAs may be addressed in an earlier stage of the procedure, but they are in any event not commonly expressed in the opinion. The committee meeting itself therefore seems more of a formality.

Although there are notification and control mechanisms in place that allow for mutual review, these checks in themselves do not seem to limit the discretion of either the NCAs or DG Competition in a substantive manner. The notification of NCAs results in some limited form of advice or guidance by DG Competition, which is mostly welcomed, but sometimes not followed. The other way around, although the NCAs have the possibility to (negatively) advice on DG Competition's decisions, in practice the advisory committee itself is more of a formality than an actual intervention mechanism. It is however possible that the mechanisms can have a disciplining effect by their mere existence.

### *4.2. Non case-specific mechanisms*

The ECN also provides for more general structures of cooperation and socialization. An important part of the ECN work proceeds through working groups. The ECN working groups are flexible in nature: they can be established and abolished depending on the needs. In the past, there have been groups to prepare new regulation at the central level, for example in the context of the 2009 guidelines on enforcement priorities of abuse of dominance, the 2010 guidelines on horizontal agreements and finally the working group on TTBER, which is still active.[64] These groups are useful for DG Competition to assess practice in the member states when drafting new regulation. This is all the more so for cases that DG Competition itself enforces little at present, such as vertical restraints cases. In addition, there are working groups that concern either sectoral issues (energy, transport, food) or specific elements of enforcement (e.g. cartels, IT).[65]

The establishment and work of the groups is discussed in the Directors-General meeting (twice a year) and a plenary meeting for the heads of the ECN divisions (four times a year). Within the working groups, cases and enforcement issues are to be addressed by representatives from the NCAs. As is the case with the advisory committee, not all the working groups are well attended in practice, although the Commission pays for the travel costs. The meetings are mainly chaired and steered by DG Competition in terms of agenda, location and secretariat;[66] however interviewees pointed out that the groups are open in nature, and that NCAs of newer member states can actively participate and learn. At times their participation can be limited because of lack of experience with the area in practice (e.g. in the context of the TTBER). It has been proposed that the working groups and meetings are 'important in order to develop common economic and legal principles for the assessment of complicated business practices, which are taking place in quickly developing markets and which are subject to evolving economic thinking.'[67] However it seems that at least in the sectoral working groups, the discussion is complicated by different prioritization of the NCAs and lack of overall coherence in the sessions. This seriously hinders the possibility of mutual learning and in-depth peer review.

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64 TTBER stands for Technology Transfer Block Exemption Regulation. The new legislation is expected in 2014.

65 There is a working group on mergers as well, which is not formally part of the ECN but linked to it.

66 The working group on Cooperation Issues and Due Process is chaired by two NCAs.

67 Dekeyser and Jaspers, 'A New Era of ECN Cooperation: Achievements and Challenges with Special Focus on the Leniency Field', cited: 11. Both authors work at DG Competition.

Considering the output of the working groups, the most notable and discussed example is the 2006 Model Leniency Programme (MLP) for cartel detection, which was produced by a working group specifically set up for this purpose. This document is basically a set of recommendations for NCAs on how to set up an effective whistle-blowing programme. Instead of pursuing exhaustive modernization, the MLP provides minimal guidelines, which are revised every five years. The programme is widely considered a success, as the number of NCAs with a leniency programme has risen from 4 in 2002 to 27 in 2013,[68] and was revised on a number of smaller issues in 2012. Previously, this programme has been analyzed as an example of experimentalist governance: indeed it has relatively broad, open goals, some possibility for discretion and a revision mechanism.[69] A second output of the ECN working groups is a 2012 the stock-taking exercise on investigation and decision-making powers.[70] Notably, these two documents have been drawn up by the NCAs together and not by DG Competition. It is so far unclear what the follow-up of this work will be, and if the stock-taking exercise will result in some sort of harmonization.

In terms of socialization more generally, in March and September staff from various NCAs spend a month at DG Competition for a stage of four weeks. The system is rotating, so that each NCA can send one official per year. Such stages help staff from NCAs learn from Commission practice and to meet with their peers in Brussels. However, the content of the stages seems to differ greatly. While some national officials can more or less actively participate in a case team, in other cases the match is less satisfactory. This can be because the unit in which officials are placed does not match their work at the NCA (e.g. transfer to a completely different sector), or because the case team to which the official is assigned simply does not have suitable work (too specific) at that stage of the case. The NCA trainees also participate in the regular introduction programme that DG Competition runs for new staff. A different and more intensive form of staff exchange takes place outside the ECN, through the system of seconded national experts (SNE). This is a more thorough exchange, and often lasts a few years (but can be as short as three months). During this period, the expert is paid by the NCA or national ministry. The idea is that the SNE will learn from Commission practice and will return with more expertise to the member state concerned; at the same time, the SNEs are recruited on the basis of the Commission's needs.

### *4.3. Transparency and contestation*

On paper, the ECN offers opportunity for contestation, most notably in its case specific mechanisms for mutual intervention. Formally both in the notification system and the advisory committee, NCAs and DG Competition will have to account for deviations from the advice. Also in the various working groups, for example in the groups where new Commission policy is discussed, DG Competition will have to defend its approach to the NCAs. However, it seems that contestation does not work optimally within the specific mechanisms that are provided: in the notification procedures, the advisory committee and various working groups it seems there are several problems. First of all, the case-specific mechanisms occur at late stages in the procedure, when actual moderations are difficult to realize. In addition, there is not always sufficient preparation time and/or resources available for ECN issues.[71] This is not only the case for small, but also for the larger and more experienced NCAs and consequently, the quality of the discussion varies (at best). In the context of the working groups, due to

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[68] Malta does not have a leniency programme.

[69] Svetiev, 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?', cited.

[70] European Competition Network, Decision-Making Powers Report, 2012, available at: http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf

European Competition Network, Investigative Powers Report, 2012, available at: http://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf

[71] Svetiev, 'Beyond Law v. Economics: Competition Policy as a Learning Platform', cited.

the diverging prioritization of NCAs, there is the risk that there is little actual discussion or mutual inspiration.

In terms of transparency, the ECN has made several improvements to the governance architecture of competition policy. There is now more information available on enforcement in the member states, at least at the central level of DG Competition but also mutually. This is important when new policy issues are identified, but also in taking up these issues and in the actual drafting process. In the ECN policy letter, which is public, the most important national competition cases and policy changes are discussed (in English), thus making this kind of information wider known beyond the mere language-area of the case. However, the ECN correspondence and working group materials are confidential.[72] To some extent, this confidentiality is necessary to ensure the 'ability to have a free and constructive dialogue.'[73] However, it also makes any external control over the system difficult, and therefore may make the network vulnerable to criticism.

## Concluding remarks

The question that this contribution intended discussed is: how do NCAs and DG Competition cooperate in the ECN? Can the ECN be considered as an experimentalist network, a tool that allows for mutual learning from local enforcement experience? The two main scope conditions (polyarchy and strategic uncertainty) for experimentalism have significantly increased in EU competition policy. There are a number of both substantive and procedural issues where high levels of uncertainty and potential for diversity exist. This is mainly the case in abuse of dominance cases, the number of which is increasing at the same time that NCAs have started to apply EU competition law in their national cases. The position of DG Competition, both in terms of policy-making and enforcement, is equally challenged as a result of more active competition enforcement in old member states and the inclusion of new member states. EU competition policy seems therefore in principle open to experimentalist solutions.

Looking at the governance structure of the system, the following picture emerges. Both DG Competition and the NCAs enjoy levels of discretion that are not limited by the ECN: the network is certainly not the hierarchical control tool that it may have seemed. On the other hand, the learning mechanisms that the ECN provides do not seem to work entirely satisfactory on a number of levels, and therefore we cannot speak of a fully-fledged experimentalist logic either. There seems to be a lack of contestation in the mechanisms (both at the case-specific and at the non case-specific level), which is not only a result of short time frames, but also of internal prioritization both at the NCAs and at DG Competition. Although the ECN made national enforcement more visible than before, this is mainly towards the other members of the network. This lack of transparency is to an extent justified by the confidential nature of the proceedings, but on the other hand makes external checks difficult.

The mechanisms in the ECN seem therefore too weak to characterize the system as fully experimentalist. However, the follow-up of the stock-taking exercise may make again more clear what kind of 'animal' the ECN is, and to what extent it may be used as a system for learning. Perceptions matter here. When the polyarchy and strategic uncertainty, although present in theory, are not perceived as such by the actors, chances of moving towards an experimentalist design will decrease. In a system that has been centralized for many years, perceptions do not change from one day to the next. But in terms of blueprint, the elements of experimentalism are embedded in the ECN structure.

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[72] Article 27(2) and 28 of Regulation 1/2003, stating that correspondence between ECN member are internal documents that is not accessible to parties and concerning the extension of professional secrecy to NCA officials.

[73] Dekeyser and Jaspers, 'A New Era of ECN Cooperation: Achievements and Challenges with Special Focus on the Leniency Field', cited : 10.

# Private Actors and Their Advisers in Administrative Agency Networks

Yane Svetiev*

The workshop for which this paper was written was titled "Exploring the Transnational Circulation of Policy Paradigms: Law Firms, Legal Networks and the Production of Expertise in the field of Competition Policy". As such, the workshop brings welcome attention to both actors and processes which, even if more obscure and less obvious or transparent, have an important influence on the shaping of competition policy and law enforcement, thus continuing in the footsteps of the work done already by Vauchez[1] and also in the spirit of the research on processes of transnationalisation of the legal profession and their effects on local legal practice.[2]

This contribution to the workshop and the resulting volume could be situated in the context of two observations about the recent evolution of EU competition policy. The first is the identification of an EU competition law epistemic community, made up of practitioner-lawyers, judges, economists and academics (a community both characterized and strengthened by the revolving doors phenomenon).[3] A further related claim of these authors is that this fairly cohesive epistemic community may be a reason and a 'soft' mechanism for a substantial harmonization of competition law across the EU, largely through informal exchanges and consensus building and often in the absence of any changes either in the text of the relevant competition laws or in the political direction from domestic governments about competition enforcement.

The second observation stems from the literature that on the modernisation process of EU competition law enforcement, attempting to identify the impetus for this process and its effects both on the institutional enforcement arrangements and on the substantive development of competition law at EU and at national level in the Member States. One important focus of this literature is the networking of the national administrative agencies responsible for competition enforcement with the European Commission and the likely effects of this development.[4] In the early years, just before and in the course of the implementation of the institutional reforms, one common view was that the modernization and the formalization of the network has been a way of extending the power of the Commission through the networked competition authorities to more directly influence the sphere of national competition enforcement[5] and simultaneously spread a particular substantive vision of competition policy.[6] An alternative interpretation of the modernization process is provided through the

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I wish to acknowledge the support of the ERC funded project on European Regulatory Private Law, within which this contribution was written.

1 Eg, most recently Vauchez, A., 'Euro-lawyering, Transnational Social Fields and European Polity-Building' in A. Vauchez and B. de Witte (eds), *Lawyering Europe European Law as a Transnational Social Field*, Oxford, Hart, 2013.

2 Eg, Flood, J., 'Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice', *International Journal of the Legal Profession*, vol. 3, 1996 : 169; Flood, J., 'Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions', *Indiana Journal of Global Legal Studies*, vol. 14, 2007: 35.

3 van Waarden, F. and M. Drahos (2002) 'Courts and (Epistemic) Communities in the Convergence of Competition Policies', *Journal of European Public Policy*, vol. 9, 2002: 913.

4 The various ways in which the emergent governance structure has been characterized is explored in greater detail in Bender's contribution to this working paper volume.

5 Eg, Riley, A., 'EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part Two: Between the Idea and the Reality: Decentralisation Under Regulation 1', *European Competition Law Review*, vol. 24, 2003: 657 ; Wilks, S., 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?', *Governance*, vol 18, 2005: 431.

6 Eg, Wigger, A. and A. Nölke, 'Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: The Case of Antitrust Enforcement', *Journal of Common Market Studies*, vol. 45, 2007: 487.

lens of the need for learning in the enforcement of competition law, both in its dimension as a tool for promoting economic efficiency[7] and if seen through the lens of a broader set of relevant policy goals.[8]

The fact that there is considerable attention on the administrative authorities and their new networks is not accidental. This is part of a wider focus of scholars and practitioners on the growing tendency for EU law to mandate the creation of independent national regulatory or enforcement authorities in various sectors and policy areas. This tendency has been examined from different disciplinary perspectives precisely because it has important regulatory, constitutional and even private law consequences. Various scholars from different disciplinary perspectives have suggested that these processes of "agencification" and networking can be constitutionally suspect and can lead to a reduction of national autonomy in administrative as well as in private law.[9]

The European Competition Network ("ECN") is of course part, and some have argued even a precursor to such processes of formalizing (multi-level) governance arrangements in the EU.[10] One challenge for research in this area is that characterising arrangements, such as the ECN, as an example of "new", "multi-level" or "networked" governance can be consistent with either of the views about the underlying character and purpose of the network and the likely direction of EU competition policy described earlier. Thus, the networking of the agencies could be an attempt to generate channels of communication that engender informal exchanges and bonds of trust, leading to an indirect form of convergence irrespective of national political pressure, which in turn could be used to narrow competition policy goals and approaches.[11] Alternatively, agency networking could be a platform for policy learning or differentiation by the participant national authorities,[12] and even such differentiation and/or learning could proceed either in a disciplined or a more haphazard way.

To come to the subject of the present working paper volume, a further challenge is that to gain some traction on how such networked agency arrangements operate, the role of private actors and their own networks and associations is also crucial. The literature on the independence of regulatory agencies (much like the earlier literature on independent central banks) focuses on the advantages such institutional arrangements offer for establishing policy commitment, resolving time inconsistency problems and building of specialized expertise.[13] But at the same time, there is also (perhaps growing) recognition that there is no such thing as absolute agency independence: namely, where an enforcement institution is independent from political control (or anchor), we simply have to ask the question who is it dependent on for both policy direction and the knowledge necessary to implement or enforce its policy mandate both through writing rules and through filling the lacunae of the rules. To the extent that there is a cohesive and fairly monolithic competition epistemic community also on

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7 Christiansen, A. and W. Kerber, 'Competition Policy With Optimally Differentiated Rules Instead of "Per Se Rules vs Rule of Reason"', *Journal of Competition Law and Economics*, vol. 2, 2006: 215

8 Svetiev, Y., 'Settling or Learning Through Commitment Decisions?', Paper Presented at the ASCOLA Annual Conference – University of Salento (June), 2013.

9 Thatcher, M., 'The Creation of European Regulatory Agencies and its Limits: A Comparative Analysis of European Delegation', *Journal of European Public Policy*, vol. 29, 2011: 790 ; Lavrijssen, S. and A. Ottow, 'Independent Supervisory Authorities: A Fragile Concept', *Legal Issues of Economic Integration*, vol. 39, 2012: 419; Cherednychenko, O., 'Public Supervision over Private Relationships: Towards European Supervision Private Law?', *European Review of Private Law* vol. 22, 2014: 37.

10 Neven, D., 'Competition Economics and Antitrust in Europe', *Economic Policy*, vol. 21, 2006: 746.

11 Although on the fragility of informal norm enforcement mechanisms in these settings see Svetiev, Y., 'The Limits of Informal Law-Making: Enforcement, Norm-generation and Learning in the ICN', in J. Pauwelyn, J. Wouters and R. Wessel (eds), *Informal International Law-Making*, Oxford, Oxford University Press, 2012.

12 Svetiev, Y., 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?', in C. Sabel and J. Zeitlin (eds) *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union*, Oxford, Oxford University Press, 2010: 79.

13 Majone, G., 'Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance', *European Union Politics*, vol. 2, 2001: 103.

the private actor side, it could be precisely this community that is filling the political vacuum and, as such, determining the direction of EU competition policy in terms of goals and substance. And even if the networking arrangements among the enforcement authorities either by conscious design, or as they come to operate, lead to policy innovation and learning, the way in which such arrangements incorporate the input of private actors in that process will be an important determinant of the kinds of policy innovation and learning that will take place.

In prior work, I have suggested that the creation, or rather formalization, of the ECN as part of the Modernization Regulation 1/2003, left scope for the emergence of an experimentalist governance architecture in the implementation of EU competition law. But both this claim and the way that such a claim can be further tested and elaborated requires unpacking a number of different layers of argument, which are worth making more explicit here.

The first layer is the legal one.[14] Here the analysis focuses on the formal legal provisions that supply the substantive law to be applied, but also the "institutional" law, i.e. the kinds of interactions between the different authorities that the law envisages and permits. Arguably, the law can principally be permissive in the creation of an experimentalist learning architecture, but not determinative. Thus, on the one hand, a law that specifies narrowly the consequences that follow if certain concentration ratios or HHI indices are reached in markets, would limit the possibility for contextualization of the rules.[15] On the other hand, a law that explicitly provides for peer review of agency decisions or for a sunset clause obliging the re-examination of the legal instrument, will create formal settings and requirements of review and reexamination, even if this does not mean they will be used in an experimentalist way.[16]

As a consequence, a second level of analysis focuses on the existence of what I have termed an experimentalist "infrastructure."[17] Such an inquiry examines the modalities of interaction that emerge and perhaps even become formalized, quite apart from the law, within a network of implementation authorities, such as the ECN. Thus, a legal provision that gives the centre (in this case the Commission) the power to take over cases or otherwise override national decision-makers could be used to centralize enforcement and minimize local adaptation, but it need not be used that way, it could also be used as a penalty default.[18] Conversely, the possibility for peer review of decisions of the Commission and national authorities does not necessarily mean that such review will be conducted thoroughly or substantively.[19] There are other aspects of the network infrastructure that matter, including who has access to the information provided by authorities to the network and the extent to

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14 Svetiev, 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?', cited.

15 Though even here, for example, an authority may – and likely will – contextualize more opaquely, through the measurement of market shares, the definition of competitive constraints etc., which adaptations may remain opaque or be made more explicit and formalized.

16 Thus, a number of scholars have argued that the mandatory review of the Unfair Commercial Practices Directive delivered by the Commission in 2013 focused excessively on deficiencies in national practice instead of focusing on the deficiencies in the legal instrument itself Svetiev, Y., 'How Consumer Law Travels', *Journal of Consumer Policy*, vol. 36, 2013: 209 ; Balogh, V. and K. Cseres, 'Institutional Design in Hungary: A Case Study of the Unfair Commercial Practices Directive', *Journal of Consumer Policy*, vol. 36, 2013: 343.

17 Svetiev, Y., 'Beyond Law versus Economics: Competition Policy as a Learning Platform', Paper Presented at the Centre for European Law and Governance Seminar – University of Amsterdam, (November 8), 2011.

18 Svetiev, 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?', cited: 112-114.

19 In Svetiev, 2011, cited above, I pointed to interview evidence about the time that authorities are given to review the cases and make contributions as part of the Advisory Committee on Anticompetitive Practices and Dominant Positions ("ACAPDP"), the capacity of authorities to dedicate human resources to that task over and above their regular enforcement activities and to make a meaningful contribution. Some of these concerns appear to be confirmed in further interviews reported by Bender in this volume.

which enforcement officials consult such information in their daily work. Finally, there are also less formal and human factors that might be more difficult to grasp, including the possibility that the Commission is held in very high regard or that national officials have career aspirations in Brussels that might influence the extent to which they might be willing to "challenge" the Commission. The latter kinds of considerations - over and above the legal provisions, the suggested cohesiveness of the epistemic community and the monolithic view of competition within the Commission's competition directorate - seem to drive common concerns about the ECN being a vehicle for extending the hegemony of the Commission and a particular variety of competition policy.[20]

This brings me to the third level of analysis, namely the question of the interaction of authorities and the private actors who are the objects (or beneficiaries) of competition enforcement, but also their representatives and advisors (as a principal focus of this working paper volume). The advisors of such parties include not only private lawyers, but also economic consultants who provide the economic research to support the particular claims made by parties before the enforcement authorities or in court. Similarly, a broader set of civil society actors, such as academics or industry observers are also relevant and may be offered opportunities to participate and provide input in the workings of the network structure. These interactions are crucial particularly in the context of the strengthened independence of national enforcement authorities from political actors and control, an independence that the Commission in recent times has shown willingness to defend from perceived attacks by Member State governments even in threatened enforcement proceedings before the EU courts. Again, this brings us back to the point made earlier that there is no such thing as complete independence. Independence from politics means dependence on some other source of knowledge: either a technocratic conception of policy knowledge or on other actors who are responsible for supplying the enforcement-relevant knowledge to the regulators.

To take one example, critics of the Commission's practice of using negotiated commitment remedies as a substitute for formal enforcement proceedings to enforce EU competition law – a practice also common among national authorities - have argued that this makes the Commission excessively dependent on the investigated entities.[21] But another way to view commitments is as a tool of experimentalist enforcement precisely because it does not rely on fixed and inflexible (context-independent) rules as the only guide to enforcement, but also because it opens up non-traditional channels for input into decision-making and introduces new review mechanisms, such as remedial monitors as well as other authorities in the network.[22] Again, a key question relates to the way in which these other actors – including the undertakings themselves, but also the new monitoring agents for instance - plug into the enforcement infrastructure and the accountability and revision mechanisms that are used (or not) to evaluate interventions.[23]

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[20] But see, Svetiev, Y., 'The Limits of Informal Law-Making: Enforcement, Norm-generation and Learning in the ICN', cited. Moreover, even based on substantive practice, Ibáñez Colomo seems to suggest that national authorities have emerged as important autonomous players in the ECN (see Ibáñez Colomo, P., 'Three Shifts in EU Competition Policy: Towards Standards, Decentralization, Settlements', *Maastricht Journal of European and Comparative Law*, vol. 20, 2013: 363).

[21] Wagner-von Papp, F., 'Best and Even Better Practices in Commitment Procedures After Alrosa: The Dangers of Abandoning the "Struggle for Competition Law"', *Common Market Law Review* vol. 49, 2012: 929 ; Botteman, Y. and A. Patsa, 'Towards a More Sustainable Use of Commitment Decisions in Article 102 Cases', *Journal of Antitrust Enforcement*, vol. 1, 2013: 347. It is worth noting that this constraint is not in any way weakened by having the Commission deliver a formal violation decision instead of pursuing a negotiated settlement nor by having access to judicial review (unless we assume that courts have superior access to knowledge relevant to the implementation of competition policy).

[22] Svetiev, Y., 'Settling or Learning Through Commitment Decisions?', cited.

[23] See Overdevest, C. and J. Zeitlin, 'Assembling an experimentalist regime: Transnational governance interactions in the forest sector', *Regulation and Governance*, special issue on Transnational Business Governance Interactions, 2012, available on early view at http://onlinelibrary.wiley.com/doi/10.1111/j.1748-5991.2012.01133.x/pdf; but also Cafaggi, F.

## 1. Private actors in policy formulation and rule-making

Given the scope of interest of the workshop and this resulting collection of working papers, in the remainder of this contribution I single out a few examples of private actor involvement in the formulation or enforcement of competition law and policy in the EU. My principal aim is to highlight some of the varying "spaces" that might require further examination, as well as the different conceptions of dependence and knowledge mentioned above that may be salient in those spaces. This is also meant to put into sharp relief the claim that a networked enforcement architecture can be consistent with different variants (or architectures) of "governance", different conceptions of policy-relevant knowledge and different processes of its incorporation into the formulation and implementation of policy. As such, these examples also highlight the importance of examining in closer detail the "infrastructure" of EU agency networks and the way in which this infrastructure affects agency decision-making in individual cases and the interaction with private parties and their representatives and advisers.

Consider for example two policy initiatives discussed in Svetiev (2010) that arose in the early days of the formalization of the ECN, namely the formulation of a leniency policy for all EU competition authorities to adopt (something that on the basis of US experience was identified as a best practice in fighting cartels), as well as the commonly identified goal of stimulating private competition law actions by harmed parties in national courts.[24] Both examples illustrate that even when a common goal is identified and some degree of harmonization is pursued through a common policy tool, the harmonization effort is constrained by (i) the absence of an *ex ante* policy template to harmonise to; and (ii) obstacles that might exist in the national legal and economic landscape to a harmonized tool (such as the national substantive and procedural law treatment of leniency applications for both evidentiary and secrecy purposes, or the required legal standards for proving and establishing damages in private competition law). Such national peculiarities provide scope for learning in both directions. Thus, the need to tailor a common mechanism, such as a leniency statement or private antitrust actions, to local conditions can reveal possible improvements in implementing the common tool (or at the very least a way to promote the common goal – such as incentivizing leniency applications by cartel members – that is less restrictive of some other common goal – such as that of transparency of competition enforcement[25] or procedural fairness). Similarly, the experience of other network members in developing private damages claim mechanisms may reveal that some domestic procedural law rule has outlived its purpose, even if - as often happens - it is either revered or at least remains unquestioned in the national legal system merely due to its longevity.

Moreover, whether these opportunities for learning are in fact realized will depend upon numerous factors including (1) whether or not the information is appropriately gathered in the network and either incorporated in common rules or otherwise disseminated in a way that discloses improvement opportunities; (2) the extent to which national actors seek and exploit such opportunities; (3) the extent to which national agencies which participate in a network such as the ECN are capable of changing local law or otherwise engaging the relevant national law-making actors to reform the law based on information gathered within the network.

Thus, it could be said that since the cartels leniency policy principally affected the activities of the competition agencies at EU and national level, the formulation of policy was kept entirely within the ambit of the ECN. On the issue of private antitrust actions, by contrast, the Commission has for a long time now envisaged possible EU harmonization legislation, but as already mentioned and as the

*(Contd.)*

and P. Iamiceli, 'Supply Chains, Contractual Governance and Certification Regimes', *European Journal of Law and Economics*, vol. 37, 2014: 131.

[24] Apesteguia, J., Dufwenberg, M. and R. Selten (2007), 'Blowing the Whistle', *Economic Theory*, vol. 31, 2007: 143 provide an interesting perspective on the ways in which policy proposals can be supported or evaluated on the basis of theory.

[25] Eg, Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG* (CJEU, 6.6.2013).

Commission foresaw, this also requires an exercise of learning about what are the problems and obstacles to private antitrust actions at national level so as to produce harmonization legislation in light of those problems, an exercise that is to some extent outside the ECN's enforcement focus.

Perhaps for that reason, when the Commission sought the necessary information for harmonization of private antitrust law, as had previously been the case with collective consumer protection actions, critics point out that it turned to other sources, in particular more "private" sources such as private consultancies or even university-based researchers.[26] This form of incorporation of private actors faces two possible concerns. One concern stems from the extent to which such private actors have access to accurate and relevant information on the issue at hand,[27] the extent to which they are part of a cohesive epistemic community, as well as their incentives for the accurate and unbiased collection and presentation of the relevant information.[28] A second - and related concern - is that the Commission, in its incarnation as a political – as opposed to expert – institution, may find it easier to instrumentalise such actors (given their incentives and potentially limited access to information) so as to firm up the basis for its proposals that in turn tilt the balance of power vis-à-vis the Member States (in their "political" or "regulatory" incarnation). Whether or not this is the case requires an examination of the bases on which such consultants are selected, the charge that is provided to them and the ways in which the Commission participates in, guides or reviews their work. Relatedly, a further problematic feature stems from the fact that this type of work product is typically not subjected to peer review or any other external scrutiny, yet it to some extent assumes an official quality upon its delivery or publication.

## 2. Private actors in individual cases

Apart from general information-gathering or consultations in setting the direction of policy or making specific soft or hard law instruments, a second area in which private actors interact directly with competition agencies is of course in the resolution of individual cases, where undertakings, represented by lawyers and economic consultants, can be either defendants or complainants or just affected market actors.

Individual case-decision making is the most important way in which enforcement agencies give shape to competition law and policy and where they are most dependent upon information supplied by market actors and their advisors. The Modernization Regulation formalizes two forms of input to the Commission's decision-making in individual cases. One is the market testing of commitments under

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[26] See Micklitz H.-W., 'Collective private enforcement in antitrust law – What is going wrong in the debate?', unpublished manuscript (on file), 2009 ; and Micklitz, H.-W., 'Administrative Enforcement of European Private Law' in R. Brownsword, H.-W. Micklitz, L. Niglia and S. Weatherill (eds), *The Foundations of European Private Law*, Oxford, Hart, 2011: 563. This practice extends to other EU bodies apart from the Commission, such as the European Parliament. See the recent Study on Consumer Protection Aspects of Financial Services, published by the European Parliament's Directorate General for Internal Policies, requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) and produced by London Economics (IP/A/IMCO/ST/2013-07, February 2014) (available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507463/IPOL-IMCO_ET(2014)507463_EN.pdf ). It is reported that the evidence for the survey was collected through a survey of stakeholders in all 28 EU Member States, including financial regulators, financial ombudsmen, consumer organisations and banking associations. In addition, three commercial banks responded from one Member State.

[27] Interview evidence with officials of national competition authorities of Member States, suggested that officials from at least some authorities disagreed with the information disclosed in the report used as a basis for the Commission's conclusion that a harmonization exercise was warranted (Svetiev, 'Beyond Law versus Economics: Competition Policy as a Learning Platform', cited).

[28] Consultancies, like private firm lawyers and even university researchers may themselves have a stake in stimulating private actions with broad evidence discovery procedures which may subsequently generate work for such entities (Ibid.). This might be one way in which one could understand the suggested cohesiveness of the competition law epistemic community.

Article 9 of the Regulation, where market actors can provide input on the remedies negotiated by the Commission with a competition defendant. In the ordinary violation procedure such input can be provided to the Commission only informally, and the distinction is presumably justified by the fact that Article 7 decisions must contain a formal finding of violation and are subject to ordinary judicial review.

A second form of peer review of Commission decision-making in individual cases (that can also extend to decisions under EU competition law of national competition authorities) is peer review by the representatives of national authorities sitting on the ACAPDP. Such an avenue of peer review is considered important in the literature on experimentalist governance[29] both because it gives concrete expression to the input from lower level units in the formulation of the common policy and because it is a potential source of learning through recursivity (even if it is worth highlighting that the input of the Advisory Committee is provided *ex ante* before the implementation of the decision rather than by reference to a comparison of theories of harm with outcomes achieved).

There are other limitations on the effective exercise of the ACAPDP's review functions due to practicalities such as the time that is available in which to conduct a review of the findings and proposed remedies by the Commission, as well as the availability of human resources or analytic capacity for national authorities to be able to perform this task effectively.[30] Modern competition cases ordinarily are also supported by extensive economic modeling which is subject to the constraints on economic tools of analysis (as adapted to the antitrust context) and which can itself be contested. Yet it is unlikely that national authorities would be in a position to dedicate resources and time to the full replication of the modeling or to provision of alternative models and scenarios in performing their review function.

Here again, private parties can fill the void, particularly in individual cases where their interests are clearly not necessarily aligned with those of the enforcement authority, such as the Commission or where their interests are not monolithic, but differentiated and not so clearly defined *ex ante* in all situations across the board.

Commentators who highlight the contestable nature of economic analysis – both theoretical and empirical – have tended to highlight the tendency for both parties to an antitrust dispute to be able to bring to the fore economic arguments, supported by eminent economic experts, that point to divergent conclusions about the competitive significance of the conduct or transaction at issue.[31] This problem has also stimulated thinking about ways in which to overcome the possibly "tainted" analysis of the expert paid by the parties so as to ensure that a decision – including a court decision – is based on credible (read rigorous and independent) economic analysis of the evidence. One prominent proposal has been the suggestion to publish the economic expert reports of economists who participate in antitrust cases in peer reviewed economics journals and to thus subject them to scrutiny of the economic scientific peer community.[32]

While such a proposal also seeks to introduce the logic of peer review in public decision-making it seems to be unworkable for both practical and conceptual reasons. Conceptually, peer reviewed scientific publications follow an entirely different logic since they serve a community with different

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[29] Sabel, C. and J. Zeitlin, 'Learning From Difference: The New Architecture of Experimentalist Governance in the EU', *European Law Journal*, vol. 14, 2008; Svetiev, 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?', cited.

[30] Again, some of these issues are explored by reference to interviews in Svetiev 'Beyond Law versus Economics: Competition Policy as a Learning Platform', cited. For further support on some of these points see Bender's contribution in this volume.

[31] Posner, R., 'Antitrust in the New Economy', *Antitrust Law Journal*, vol. 68, 2001: 927.

[32] Areeda, P., 'Always a Borrower: Law and Other Disciplines', *Duke Law Journal*, vol. 1988: 1036.

goals and rationality.[33] The scientific community prizes output that is new and original yet builds on the existing disciplinary corpus, rather than output that is meant to be useful and perhaps innovative, even if – in many ways – openly incomplete. This in turn influences the process of review and publication that proceeds on altogether different criteria and schedule to that of economic expertise that is meant to aid in making concrete decisions. Further, as a practical matter, this kind of procedure could only work to protect from the worst excesses of bad faith expert evidence and it would only do so indirectly if hired experts are concerned about any consequences for their reputation that might result in their "scientific" community as a result of the publication of their analysis.[34]

Apart from across-agency forms of peer review, such as the ACAPDP within the ECN, and international peer review of enforcement practices performed within the auspices of the OECD and the ICN or UNCTAD, agencies themselves have been experimenting with various formats and architectures for introducing review and generating learning as part of their own implementation techniques. Examples of such mechanisms include the integration of both lawyers and economists into the European Commission's case teams for investigation and analysis from the very outset.[35] This allows for the co-evolution of the hypotheses of competitive harm (often based on prior precedents) and the collection and analysis of the evidence (which might in fact disclose a context quite different from that in precedent cases). Such integration allows for the build up of synergies and a cooperative rather than antagonistic relationship, but it also risks the development of a "group think" mentality that is difficult to disrupt even by evidence pointing in a different direction. Thus, agencies have also been experimenting with the creation of internal review procedures by external experts or so-called "devil's advocate" processes so as to test their approach to a particular case.[36]

Moreover, in some circumstances private lawyers acting for parties directly involved in a particular case have themselves proposed innovative instruments on an *ad hoc* basis. Thus, in its analysis of the proposed acquisition by Outokumpu (a Finnish stainless steel producer) of Inoxum (the stainless steel division of ThyssenKrupp of Germany), the European Commission was concerned about anticompetitive effects of the merger. Among other evidence, the Commission relied on economic modeling (based on a Bertrand-Edgeworth model) supported by its own Chief Economist Unit to buttress its concerns. The Commission in turn requested significant divestments by Outokumpu by way of remedy in return for approval of the merger.

The legal representatives of Outokumpu wished to resist the requested remedies and were advised by their own expert economic advisers that the economic modeling by the Commission's Chief Economist unit was unsound. Yet the analysis of these economic advisers was of course tainted by the fact that they were experts paid by the party seeking to procure an approval of the merger, even if they themselves were convinced of the soundness of their position.[37] In order to overcome this problem, Outokumpu's legal representatives decided on a rather unorthodox strategy: they asked three independent and well-respected academic economists to themselves review the data and assess the appropriateness of Bertrand-Edgworth model used by the Commission's economist, to do so without direction from Outokumpu or Outokumpu's representatives and to deliver a report simultaneously to

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33 A point acknowledged at least in general terms by Areeda (Ibid.).

34 One could envisage that the community may come to treat differently (and more permissively) published reports of expert evidence from "true" research articles, for example.

35 Svetiev, 'Beyond Law versus Economics: Competition Policy as a Learning Platform', cited.

36 Svetiev, Y., 'Partial Formalization of the Regulatory Network', 2010. Available at SSRN: http://ssrn.com/abstract=1564890 or http://dx.doi.org/10.2139/ssrn.1564890 (with reference to Interview with an Official of the South African Competition Authority).

37 Interview with a Legal Representative of Outokumpu in the merger approval process with the Commission (Florence, October 5, 2013).

both Outokumpu and the Commission, without an opportunity for Outokumpu's lawyers to review or even see the report before it was delivered to the Commission.[38]

A full review of the merits of this instrument of peer review is beyond the scope of this contribution. Notwithstanding the fact that the Commission's decision extensively refers to points raised in the so-called "wise men" panel report,[39] the legal representative of Outokumpu who decided to introduce this procedure recognized that the static nature of the questions posed to the "wise men" panel and the absence of a discursive procedure left the conclusions of the panel open to misinterpretation or even misrepresentation. Nonetheless, the use of this form of peer review does lead to a number of observations. First, it suggests that even in settings where the investigative and decision-making procedure is largely based on a negotiation between an enforcer, such as the Commission, and an undertaking, healthy disagreement and debate can ensue about the proper understanding of the features and competitive dynamics in the market.[40] Secondly, the negotiation procedure allows the parties to find novel ways in which to test and propose their arguments in a way that may be more difficult in a more rigidly formal setting (such as a court).[41] A court setting would have allowed for closer scrutiny of the independent expert report vis-à-vis the Commission's own modeling, but the problem is that a relatively less well informed party (the judge) would have to develop criteria to decide the merits of the modeling dispute.[42] Finally, the argument that there may be a high degree of consensus in the competition epistemic community about the proper view and function of competition law and policy, even if it were true, may be less significant than first appears if it does not entail a consensus view about the outcomes of individual cases. This is not least because the interests and rationality, even of the competition law professionals, may not be as cohesive as might appear at first glance.[43]

## Conclusion

As already indicated at the outset, I situate this contribution to the volume in the context of the ongoing debate about the so-called "agencification" in the EU that has proceeded at a fast pace in recent times both at the EU level and, pursuant to EU mandates, also at national level. This process

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[38] This loss of control over the expert input may appear to be an unorthodox strategy for a private lawyer. Acknowledging this, Outokumpu's legal representative pointed out that there had been a precedent of the Commission using a "wise men" panel previously, in the analysis of a proposed merger in which the same legal representative was involved. 94/893/EC: Commission Decision of 21 June 1994 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (IV/M.430 - Procter & Gamble/VP Schickedanz (II)) (Text with EEA relevance), Official Journal L 354 , 31/12/1994 P. 0032 – 0065.

[39] Commission Decision of 07.11.2012 addressed to Outokumpu OY declaring a concentration to be compatible with the internal market and the EEA agreement (Case COMP/M.6471 – Outokumpu/INOXUM), pars. 95-131. Outokumpu's representative also drew an analogy to the resort to the Ombudsman by Intel in its competition case as a source of independent review on the Commission's procedures. See Decision of the European Ombudsman closing his inquiry into complaint 1935/2008/FOR against the European Commission (concluding that the Commission had committed an instance of maladministration).

[40] cf Wagner-von Papp, 'Best and Even Better Practices in Commitment Procedures After Alrosa: The Dangers of Abandoning the "Struggle for Competition Law"', cited: 950-951 suggesting that the absence of an adversarial spirit from the negotiation of commitment decisions with the Commission is likely to weaken their quality and soundness.

[41] Interestingly, the Commission apparently of its own accord subsequently proposed to use a "wise men" panel again to evaluate a proposed remedy in the same Outokumpu merger review process.

[42] See the contribution of Kerber discussing the appropriate normative foundations of competition policy and the role of economic analysis (Kerber, W., 'Should competition law promote efficiency? - Some reflections of an economist on the normative foundations of competition law' in J. Drexl, L. Idot, and J. Moneger (eds), *Economic Theory and Competition Law*, Cheltenham, Edward Elgar, 2009).

[43] This might be one source of "strategic uncertainty" that Sabel and Zeitlin suggest dislodges experimentalist learning, which may in turn lead to the emergence of an experimentalist architecture.

has lead to the creation of regulatory and enforcement agencies in many Member States where such entities were relatively unknown and constitutionally unfamiliar. Yet, as some scholars have pointed out – writing from within different contexts – the processes of departure from the so-called "transmission belt" model of the public administration have been going on for a much longer period of time, even if imperceptibly, often hidden under the doctrinal paean of non-delegation.[44] After central banks, competition agencies were the first target for the formalization of independence. But do such processes lead to an elaboration of a "technology of expertise" that, is supposed to derive its legitimacy from technocratic neutrality and the suppression (or concealment) of value conflicts?[45] Or is the world of agencies vulnerable to capture by informal networks and epistemic communities and less perceptible subversion to their own interests and purposes? Or do they provide deliberative transnational settings for policy learning, which even discloses an experimentalist character so that private parties who participate in policy implementation are themselves one of the "lower level actors"[46] who can regain their autonomy from top-down regulation by contributing to the learning process?

In this contribution, I have sought to show that different scenarios may be detected in different settings. One challenge is to identify the different points or spaces in which firms, lawyers, consultants are given the opportunity to influence policy in the agency and network settings and this can range from information gathering, to drafting policy proposals and rules to their participation in individual case resolution. Moreover, the interests and incentives of private parties and their advisers, their capacity to contribute towards policy learning, as well as the way they are incorporated into the decision-making infrastructure and the methods of review of their input can vary substantially in those different settings. Focusing on these spaces of influence and on the way that private actors are incorporated into the governance infrastructure can also be a part of the processes of recursivity and learning given that most EU enforcement arrangements are themselves works-in-progress often put in place haphazardly either in response to crisis or as a short-cut to pursue an intermediate policy goal or to overcome political gridlock.

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44 Taggart, M., 'From "Parliamentary Powers" to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century', *University of Toronto Law Journal*, vol. 55, 2005: 575

45 Everson, M., 'A Technology of Expertise: EU Financial Services Agencies', LSE 'Europe in Question' Discussion Paper Series, LEQS Paper No. 49/2012, 2012.

46 Sabel and Zeitlin, 'Learning From Difference: The New Architecture of Experimentalist Governance in the EU', cited.

# When 'Chicago' meets London and Paris: Competition elites and the regulation of restrictive practices

Andy Smith*

The general impact of European Union (EU) competition policy upon the government of economic activity in Europe has been well documented[1]. However, as specialists acknowledge[2], the question of whether this policy has been fully appropriated within the member states has hardly been researched at all. Instead, stimulating but unsubstantiated claims have been made about how DG COMP has been the importer into Europe of a particular approach to governing inter-firm competition inspired by 'the Chicago school' of law and economics[3]. More precisely, from these claims 'Chicago's doctrine on the regulation of cartels and other restrictive practices can be hypothesized as having prompted three changes in EU policy and national practices:

(i) a switch away from deciding in terms of what is prescribed by law towards judgements based more upon economic analysis of the actual impact of a practice upon markets;

(ii) replacing a concern for outlawing any restrictive practice in a market ('prohibition') towards banning only those which are deemed 'abusive';

(iii) using leniency clauses in order to encourage firms to act as whistle-blowers as regards the cartels they themselves have been involved in.

More fundamentally, formulating claims about the influence of 'Chicago' as hypotheses is heuristic because this guides research to operationalize generalizable questions about the role of doctrine within policy and decision-making, its transfer across polities[4] and, in the case of the EU, 'Europeanization'[5].

In order to test these hypotheses, this text successively presents initial data on change or reproduction in the government of restrictive practices within France and the United Kingdom (UK) during the 2000s[6]. These states have been chosen chiefly because although both began regulating inter-firm competition in the 1990s from very low national bases, the UK is frequently seen as much more open to both 'American' influences and the siren call of 'economic-based' policymaking. Although my principal findings do not frontally contradict these culturalist generalizations, they show

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1 See, Ehlermann C-D. and Marquis M., *European Competition Law Annual 2007*, Oxford: Hart, 2007; Cini, M. et McGowan, L., *Competition policy in the European Union*, 2nd edition, Basingstoke: Macmillan, 2009.

2 Quack S., Djelic ML. (2005) 'Adaptation, recombination and reinforcement : The story of antitrust and competition law in Germany and Europe', in W. Streeck & K. Thelen, dir., *Beyond Continuity. Institutional Change in Advanced Political Economies*, Oxford : Oxford University Press, 2005, p. 256.

3 Wigger A., Nölke A., 'Enhanced Roles of Private Actors in EU Business Regulation and the Erosian of Rhenish Capitalism: the Case of Antitrust Enforcement', *Journal of Common Market Studies*, 45 (2), 2007, p. 487-513.

4 Bulmer S., Padgett S., 'Policy transfer in the European Union : an institutionalist perspective', *British Journal of Politics and International Relations*, 35, 2004, p.103-126; Knill C., Lenshow A., 'Compliance, competition and communication. Different approaches of European governance and their impact on national institutions', *Journal of Common Market Studies*, 48(3), 2005, p. 583-606.

5 Jordan, A., 'The Europeanization of National Government and Policy: A Departmental Perspective', *British Journal of Political Science*, 33 (2), 2003, p. 261-282.

6 To date, this data includes quantified documentary analysis, biographical information and around 20 interviews with regulators and the regulated based in Brussels, Paris and London. This study has been carried out within a research project on *'le Gouvernement européen des industries'* (GEDI) financed by the French *Agence nationale de la recherche*. We thank our GEDI colleagues and participants in the EUI workshop (in particular Mel Marquis) for their comments on previous versions of this text, in particular upon a longer publication now published in French (Smith A., 'Transfers institutionnels et politiques de concurrence: Les cas communautaires, français et britannique', *Gouvernement et action publique*, 2(3), p. 415-440).

that the actual conduits for change in both countries have little to do with national stereotypes. Instead, the causes of 'Chicago's' respective influence upon competition regulators based in Paris and in London can only be captured by examining the specific organizations involved and the professions that dominate them.

## 1. Paris: Still dominated by law and lawyers

Until the 1980s, the prevalence of neo-mercantilism within French politics, administration and business practices meant that very little regulation of inter-firm competition had been institutionalized[7]. However, since then such regulation has emerged and deepened over three periods of change. Lasting from only 1986 to 1989, the first established a *Conseil de la Concurrence* that was independent of the state and given powers to sanction anti-competitive behaviour both discursively and with fines. Indeed, as of 1989 staff of the *Conseil* began to develop an offensive against cartels and other such restrictive practices, building up along the way considerable jurisprudence favourable to this aim. At the time, the causes and effects of change were almost exclusively national. From the early 1990s to the mid-2000s, this active approach to regulating competition was deepened and consolidated during a second period of activity marked increasingly by references to EU law and interactions between staff of the *Conseil de la Concurrence* and that of DG COMP. Unsurprisingly, the creation of the European Competition Network (ECN) in 2004 formalized and further structured this extra-national co-operation and interdependence[8]. Nevertheless, as a third period of change underlines, activity at a national scale has of course remained extremely important. Indeed, the transformation in January 2009 of the *Conseil* into an *Autorité de la Concurrence* doted with increased investigative powers owes more to an internally-centred report (the *Rapport Attali*) and the national legislation (*la Loi sur la modernisation de l'économie*[9]) which it largely inspired and legitimated.

As regards the regulation of restrictive practices, and as tables 1 and 2 highlight, the activity of the *Conseil* then the *Autorité de la Concurrence* has become particularly intense. Indeed, over the last 20 years cartels and abuse of dominant position have frequently been sanctioned through increasingly heavy fines[10].

When examined more closely, these tables also reveal a number of other key features of French competition regulation. First, the activity of the *Conseil/Autorité* has been dominated by nationally-bounded thinking and action. Of course, whenever trans-frontier trade is in question the Commission is more likely to intervene directly. Nevertheless, it is surprising that so few references to Community law and principles, or other member states[11], feature in the decisions studied here (only 19 out of 301, i.e. 6%).

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7 Dumez, H., and Jeunemaître, A., *La concurrence en Europe. De nouvelles règles pour les entreprises*, Paris: Seuil, 1991, p. 73.

8 On interview, a director of the Conseil represented this development as follows: *'Quand on applique le droit communautaire on n'est pas tout à fait indépendant ! On reste un service déconcentré de la Commission européenne (…) il y a même des vraies obligations de coordination avec la Commission et les autres autorités nationales. Nous déjà quand on a une affaire, quand on pense que le droit européen doit intervenir, on doit le signaler par un réseau informatique (…). Quand on s'approche de la décision on doit indiquer à la Commission quel est le sens de la décision qu'on va prendre (…). Si elle trouve qu'on va faire de grosses bêtises, il y a même une possibilité que la Commission reprenne une affaire…'.* Interview, Februrary 2007.

9 Loi n° 2008-776 du 4 août 2008 de modernisation de l'économie.

10 For example, petrol companies (42 million euros in 2008), Corsican cement manufacturers (25m in 2007), builders of high schools in Île de France (47.3 m also in 2007).

11 Only a single such case was encountered. In 2008 (08-D-30), the *Conseil de la Concurrence* thanked the British *Office of Fair Trading* for pursuing the enquiry in the UK.

**Table 1: Decisions over collusions by the Conseil de la Concurrence (1999-2008)**

| *Year* | *Decisions*[12] | *Cartels* | *Abuse of dominant position* | *EU evoked* | *Economic analysis* |
|---|---|---|---|---|---|
| 1999 | 18 | 14 | 4 | 1 | 0 |
| 2000 | 19 | 11 | 8 | 3 | 0 |
| 2001 | 36 | 26 | 10 | 2 | 0 |
| 2002 | 19 | 16 | 3 | 0 | 0 |
| 2003 | 38 | 25 | 13 | 3 | 1 |
| 2004 | 39 | 22 | 17 | 1 | 0 |
| 2005 | 43 | 27 | 16 | 3 | 3 |
| 2006 | 24 | 14 | 10 | 2 | 2 |
| 2007 | 41 | 26 | 15 | 1 | 5 |
| 2008 | 24 | 18 | 6 | 3 | 9 |
| **Total** | **301** | **199** | **102** | **19** | **20** |

(Source: author's analysis of decisions published on website of the *Conseil de la concurrence* (July 2009).

**Table 2: Decisions over collusions by the Autorité de la Concurrence (2009-11)**

| *Year* | *Decisions* | *Cartels* | *Abuse of dominant position* | *Mixture ADP/ cartel* | *EU evoked* | *Economic analysis* | *Fines (millions of euros)* |
|---|---|---|---|---|---|---|---|
| 2009 | 15 | 9 | 4 | 2 | 6 | 1 | 206,6 |
| 2010 | 11 | 10 | 0 | 1 | 5 | 1 | 442,4 |
| 2011 | 8 | 7 | 1 | 0 | 6 | 2 | 419,8 |
| **Total** | **34** | **26** | **5** | **3** | **17** | **4** | **1068,8** |

(Source: author's analysis of decisions published on website of the *Autorité de la concurrence* (July 2012).

As regards the usage of economic analysis, this only appears at all after 2005. Since then, particularly in cases of abuse of dominant position, a gradual increase in neo-classical micro-analysis has occurred. Indeed, ever since a key decision made by the appeal court in Paris[13], during this period a new criterion – damage to the economy – has emerged wherein the influence of economists in general, and those influenced by 'Chicago' in particular, can be discerned.

Indeed, a hypothesis that merits further testing is that this development is linked to the appointment since 2007 of a Chief Economist to the *Conseil* and then the *Autorité de la concurrence*. The career trajectories of the three persons who have held this post (see Box 1) confirm that mainstream neo-classic economics has been the preference of these organizations. However, none were trained in the United States and are instead typical examples of French 'state economists'[14] who in their presentations of themselves highlight neither their experience overseas nor their implication in EU-scale activities. This biographical information clearly needs supplementing of course, in particular by producing data on the other six members of the *'service économique'* that the chief economist heads and, above all, what they actually do within the *Autorité de la Concurrence*.

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[12] Each decision is set out in documents that range from 10 to 180 pages (and are about 20 pages on average). For reasons of comparability with the British case, these figures do not include cases that relate to telecommunications (dealt with by a sector-specific regulator in the UK: OFTEL).

[13] Decision 08-D-22 cites the 'arrêt Fougerolle Ballot' adopted on the 13th of January, 1998.

[14] Lebaron, F., *La croyance économique. Les economists entre science et politique*, Paris: Seuil, 2000.

**Box 1: The first three chief economists of French competition policy**

| | Initial training | Phd. training | Posts held | Overseas experience |
|---|---|---|---|---|
| Philippe Choné (2007-9) | Ecole nationale de la statistique et de l'administration économique (ENSAE) in Paris | Toulouse school of economics | Professor at l'ENSAE (2010 >)<br>Director of the CREST-INSEE research centre (Paris), 2004-5<br>Economist at the *Conseil de la Concurrence* (2002-3) | Only conferences in the US, but also in Germany, Italy and, Hong Kong |
| Thibaud Vergé (2010 >13) | Ecole Polytechnique (Paris) then Toulouse University (Masters) | Toulouse school of economics | Lecturer in economics at the Universities of Bristol (2000-2) and Southampton (2002-5);<br>Reader at CREST in Paris (2005-10) | Apart from 5 years teaching in the UK, his CV only lists his role in *The Association of Competition Economic*s since 2011 |
| Etienne Pfister (2013 >) | | University of Paris 1 | Head of anti-trust unit 3 at Conseil de la Concurrence since 2007;<br>Assistant professor at University of Nancy | |

The final result of our documentary analysis which needs to be underlined here concerns the use of leniency clauses in order to facilitate the inquiries undertaken by the *Conseil* then the *Autorité de la Concurrence*. Present in French law since 2001[15], this practice seems to have been inspired by that of the Commission (1998), the UK (also 1998) and the US (early 1990s). Moreover, at the end of 2012 the Commission published a new *Model leniency programme* officially presented as a coproduction by national agencies and DG COMP[16]. Nevertheless, the actual usage of leniency clauses in France remains exceptional. It is therefore important not to overstate the impact of this practice in France, nor the borrowing from 'Chicago' approaches to regulation upon which it is said to be based.

Overall, the governing of inter-firm relations in France has certainly changed a great deal since the late 1980s. From a time when the Minister for Economic Affairs could take decisions on such matters quite autonomously, the government of competition has become much more dense and less dependent upon such ministerial involvement. This said, the hypothesis that would explain this change in terms of institutional transfer must be used only sparingly for the following two reasons.

Firstly, the low introduction of economic analysis and leniency clauses into the practices of the *Conseil* then the *Autorité de la Concurrence* reveal how strong judicial reasoning still is in the French

15 In a law on *'les nouvelles régulations économiques'* (2001-420 of 15th May, 2000).

16 *Global Competition Review*, 23.11.12.

case. Indeed, backing up this point is the fact that the four people who have held the presidency of these organizations have all had strong levels of legal training and had even previously worked within the *Conseil d'Etat* (Pierre Laurent, from 1987 to 1993, Charles Barbeau from 1993 to 1998, Marie-Dominique Hagelsteen from 1998 to 2004 and, since 2004, Bruno Lasserre).

Secondly, if there is no doubt that the French government of competition is integrated within that of the EU and that this has been accelerated by the ECN, references to Europe within actual decision-making remain rare. Instead, other sources of legitimacy and legal instruments specific to France still play a much more important role.

## 2. London: 'Economics' in the UK

If many commentators today automatically equate the UK as a polity with neo-liberalism, the history of competition policy in this country is a powerful reminder both that its linkages with this ideology have not always been so tight and that, in any case, they always need to be examined around specific domains of policymaking and implementation. Indeed, until the mid-1990s British decision-making over inter-firm competition was very *ad hoc*, thereby leaving much room for ministerial autonomy[17]. Since 2000, however, a much more systematic approach has been institutionalized which, moreover, has entailed the importing of recipes from the EU but also the US.

As regards the organizations that have developed and structured this field, three in particular need highlighting: first the ministry known for many years as the Department of Trade and Industry (DTI) and now as the Department of Business; second the Monoplies and Mergers Commission (MMC) which subsequently became the Competition Commission (CC), and third the *Office of Fair Trading* (OFT). Despite the ad hoc nature of decision-making prior to the mid-1990s, economists have long played a considerable role within each of these organizations[18]. Indeed, Dumez and Jeunemaître highlight that as early as 1991 the presence amongst MMC commissioners of economists close to the Chicago school of law and economics[19].

Meanwhile initial proposals for a genuine UK competition policy first came from civil servants in the DTI who, between 1986 and 1989 and then again between 1992 and 1996, prepared a 'white paper' and two 'green papers' on this issue. None of these proposals themselves became law due to opposition marshalled around the defence of a common law approach, resistance by the *Confederation of British Industry* (CBI)[20] and nationalist anti-Europeanism within the governing Conservative Party. However, when the Labour Party came to power in 1997 each of these points was overcome. In particular, the CBI changed its preferences largely because many of its members now came to see the advantage of aligning British law and policy better with what had been institutionalized at the scale of the EU. Consequently, first in 1998 through 'The Competition Act' then in 2002 through 'The Enterprise Act', five major changes were either made or codified in law. The first three were essentially procedural and entailed the abandoning of ministerial authority, the creation of investigatory powers and the introduction of a system of sanctions. More fundamentally, however, by introducing a series of *per se* rules, these pieces of legislation also modified the substance of UK law in two ways. First they replaced an approach which had previously only condemned abuse of dominant position by one that sought to exclude all situations of dominant position where abuse might

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17 Wilks S., *In the Public Interest: Competition Policy and the Monopoly and Mergers Commission*, Manchester: Manchester University Press, 1999; Dumez & Jeunemaître, cited, p. 107.

18 In 1991, the OFT had a dozen economists, the *Competition Policy Division* of DTI had five and each of the MMC's inquiry teams had at least one, Ibid., p. 111.

19 Ibid.

20 Baldi, G., 'Europeanizing Antitrust: British Competition Policy Reform and Member State Convergence', *British Journal of Politics and International Relations*, 8 (4), 2006, p. 516.

possibly occur – a change more in keeping with German and EU ordoliberalism than with the Chicago school of reasoning. Second, and conversely, a vague criterion couched in terms of 'defending the public interest' was replaced by a commitment to outlaw company or inter-firm practices each time there was 'a substantial reduction in competition'[21]– a move very much in line with the prescriptions made by the Chicago School.

If all these changes seemed to make British competition regulation resemble that of the EU, it would be wrong to assume, as many have done, that this was the result of top-down 'Europeanization'[22]. Instead, as Cini[23] hypothesizes but does not demonstrate, British competition elites have imported policy recipes as much from the US as from the EU. As a step towards verifying this claim, let us now examine the actual decision-making (by the OFT) and doctrinal or recommendation making (by the CC) that has taken actually place since 2000.

The first thing to highlight about formalized decision-making by the OFT set out in table 4 is that this takes place much less frequently than in the French case. Between 2001 and 2011 this organization only took 67 decisions (7 per year on average) as compared to 298 (27 per year) by its counterpart across the channel. One explanation is that the OFT is not authorized to intervene in cases concerning individuals which, in the UK, are a matter for the courts[24]. Another is that OFT's formal decisions are only made after an initial economic study has already demonstrated that they concern matters of general interest. By systematically using economic analysis but remaining relatively *ad hoc*, the OFT's practices thus largely reproduce those that existed before 2000. Moreover, amongst the OFT's published decisions very few explicitly reference the EU and its competition policy (7/67, i.e. 10%).

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21 Cini, M., 'Competition Policy', in I. Bache et A. Jordan (eds.), *The Europeanisation of British Politics*, London: Palgrave, 2008, p. 216-230.

22 Eyre, S., Lodge, M., 'National Tunes and a European Melody? Competition Law Reform in the UK and Germany', *Journal of European Public Policy*, 7 (1), 2000, p. 63-79.

23 Cini, M., Competition Policy', cited.

24 Indeed, The Enterprise Act of 2002 states that the OFT will intervene only when there has been 'a breach that affects the collective interests of consumers' (part 8 of the act).

**Table 3: OFT decisions over collusions (2001-2011)**

| *Year* | *Decisions* | *Cartels* | *Abuse of dominant position* | *EU evoked* | *Economic analysis* |
|---|---|---|---|---|---|
| 2001 | 10 | 3 | 7 | 1 | 4 |
| 2002 | 9 | 4 | 5 | 0 | 2 |
| 2003 | 13 | 6 | 7 | 0 | 4 |
| 2004 | 13 | 5 | 8 | 1 | 3 |
| 2005 | 6 | 5 | 1 | 1 | 2 |
| 2006 | 7 | 4 | 3 | 0 | 2 |
| 2007 | 2 | 1 | 1 | 0 | 0 |
| 2008 | 1 | 0 | 1 | 0 | 0 |
| 2009 | 1 | 1 | 0 | 0 | 0 |
| 2010 | 2 | 1 | 1 | 1 | 1 |
| 2011 | 3 | 1 | 2 | 3 | 1 |
| **Total** | **67** | **31** | **36** | **7** | **19** |

Analysis of the formal decisions actually taken by the OFT since 2000 reveals that they often entail economic analysis, particularly when cases of abuse of dominant position are at issue. Moreover, in keeping with 'Chicago' doctrine, this analysis is used to identify instances where dominant positions have indeed been 'abused'. In addition, this doctrine is also in evidence over the more frequent usage of leniency causes than in the French cases. Since 2002 virtually all OFT decisions that have culminated in fines have been put together with the help of whistleblowers benefitting from this form of leniency.

This said, when examining the career trajectories of the OFT's two chief economists to date the case for wholesale importing of 'Chicago' into this organization becomes less solid. As box 2 sets out, in terms of their training both the persons in question are pure products of British universities (Oxford and London), not those of the US. If both worked during the early stages of their career for economic consultancies known to be dominated by neo-classical economics, more research is needed in order to identify the depth to which the doctrines of 'Chicago' have really permeated thinking and practice in the OFT.

**Box 2: The OFT's first two chief economists**

| | Initial training | Phd. training | Posts held | Overseas experience |
|---|---|---|---|---|
| Amelia Fletcher (2001-13) | Oxford University | Oxford University | Consultant at London Economics Ltd. (1994-99) then at Frontier Economics Ltd. (1999-2001) | None |
| Chris Walters (2013 >) | University of London | University of London (Phd in econometrics) | OFT (2007-13: Mergers then Goods and Consumer services); Competition Commission (2003-7); Lexecon Ltd (2001-2003); London Economics Ltd (1999-2000) | None |

As regards the opinions prepared and published by The Competition Commission, as table 5 underlines, once again one finds little reference to the EU's government of competition but much importance given to economic analysis[25]. Indeed, over the last 10 years only 2 out of 25 reports on restrictive practices published by this organization have not included a substantial 'economic' dimension.

**Table 5: Opinions published on restrictive practices by The Competition Commission (1999-2011)**

| *Year* | *Opinions* | *EU evoked* | *Economic Analysis* |
|---|---|---|---|
| 1999 | 3 | 0 | 2 |
| 2000 | 6 | 1 | 5 |
| 2001 | 1 | 0 | 1 |
| 2002 | 3 | 0 | 3 |
| 2003 | 2 | 0 | 2 |
| 2004 | 0 | 0 | 0 |
| 2005 | 1 | 0 | 1 |
| 2006 | 2 | 0 | 2 |
| 2007 | 2 | 0 | 2 |
| 2008 | 5 | 0 | 5 |
| 2009 | 0 | 0 | 0 |
| 2010 | 0 | 0 | 0 |
| 2011 | 0 | 0 | 0 |
| **Total** | **25** | **1** | **23** |

[25] It should be underlined that the *Competition Commission* publishes many more opinions on mergers and acquisitions (thereby reproducing its initial mission as the MMC).

This analysis can be deepened by examining the career trajectories of the CC's last four chief economists. As box 3 shows, if their involvement in other countries is greater than for their counterparts in France or the OFT, obvious links with the 'Chicago school' of law and economics do not appear to be present here either.

**Box 3: The Competition Commission's Last Four Chief Economists**

| | Initial Training | Phd. | Posts held | Overseas experience |
|---|---|---|---|---|
| Daniel Gordon (2013 >) | Oxford University | Oxford University | Director of Ofcom; director at the OFT 2002-13; The Treasury 1999-2002; MMC (1994-99) | None |
| Miguel de la Mano (2011-2013) | Universities of Kiel and Saarbrucken (Germany) | Oxford University | DG COMP (2001 >) | European Commission civil servant |
| Alison Oldale (2009-2011) | University of Cambridge | London School of Economics | Consultant with LECG Ltd. (1999-2009) | 3 years of consultancy in Brussels |
| John Davies (2003-9) | Oxford University | No Phd., just a D.Phil | Consultant with Frontier Economics Ltd. | From 2009 to 2013 he headed Mauritius' Competition Commission. Since 2013 he is director of the OECD's competition directorate. |

Overall, a first provisional conclusion on the British case is that the government of inter-firm competition has changed considerably over the last twenty years. Moreover, some of the instruments and practices put into place confirm Cini's hypothesis regarding American influence in the UK, and that of 'the Chicago School' in particular[26]. However, this national case is both more complex and stimulating than this hypothesis would lead one to believe. Firstly, much of the commitment to economic analysis largely predated formal change in competition policy at the end of the 1990s. Secondly, more research needs to be done on the economists who actually work within the British government of competition and on the doctrines and methods of analysis they have contributed to institutionalizing as stabilized aspects of policy in this country.

[26] Cini, M., 'Competition Policy', cited.

## Conclusion

This text has sought to show difference and similarities in the government of inter-firm competition in France and Britain whilst questioning the extent of EU influence upon both. As many other research projects have shown, in both cases, this government of competition has become more institutionalized and a more structural part of governing national economic activity. From this angle considerable similarities and even some convergence can be identified between these two member states. However, as table 6 underlines, considerable differences remain over key aspects of policy and economic doctrine. Analysis in terms of institutionalized path dependency can perhaps explain some of the persistence of legalistic reasoning in 'Paris' and that based on 'economics' in 'London'. However, this question requires much greater attention being paid to the organizations and individuals who have built and 'carried' proposals for governmental practice, and thus contributed directly to their institutionalization. This text has made some initial steps in this direction but much more needs to be done by taking greater inspiration from the sociology of professions and fields[27] that have thus far been heuristically applied to other areas of social and economic life.

**Table 6: Institutional Change Compared**

| | *France* | *UK* |
|---|---|---|
| i) Usage of Economic analysis | Growing but still very rare | Systematic |
| ii) Accent upon actual abuse of dominant position | Growing but limited | Growing and structural |
| iii) Usage of leniency clauses | Only occasional | Systematic |
| iv) Reference to the ECN and EU | Occasional | Occasional |

Finally, by so doing a more general contribution to the study of the EU and its impact upon national polities could also be made. Existing research on the 'Europeanization' of policy areas where employees of the European Commission ostensibly have hierarchical power provides a means of further problematizing this potential contribution. On the one hand Bulmer and Padgett (2004) consider that in such cases top-down, EU > national institutional transfers are highly likely to be made because EU competence is coercive and because it encourages emulation across member states. On the other hand, Knill and Lenshow (2005) rightly underline that the formal power of law is rarely enough to prompt institutional change. Indeed, given that to do so such law has to have provoked contentious decisions and even court cases, it is actually more likely that 'hierarchical' EU competence encourages member state actors to keep a low profile and adopt EU-inspired reforms only rarely. For the moment our analysis of competition policy in France and the UK gives more credence to Knill and Lenshow's interpretation. But only more research will enable the drawing of firm conclusions on this point.

[27] See, Lebaron, F., *La croyance économique. Les economists entre science et politique*, cited.

# The political economy of global competition law and policy: an institutional approach

Pablo Iglesias-Rodríguez*

Recent decades have seen an increasing globalization of the markets and, contemporarily, a proliferation of national competition regimes and authorities whose priorities and competences are often circumscribed to the domestic level. Such a fragmentation of competition regulation and enforcement in a globalized economic environment poses some challenges with a potential negative impact on consumers, businesses and, more generally, competition.[1] For example, national competition authorities may not always be able to tackle competition problems with a multijurisdictional nature owing to *inter alia* lack of resources or powers to either investigate foreign firms or enforce decisions against them.[2] Also, there is the risk of inconsistent or duplicative competition rules and procedures across jurisdictions.[3]

Global Networks of Competition authorities (GCNs) perform very relevant functions that may help to mitigate the problems mentioned above. For example, they provide forums for the exchange of information and debate among competition authorities, facilitate their coordination and issue standards aimed at the adoption of best practices in the area of competition law and policy at the international level.[4]

Among the different GCNs, the International Competition Network (ICN) launched in the year 2001 by representatives of competition authorities from 14 jurisdictions, has emerged as the main global standard-setter in the field.[5] From an institutional perspective the ICN is a very interesting phenomenon. Since its creation it has grown rapidly in membership, reaching in the year 2014, 324 members from 100 jurisdictions. It has also become a powerful organization and its standards are very influential among jurisdictions worldwide.[6]

Whereas the literature on the ICN has paid substantial attention to the analysis of the emergence and rationale of the ICN, the arguments offered till date are rather incomplete. These generally tend to explain the ICN as an institutional development aimed at overcoming alleged weaknesses of other GCNs existing at the time of its creation.[7] While these accounts of the ICN's origins provide some

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This paper is based on a presentation made at the Workshop: Exploring the Transnational Circulation of Policy Paradigms: Law Firms, Legal Networks and the Production of Expertise in the Field of Competition Policies, held on 21.06.2013 at the European University Institute in Florence and hosted by the Global Governance Programme of the Robert Schuman Centre for Advanced Studies. I am very grateful to the scientific coordinators of the project – Julie Bailleux and Antoine Vauchez – for their kind invitation to the conference and to the participants for their useful comments.

1 J. Fingleton, 'Competition Agencies and Global Markets: The Challenges Ahead', in P. Lugard (Ed.), *The International Competition Network at Ten. Origins, Accomplishments and Aspirations* (Cambridge: Intersentia, 2011), pp. 174-176.

2 Fingleton, 'Competition Agencies and Global Markets: The Challenges Ahead', p. 178.

3 Fingleton, 'Competition Agencies and Global Markets: The Challenges Ahead', p. 176.

4 Fingleton, 'Competition Agencies and Global Markets: The Challenges Ahead', pp. 191-192.

5 See e.g., E.M. Fox, 'Linked-In: Antitrust and the Virtues of a Virtual Network' in P. Lugard (Ed.), *The International Competition Network at Ten. Origins, Accomplishments and Aspirations* (Cambridge: Intersentia, 2011), p. 127.

6 A detailed analysis of the influence of the ICN on the development of the competition law framework of a specific country is provided by E. Pérez-Motta – 'The Role of the International Competition Network (ICN) in the Promotion of Competition in Developing Countries: The Case of Mexico', in P. Lugard (Ed.), *The International Competition Network at Ten. Origins, Accomplishments and Aspirations* (Cambridge: Intersentia, 2011).

7 See e.g., M.E. Janow and J.F. Rill, 'The Origins of the ICN', in P. Lugard (Ed.), *The International Competition Network at Ten. Origins, Accomplishments and Aspirations* (Cambridge: Intersentia, 2011).

useful insights, they however dismiss important political economy considerations, which are relevant to understand not only the reasons behind the creation of the ICN but also its legitimacy.

This paper argues that from an institutional political economy perspective the ICN essentially constitutes a product of the Organisation for Economic Co-operation and Development (OECD) launched as a reaction to the threat of a shift of power in the definition of competition law and policy at the global level and primarily aimed at keeping the hegemony of the OECD in this field. The paper proceeds as follows. First, it starts with an analysis of the evolution of the global institutional setting of competition law and policy with a focus on the emergence, in the 1990s, of bodies with a global dimension vested with responsibilities in competition law and policy that threatened the traditional preeminence of the OECD as a standard-setter in competition matters. The paper continues with an explanation of the ICN as a reaction to such threat. This argument is supported by the analysis of the process of creation of the ICN – launched and backed by OECD members – and of the internal rules governing its functioning – which have been devised so as to grant the OECD jurisdictions a privileged position within the ICN. The paper concludes with some considerations about the input-legitimacy and the output-legitimacy of the ICN, the rationale of the OECD's ascendancy over the network, as well as some insights as regards the future of the ICN.

## 1. Global competition law and policy in perspective

### *1.1. From 1961 to 1996: the preeminence of the OECD as a standard-setter in competition law and policy*

Traditionally the definition of global standards in the field of competition law and policy has been a matter reserved to the OECD jurisdictions, mostly, through the so-called Committee of Experts on Restrictive Business Practices, created in the year 1961.[8] This Committee, later renamed, the Committee on Competition Law and Policy,[9] and, subsequently – and, currently – the Competition Committee,[10] is in charge of *inter alia*: "Enhancing the effectiveness of competition law enforcement, through measures that include the development of best practices and the promotion of cooperation among competition authorities of Member countries".[11] One of the main rulemaking outputs of the Competition Committee consists of recommendations that are submitted to the OECD Council for their adoption.[12] Some of these are aimed at the enhancement of the cooperation between competition authorities in the investigation of breaches of competition laws and their enforcement[13] whereas others are intended to set standards in substantive fields of competition law and policy, such as cartels.[14]

From an input-legitimacy perspective the Competition Committee is a rather elitist entity, as it essentially comprises representatives of competition authorities of the OECD member countries – who

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8 This Committee was set by the Resolution of the Council concerning action in the field of restrictive business practices and the establishment of a Committee of Experts [OECD/C(61)47(Final)].

9 Resolution of the Council concerning the Committee of Experts on Restrictive Business Practices and amending its name and terms of reference [C(87)138(Final)].

10 Decision of the OECD Council, session 1017, [C/M(2001)23, item 402] and document [C(2001)261] – see OECD, *Directory of Bodies. Mandates, Membership, Officers* (2007), p. 239.

11 Section A(I)(b)(iii) Resolution of the Council [C(2008)134 & CORR1 and C/M(2008)17, item 219].

12 E.M. Fox and A. Arena, 'The International Institutions of Competition Law: The Systems' Norms', in E.M. Fox and M.J. Trebilcock (Eds.), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford: Oxford University Press, 2013), p. 478.

13 See e.g., Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade [C(95)130 (Final)].

14 See, for instance, the Recommendation of the Council concerning Effective Action Against Hard Core Cartels [C(98)35 (Final)].

also elect the Chair of the Competition Committee.[15] As a result, the recommendations and other policy outcomes elaborated by the Competition Committee principally source from debates and discussions among economically developed countries.[16] Despite the fact that the work and the recommendations of the Competition Committee are primarily addressed to the OECD member countries,[17] the Competition Committee also encourages non-member jurisdictions to endorse and apply its standards.[18] For instance, the Competition Committee conducts reviews of the competition regulatory frameworks of countries aspiring to become members of the OECD, in order to assess whether they comply with OECD competition-related criteria and to give guidance on how to converge towards them.[19] Owing to the fact that compliance with the OECD competition policy standards has an impact on the likeness of an admission of a country to the OECD,[20] the results of the reviews carried out by the Competition Committee may create very powerful incentives on candidate countries to endorse and implement the OECD's competition law principles in a sound manner.

The access of non-OECD countries to the activities performed by the OECD in the field of competition law and policy was enhanced with the creation of the Global Forum on Competition (GFC) in the year 2001.[21] The GFC is intended as a forum of, *inter alia*, exchange and debate on competition law issues between the OECD countries and non-OECD jurisdictions.[22] Despite its inclusive character, the GFC has some features that restrict the influence of non-OECD countries in global standard-setting activities. In this regard, the scope of the activities of the GFC is much more limited than that of the Competition Committee. Whereas the Competition Committee is a true standard-setting entity with a clear organizational structure and continuous operation throughout the year, the GFC essentially consists of an annual event that follows a workshop format and where staff from the OECD, representatives of competition authorities from both OECD and non-OECD countries as well as members of civil society, academia and international organizations make presentations and

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15 Fox and Arena, 'The International Institutions of Competition Law: The Systems' Norms', p. 478.

16 The Competition Committee may nevertheless invite some non-OECD countries to participate in its work and activities for a fixed-term – see OECD, *Proactive Strategy vis-à-vis non Members* (DAF/COMP(2005)26, 2005). For instance, as at December 2013, the Competition Committee had as observers the following jurisdictions: Brazil, Bulgaria, Chinese Taipei, Colombia, Egypt, India, Indonesia, Latvia, Lithuania, Malta, Peru, Romania, Russian Federation, South Africa and Ukraine – OECD, *Directory of Bodies of the OECD* (2012), p. 237.

17 See e.g., Section A(I)(b)(iii), OECD, Resolution of the Council [C(2008)134 & CORR1 and C/M(2008)17, item 219].

18 See e.g., Section A(I)(b)(viii), OECD, Resolution of the Council [C(2008)134 & CORR1 and C/M(2008)17, item 219].

19 See e.g., OECD, *Chile – Accession Report on Competition Law and Policy* (2010).

20 The assessment of competition law and policy is indeed part of the process of accession of countries to the OECD; in this respect see e.g., OECD, *Chile – Accession Report on Competition Law and Policy*, p. 3: "The Competition Committee (the "Committee") was requested to examine Chile"s position with respect to core competition features and to provide Council with a formal opinion on the willingness and ability of Chile to assume the obligations of OECD membership. In doing so, the Competition Committee assessed the degree of coherence of Chile's competition law and policy with that of OECD Member countries. This report, prepared as part of the Competition Committee's accession review, highlights some of the key challenges facing Chile in its implementation and enforcement of competition policy."

21 Information about the first meeting of the GFC is provided by: OECD, *Global Forum on Competition 2001* (2001), available at http://www.oecd.org/competition/globalforum/GlobalForum-October2001.pdf.

22 See OECD, *Directory of Bodies of the OECD*, p. 240. The participants in the GFC have, till date, included: Albania, Algeria, Argentina, Azerbaijan, Bahrain, Bosnia and Herzegovina, Bulgaria, Cameroon, Colombia, Costa Rica, Croatia, Ecuador, Egypt, El Salvador, FYROM, Gabon, Georgia, Ivory Coast, Jamaica, Jordan, Kazakhstan, Kenya, Latvia, Lebanon, Malaysia, Malta, Mongolia, Morocco, Nigeria, Pakistan, Panama, Papua New Guinea, Peru, Philippines, Senegal, Serbia, Singapore, Tanzania, Thailand, Tunisia, Ukraine, Uzbekistan, Venezuela, Vietnam, Zambia and Andean Community, Asian Development Bank, Business and Industry Advisory Committee, CARICOM Commission, Common Market for Eastern and Southern Africa, Consumers International, Consumer Unity & Trust Society(CUTS) International, International Bar Association, International Development Research Centre, Inter-American Development Bank, Trade Union Advisory Committee, United Nations Conference on Trade and Development, Commission of the West African Economic and Monetary Union, World Trade Organization, World Bank – OECD, *Directory of Bodies of the OECD*, p. 241.

discuss about various topics in the field of competition law and policy.[23] Moreover, the decisions about who participates in the GFC as well as what issues are debated on it are made by the OECD members,[24] that, as a result, exercise a substantial influence in the definition of the agenda of the GFC. The hierarchical relation between the Competition Committee and the GFC is also evidenced by the fact that the latter is used, not only as a space of debate and discussion between OECD and non-OECD countries, but also as a tool for the dissemination and promotion of the OECD's views in the area of competition law.[25]

### *1.2. From 1996 to 1997: the emergence of alternative global forums in the field of competition law and policy*

#### 1.2.1. The World Trade Organization Working Group on the Interaction between Trade and Competition Policy

The mid 1990s saw the advent of new institutional settings that performed functions with regard to competition law issues with a global dimension and that operated in parallel to the Competition Committee. The first of these forums was the World Trade Organization (WTO) Working Group on the Interaction between Trade and Competition Policy (WGTCP). The roots of the WGTCP can be traced to the Singapore Ministerial Conference of the WTO in the year 1996 that proposed the creation of: "…a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework".[26] The WGTCP was part of a policy initiative, initially launched and supported by the European Commission, to consolidate the WTO as the leading standard-setter in global competition law and policy.[27]

The work of the WGTCP did not directly overlap with the activities performed by the Competition Committee; for instance, the scope of the tasks of the WGTCP was rather narrow and focused on aspects of competition law with an impact on trade and vice versa; moreover, the WGTCP intended not to duplicate the tasks carried out by other international bodies working on competition policy issues.[28] However, at the same time, the creation of the WGTCP meant that the definition of the global policy agenda concerning the discussion about core aspects of competition law was not anymore monopolized by the main economic powers. In this respect, unlike the Competition Committee, that represented the most economically developed countries of the world, the WGTCP comprised all the members of the WTO,[29] and, hence, it was much more inclusive than its OECD counterpart. The broader membership of the WGTCP was also reflected in its working mechanisms. The initial

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23 See e.g., the *Agenda of the 12th Global Forum on Competition*, available at http://www.oecd.org/competition/globalforum/2013GFC_Agenda.pdf.

24 See http://www.oecd.org/competition/globalforum/abouttheglobalforumoncompetition.htm.

25 See OECD, *Directory of Bodies of the OECD*, p. 240.

26 Para 20, Singapore Ministerial Declaration (WT/MIN(96)/DEC, 1996), available at http://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf.

27 See e.g., Mr. Karel Van Miert – Member of the European Commission –, *The WTO and Competition Policy: the Need to Consider Negotiations* (Address before Ambassadors to the WTO, 21.04.1998), available at http://ec.europa.eu/competition/speeches/text/sp1998_038_en.html and D.J. Gerber, *Global Competition: Law, Markets, and Globalization* (Oxford: Oxford University Press, 2010), pp. 103-104.

28 "In pursuing the items of its work programme, the Working Group should draw upon and avoid unnecessary duplication of the work of other WTO bodies concerned with specific trade measures as well as the work under way in UNCTAD and other organizations." – WTO, *Working Group on the Interaction between Trade and Competition Policy Report (1997) to the General Council* (WT/WGTCP/1, 1997), Annex 1.

29 See http://www.wto.org/english/tratop_e/comp_e/comp_e.htm.

mandate of the WGTCP was indeed decided by a WTO Ministerial Conference[30] and the definition of the specific work to be conducted under such mandate was the result of a process open to all WTO jurisdictions and where both economically developing and developed countries gave their opinions.[31]

### 1.2.2. The United Nations Conference on Trade and Development Intergovernmental Group of Experts on Competition Law and Policy

The United Nations Conference on Trade and Development (UNCTAD) Intergovernmental Group of Experts (IGE) on Competition Law and Policy was formally established in the year 1997 by the UN General Assembly[32] upon recommendation of the UNCTAD. The IGE took over the duties previously performed by the so-called Intergovernmental Group of Experts on Restrictive Business Practices, which was in charge of, *inter alia*, monitoring the application and implementation of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UN Set).[33] The UN Set is a non-binding multilateral agreement aimed at the control of anticompetitive practices, with a particular focus on the protection of less economically developed countries. It also provides mechanisms for the exchange of best practices in competition law and policy among countries.[34]

The UN Set has been subject to several reviews by the members of UNCTAD. It was in one of those reviews – the Third Review Conference, held in November 1995 –[35] when the UNCTAD jurisdictions assembled recommended that the UN General Assembly changed the name of the IGE from "Restrictive Business Practices" to "Competition Law and Policy".[36] This proposal to change the name of the IGE, which was later adopted by the UN General Assembly, somehow reflected the determination of an important part of the UNCTAD members to consolidate the IGE as the global forum of reference in the field of competition law and policy. This is indeed patent in some of the passages of the Report of the Third United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. For instance, with respect to the closing statements by the Vice-President of the Review Conference, the Report states:

> "The resolution [of the Review Conference] had also recommended that the General Assembly change the Group's title to Intergovernmental Group of Experts on Competition Law and Policy, a title similar to that of the equivalent OECD expert group, and which was in line with the nature of the Group's work and with the changes taking place in this area in the real world. The Review Conference would thus send a strong signal to UNCTAD IX, for the Intergovernmental Group was the only universal forum providing the opportunity to work in a useful and efficient manner on the

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30 The Singapore Ministerial Conference – the first WTO Ministerial Conference. Information about this conference is available at http://www.wto.org/english/thewto_e/minist_e/min96_e/min96_e.htm.

31 Written submissions in this respect were made by Australia, Canada, China, Egypt, the European Community and its member States, Hong Kong, India, Japan, Mexico, Nigeria, New Zealand, Norway, Pakistan, Peru, the Philippines – on behalf of ASEAN WTO Members –, Poland, Switzerland, the Republic of Korea, the United States of America (US) and Venezuela – see, WTO, *Working Group on the Interaction between Trade and Competition Policy Report (1997) to the General Council*, p. 1.

32 Resolution Adopted by the General Assembly (A/RES/52/182, 1997), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/52/182&Lang=E.

33 Section G(3)(f), The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980).

34 M. Dabbah, *International and Comparative Competition Law* (Cambridge: Cambridge University Press, 2010), pp. 144-145.

35 Third United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, 13 November 1995.

36 Section 14, Resolution Adopted by the Review Conference at its 5th (closing) meeting, on 21 November 1995.

> development of the tools and institutions necessary for the implementation of competition policy in the context of globalization. He [the Vice-President of the Conference speaking on behalf of the President] therefore hoped that the General Assembly and UNCTAD IX, each within its competence, would provide a stimulus to the Group's work."[37]

The IGE is composed of experts on competition law – in most cases they are members of competition authorities –[38] from the UNCTAD jurisdictions, which, as at early 2014, comprised 194 member states.[39]

## 2. The rationale of the ICN: a response to the threat to the preeminence of the OECD in the definition of global competition law and policy

As explained above, since the 1960s the Competition Committee had been exercising a *de facto* monopoly in the definition of global standards in the field of competition law and policy. Such a preeminent role started to be threatened in the 1990s with the creation of the WGTCP – in the year 1996 – and of the IGE – in the year 1998 –, which brought about the possibility of fragmentation in the definition of global competition policies among the OECD, the WTO and the UNCTAD or even the potential of a shift of leadership in the performance of such role from the OECD to the WTO and/or the UNCTAD. Indeed, the creation of the WGTCP and of the IGE were part of institutional strategies launched respectively by the WTO and by the UNCTAD aimed at expanding the roles of both organizations in competition law and policy in the global arena.

The possibility of either of those scenarios raised concerns among some OECD jurisdictions, such as the US, which preferred the definition of global competition standards to be led by an organization whose members represented well-developed free-market economies with more like-minded perspectives about competition law issues.[40] Both the WTO's WGTCP and the UNCTAD's IGE were indeed much more inclusive than the OECD's Competition Committee because they were composed of economically developing and developed countries, which, in addition, formally enjoyed equal decision-making rights in the internal decision-making procedures of the WGTCP and the IGE, respectively. The emergence of either the WGTCP and/or the IGE as the main standard-setter(s) in competition law and policy in the global arena could indeed have the effect of shifting the global competition agenda towards issues and perspectives that represented the interests of less-economically developed nations but not necessarily those of the OECD jurisdictions.

Against this background, the process of creation of the ICN, which started in the year 1997 – hence, immediately after WGTCP and the IGE were launched –, can be analyzed as an institutional response of the OECD jurisdictions to the WTO and the UNCTAD's initiatives. Indeed, the ICN is, above all, an OECD-driven institutional development in the field of competition law and policy.

The main instigator of the creation of the ICN was the US, one of the OECD founding countries. In this respect the origins of the ICN can be traced to the work of the International Competition Policy Advisory Committee (ICPAC). The ICPAC was a committee of experts[41] created in the year 1997 by Ms. Janet Reno – the US Attorney General – and Mr. Joel Klein – the US Assistant Attorney General

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[37] UN, *Report of the Third United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* (TD/RBP/CONF.4/15, 1996), para 76.

[38] See e.g., UNCTAD, *List of participants at the Intergovernmental Group of Experts on Competition Law and Policy Tenth Session*, Geneva, 7–9 July 2009 (TD/B/C.I/CLP/Inf.1, 2009), available at http://unctad.org/en/docs/ciclplinfd1_enfrsp.pdf.

[39] See e.g., UNCTAD, *UNCTAD Annual Report 2012* (2013), p. 8.

[40] Fox, 'Linked-In: Antitrust and the Virtues of a Virtual Network', p. 112.

[41] The membership of the ICPAC is available at http://www.justice.gov/atr/icpac/1292.htm.

in charge of the Antitrust Division.[42] The ICPAC was entrusted with the provision of advice to the US Department of Justice and the US Government on competition law and policy issues with an international dimension and of relevance to the US.[43] In February 2000 the ICPAC published its report (ICPAC Report) where it recommended, *inter alia*, the creation of a "Global Competition Initiative", an international venue that would gather government officials, private firms and non-governmental organizations to consult and discuss about competition law and policy[44] so as to achieve greater degrees of legal convergence and foster a common culture in the field.[45]

The idea of a Global Competition Initiative, as proposed by the ICPAC Report was endorsed by both Mr. Joel Klein and the Competition Commissioner, Mr. Mario Monti, at the 'EC Merger Control: 10th anniversary conference' held in Brussels on 14 and 15 September 2000[46] as well as by senior competition law officials gathered by the International Bar Association in Ditchley Park (UK) in February 2001.[47] The ICN was officially launched at the Fordham Corporate Law Institute Annual Conference on International Antitrust Law and Policy in October 2001.[48] The founders of the ICN were representatives of 16 competition authorities from 14 jurisdictions. Ten out of those 14 jurisdictions were OECD members.[49]

## 3. The ICN and the illusion of greater legitimacy in global competition law and policy

The initial success of the ICN and its ability to consolidate itself as the main standard-setter in global competition law and policy depended to a great extent on its capacity to convey the impression, among its potential members, that it would overcome some of the weaknesses of other institutional alternatives – e.g., the Competition Committee, the WGTCP and the IGE – and, notably, to show that it was an organization vested with greater legitimacy than its counterparts, open to the participation of both economically developing and developed countries and to discussion on a broad range of competition law issues.

The need of greater legitimacy in global competition law and policy was indeed among the core reasons put forward to justify the creation of the ICN. For instance, in the view of the ICPAC, the Global Competition Initiative would overcome some of the limitations of the global competition forums existing at the time. Unlike the WTO, that focused its work on competition law issues with an impact on trade, the Global Competition Initiative would address "the full range of competition policy

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42 See e.g., the remarks by Attorney General Janet Reno and by Assistant Attorney General Joel Klein at the ICPAC meeting of November 24, 1997, respectively available at http://www.justice.gov/atr/icpac/1293.htm and http://www.justice.gov/atr/icpac/1294.htm.

43 ICPAC, *Final Report to the Attorney General and Assistant Attorney General for Antitrust* (2000), p. 34.

44 ICPAC, *Final Report to the Attorney General and Assistant Attorney General for Antitrust*, p. 282.

45 ICPAC, *Final Report to the Attorney General and Assistant Attorney General for Antitrust*, p. 284.

46 See Mr. J.I. Klein – Assistant Attorney General Antitrust Division, US Department of Justice –, *Time for a Global Competition Initiative?*, Speech at the EC Merger Control 10th Anniversary Conference, Brussels, 14-15 September 2000, available at http://www.justice.gov/atr/public/speeches/6486.pdf and Mr. Mario Monti - Member of the European Commission in charge of Competition –, *The main challenges for a new decade of EC Merger Control*, Speech at the EC Merger Control 10th Anniversary Conference, Brussels, 14-15 September 2000 (Speech/00/311, 2000).

47 Janow and Rill, 'The Origins of the ICN', pp. 34-35.

48 Janow and Rill, 'The Origins of the ICN', p. 36.

49 See ICN, *ICN Factsheet and Key Messages* (2009), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf, p. 1. The founding jurisdictions were Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Mexico, South Africa, South Korea, the United Kingdom, the United States of America, and Zambia – see http://www.internationalcompetitionnetwork.org/about/history.aspx. Of these, only the European Union, Israel, South Africa and Zambia were not OECD members – the OECD membership and dates of accession are available at http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm.

matters of consequence to the global economy".[50] Moreover, in contrast to the OECD's Competition Committee limited membership, the Global Competition Initiative would be "inclusive in its membership, open to developed and developing nations, and comprehensive, or at least open to the possibility of breadth, in its coverage of issue areas".[51]

The ICN is certainly much more inclusive than the OECD Competition Committee. Its 324 members[52] come from more than 100 jurisdictions[53] that represent different degrees of economic development, from very modest to the most advanced. In addition, decisions at the ICN are adopted at the ICN Annual Conferences by consensus of the ICN members – that enjoy the same voting rights.[54] Hence, formally, from the point of view of participatory rights, all the members of the ICN have equal footing in the activities of the network.

Despite the ICN's input-legitimacy achievements, a closer look at the evolution of its internal governance evidences that, from the very same moment of the ICN's inception, OECD jurisdictions took a series of measures aimed at ensuring their preeminence within the network. These have resulted in certain asymmetries in the position that different jurisdictions hold within the ICN.

### *3.1. The influence of the OECD on the ICN's governance*

The rules of the ICN have been devised, from the onset, in a manner that has enabled OECD jurisdictions to keep control of central aspects of the governance of the ICN.

The process of establishment of ascendancy over the ICN by its founding members started in the very early stages of development of the ICN. Those jurisdictions were in charge of drafting the seminal rules of the ICN in the year 2002: the Memorandum on the Establishment and Operation of the International Competition Network (ICN Memorandum) and the International Competition Network Interim Operational Framework (ICN Interim Operational Framework).[55] Both documents devoted particular attention to the configuration of the so-called Steering Group (SG) of the ICN. On the one side, they entrusted the SG with the performance of the most relevant functions within the ICN. These powers included, *inter alia*, the guidance of the work of the ICN, the establishment of the ICN Working Groups, the designation of their chairs, the provision of recommendations about their composition and the review and approval of the work plans of the Working Groups.[56] The work of the ICN is to a great extent based on the activities performed by its Working Groups.[57] Therefore, by virtue of the provisions of the ICN Memorandum and of the ICN Interim Operational Framework, the SG was able to exercise substantial influence on the work and structure of the ICN from its inception. On the other side, the ICN Memorandum also stipulated that: "To ensure an effective launch of ICN, antitrust agencies of the following jurisdictions will serve as an interim steering group until they are confirmed by ICN at the first conference: Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia". In other words, the ICN founding jurisdictions allocated themselves all the seats of the interim SG – and

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50 ICPAC, *Final Report to the Attorney General and Assistant Attorney General for Antitrust*, pp. 282-283.

51 ICPAC, *Final Report to the Attorney General and Assistant Attorney General for Antitrust*, pp. 282-282.

52 As at February 2014.

53 The membership of the ICN is available at http://www.internationalcompetitionnetwork.org/members/member-directory.aspx.

54 Sections 1(i), (v) and 2(v) ICN Operational Framework.

55 Respectively available at http://www.internationalcompetitionnetwork.org/uploads/library/doc579.pdf and http://www.internationalcompetitionnetwork.org/uploads/library/doc575.pdf

56 Memorandum on the Establishment and Operation of the International Competition Network (2002) and the International Competition Network Interim Operational Framework (2002).

57 See *ICN, ICN Factsheet and Key Messages*, p. 1.

hence, the core powers within the ICN. Whereas this organizational arrangement was grounded on some plausible arguments – e.g., the need to ensure that the ICN founding members were able to successfully pre-organize and launch the ICN –, it nevertheless resulted in a concentration of power in the OECD-ICN members from the onset. Indeed, the composition of the Interim SG was confirmed at the first ICN Annual Conference, held in Naples (Italy) on September 28-29, 2002, and the Interim SG became the SG.[58]

The second step in the consolidation of the power of the OECD jurisdictions within the SG – and, hence, within the ICN – came with the amendments operated in the year 2003 on the ICN Interim Operational Framework adopted by the First ICN Annual Conference in the year 2002. Those amendments were in first instance proposed by the ICN Operational Framework Working Group (OFWG) whose creation was instigated by the SG.[59] The SG requested the OFWG advice on, *inter alia*, the method for the selection and appointment of the members of the SG – a matter that was not specified in the ICN Interim Operational Framework.[60] The OFWG came up with some proposals that were later adopted by the SG[61] and by the ICN Members at the Second ICN Annual Conference, held in Mérida (Mexico) on June 23-25, 2003,[62] and which resulted in further enhancement of the position of the OECD jurisdictions within the SG.

First, the OFWG proposed that the SG be composed of 15 members divided in 2 categories. On the one hand there would be *ex-officio* members, a group consisting of the ICN members designated to host an ICN annual conference. These would be part of the SG until its renewal following the relevant annual conference of the ICN. On the other hand, the rest of the SG would comprise ICN members appointed by consensus of the ICN members at the ICN Annual Conference in odd-numbered years, upon recommendation of the outgoing SG. In cases of renounce by one of the members of the SG, the SG would also have the power to appoint a replacement.[63]

This system, which granted the SG the power to select its own members, had the effect of giving the founding members of the ICN – and members of its first SG – considerable influence in the definition of the composition of subsequent SGs. The fact that the proposals of the OFWG did not contemplate any mechanism for the solution of potential disagreements about SG appointments between the SG and the ICN Members at the Annual Conference, factually relegated the role of the latter to a mere rubber-stamp of the selection/recommendations of the outgoing SG. Indeed, the OFWG used the wording: "Steering Group members are confirmed by consensus of ICN Members…", suggesting that the functions of the ICN Annual Conference in the appointment process would be rather passive.

It is also worth noting that the system proposed by the OFWG – and adopted by the SG and by the second ICN Annual Conference in 2003 – placed no restrictions on the potential continuation of members of the outgoing steering group after the initial 2-year term.[64] Indeed, the proposed rules granted discretion to the members of the outgoing SG in deciding whether to recommend the

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58 See E.M. Fox, *A Report on the First Annual Conference of The International Competition* Network (2002), p. 11.

59 In accordance with the duties of the SG – as set in the ICN Interim Operational Framework, adopted at the first ICN Annual Conference, held in Naples (Italy) on September 29, 2002 – which, as referred above, included the establishment of working groups, the designation of their leaders and the recommendation of their composition.

60 See e.g., OFWG, *Report to the Steering Group* (2003), p.1.

61 See e.g., OFWG, *Report to the Steering Group*, p.1.

62 ICN Operational Framework (2003).

63 OFWG, *Report to the Steering Group*, pp. 2-3.

64 See OFWG, *Report to the Steering Group*, p. 3: "Any ICN Member, including a member of the outgoing Steering Group, may ask the outgoing Steering Group to be nominated to be on the next Steering Group."

appointment of new members at the moment of renewal,[65] hence, opening the door to potential persistence in the composition of the SG.

Secondly, the OFWG proposed certain criteria to be considered by the members of an outgoing SG when they selected and recommended the members of the incoming SG. Some of these criteria have contributed, directly or indirectly to the hegemony of the OECD within the ICN. For example, the OFWP proposed that an outgoing SG selected incoming SG members according to the degree of participation of the latter in the activities of the ICN.[66] Taking the plausible assumption that the extent of actual and/or potential quantitative and qualitative engagement of competition authorities in the ICN bears some relation with their budgets, the proposal of the OFWG favoured the selection to the SG of members from among well-funded competition authorities.

The composition of the OFWG – whose members were designated by the SG – may have played a role in the content of the proposals submitted to the SG. Notably, the OFWG was chaired by Canada and Italy and 10 out of its 18 members were from OECD countries – moreover, 8 of those 10 members were, contemporarily, members of the ICN Interim SG.[67]

Other amendments operated over the years on the rules concerning the SG have further enhanced the preeminence of well-developed economies within the SG. For instance, with regard to the selection criteria, the ICN Operational Framework in force as at 2014 requires that: "(i) All elected ICN Steering Group members shall meet the following criteria: (a) Significant resource commitment to the ICN, mindful of the relative size of the member agency; and (b) Consistent and effective ICN participation, which may include, but is not limited to: Working Group co-chair experience; leadership of an ICN time-specific or ongoing project; or a substantial contribution to the overall work of the ICN".[68] In other words, the ICN Operational Framework links the eligibility to the SG to the resources of the relevant ICN members, therefore limiting to a large extent the access of competition authorities from modest economies.

The persistent encompassment – by the ICN Operational Framework – of the preeminence of OECD countries within the SG may contribute to explain its path dependent membership. Indeed, the elected members of the SG of the year 2014 represented 17 jurisdictions,[69] of which 10 were among the ICN founding jurisdictions that were contemporarily part of the original SG and OECD members. Moreover, 13 out of the 18 jurisdictions represented in the SG of the year 2014 are OECD members. This is shown in table 1 below.

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65 See OFWG, *Report to the Steering Group*, p. 3: "In making its recommendations, the outgoing Steering Group shall consider:… The desirability of confirming new Steering Group member(s) in each round".

66 OFWG, *Report to the Steering Group*, p. 3.

67 The composition of the OFWG is available at OFWG, *Report to the Steering Group*, Appendix A.

68 Section 3.2.3(i) ICN Operational Framework.

69 The membership of the SG is available at http://www.internationalcompetitionnetwork.org/about/steering-group/members.aspx. The SG of the year 2014 comprised 19 members, which represented 18 jurisdictions – the US had two members: the US Department of Justice and the US Federal Trade Commission. The Polish Office of Competition and Consumer Protection was an *ex-officio* member – see the Minutes of the ICN Steering Group Meeting, Wednesday, April 10, 2013 (2013), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc917.pdf.

**Table 1**

| Composition of the ICN Steering Group | | | |
|---|---|---|---|
| | Year 2001 | Year 2014 | OECD Member |
| Australia | ✔ | ✔ | ✔ |
| Barbados | ✖ | ✔ | ✖ |
| Brazil | ✖ | ✔ | ✖ |
| Canada | ✔ | ✔ | ✔ |
| European Union | ✔ | ✔ | ✖ |
| France | ✔ | ✔ | ✔ |
| Germany | ✔ | ✔ | ✔ |
| Israel | ✔ | ✖ | ✔ |
| Italy | ✔ | ✔ | ✔ |
| Japan | ✔ | ✔ | ✔ |
| Korea | ✔ | ✔ | ✔ |
| Mexico | ✔ | ✔ | ✔ |
| Netherlands | ✖ | ✔ | ✔ |
| Poland | ✖ | ✔ | ✔ |
| Russian Federation | ✖ | ✔ | ✖ |
| South Africa | ✔ | ✔ | ✖ |
| Turkey | ✖ | ✔ | ✔ |
| United Kingdom | ✔ | ✔ | ✔ |
| United States of America | ✔ | ✔ | ✔ |
| Zambia | ✔ | ✖ | ✖ |

## Conclusion

The creation of the ICN in the year 2001 has enabled OECD jurisdictions to keep control of the definition of global standards in competition law and policy through a twofold process.

In the first place, the ICN was designed as an organization open to a broad membership and to discussion on several competition law topics. This contributed to the fast growth of its membership throughout the years and its consolidation as the main global standard-setting organization in the field of competition law and policy. Owing to, *inter alia*, the scarcity of resources of which competition authorities dispose, the allocation of funds to participation in the activities of the ICN has limited the ability of several competition authorities – especially those with more modest budgets – to participate in other global standard-setting forums.[70] This, in turn, may explain, to some extent, the fate of the ICN's counterparts. The WTO's WGTCP became inactive in the year 2003[71] and the UNCTAD's IGE, which has lost part of its appeal since the creation of the ICN, largely remains as a forum for the discussion of competition law issues of interest, primarily, to low-income countries.[72]

[70] H.M. Hollman and W.E. Kovacic, 'The International Competition Network: Its Past, Current and Future Role' in P. Lugard (Ed.), *The International Competition Network at Ten. Origins, Accomplishments and Aspirations* (Cambridge: Intersentia, 2011), pp. 71, 80, 81.

[71] See Hollman and Kovacic, 'The International Competition Network: Its Past, Current and Future Role', p. 73.

[72] See Hollman and Kovacic, 'The International Competition Network: Its Past, Current and Future Role', pp. 70-71.

Secondly, the ICN founding competition authorities, which principally came from OECD jurisdictions, developed the rules of the ICN – and of its SG – so as to keep control of the internal governance and agenda of the organization from the onset. Such an OECD preeminence, which is also reflected in the composition of the ICN's Working Groups,[73] had led in certain instances to policy outputs that reflect, above all, the interests of competition authorities from economically developed jurisdictions.[74] This questions, not only the input-legitimacy of the ICN, but also the output-legitimacy of the network and of its regulatory outputs.

The OECD's hegemony within the ICN might have had some rationale when the ICN was created. In effect, in the year 2001 a number of jurisdictions from economically developing countries did not have sound competition regimes.[75] However the scenario of 2014 barely resembles that of the year 2001.[76] Several emerging countries have become key actors in the global economic arena displacing the position of other traditional powers. Such greater relevance has been matched with an increasing interest in achieving more important roles in global policy-making.[77] If the ICN fails to provide a framework better suited to the participatory needs and wishes of non-OECD countries, there is the risk that the latter will shift their attention and resources to other global forums where they can engage more actively and in a more meaningful manner.

The future of the ICN will in large part be related to its ability to transform itself and build a truly inclusive internal governance regime where all its members are in a level playing field position. A move in such a direction requires, not only an active stand by non-OECD jurisdictions – which must actively demand a more prominent position within the ICN – but also the commitment of the hardcore members of the ICN's SG to move forward and support the active participation of non-OECD countries in the governance of the network.

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73 For example, as at March 2014, the competition authorities that chaired the ICN's Working Group came from France, Portugal and Mauritus (Advocacy Working Group), Mexico, the US and Norway (Agency Effectiveness Working Group), Japan, US, Germany, Canada and Australia (Cartel Working Group), Italy, the European Union and India (Merger Working Group) and Sweden, Turkey and the UK (Unilateral Conduct Working Group). Information about these Working Groups is available at http://www.internationalcompetitionnetwork.org/working-groups/current.aspx.

74 See e.g., Fox, 'Linked-In: Antitrust and the Virtues of a Virtual Network', pp. 127-130.

75 See e.g., Pérez-Motta, 'The Role of the International Competition Network (ICN) in the Promotion of Competition in Developing Countries: The Case of Mexico', p. 218.

76 On the rise of new powers in the field of competition law and policy see M. Marquis, 'Idea merchants and paradigm peddlers in global antitrust' pp. 60-61 – this volume.

77 See e.g., A. Rowley and T. Ogier, 'Rising powers slam IMF reform delay', *Emerging Markets* (11.10.2013), available at http://www.emergingmarkets.org/Article/3266181/Rising-powers-slam-IMF-reform-delay.html.

# Idea merchants and paradigm peddlers in global antitrust

Mel Marquis*

## 1. Introduction

By rough analogy to other fields of activity, in the world of competition law, proponents of ideas and paradigms – competition authorities and competition law systems – compete for what may loosely be termed market share. With competition law, while notional degrees of market share defy precise measurement, we might take as an imperfect proxy certain observed isomorphic processes. Isomorphism should not necessarily be understood as mimicry; actual and potential 'buyers' of concepts and paradigms may be sophisticated enough to absorb attractive ideas by way of a self-regarding selective adaptation and vernacularization that partly or fully takes account of local needs and other constraints such as the cultural infrastructure and political (and political economy) constraints, as well as institutional resources, (in)capacities and (dys)functions. A 'transaction' can thus occur not only where an isomorphic shift is purely mimetic but also where the shift is a matter of degree or hybridization. Occasionally, exported ideas fail to take root in foreign soil. They may have no chance to flourish due to resource/capacity constraints and weak institutions and enforcement; or there may be a mismatch between elite-level approximation or replication of foreign solutions and a country's cultural/multi-cultural norms or shifting political currents. And in the end, an injudicious transaction may breed contempt, which may have far-reaching consequences.[1]

From the perspective of the 'merchants' and 'peddlers', the more they can stimulate isomorphic processes, the easier it will be to achieve greater degrees of substantive, procedural, institutional and intellectual convergence across jurisdictions. This objective dovetails with that of gaining, as it were, a large share of the market. Attentive observers have cautioned that convergence is not to be pursued as an inherently desirable goal; relative costs, risks and benefits as well as capacities should be taken into account along with the particular contextual fabric of the jurisdiction or group of jurisdictions that may be interested in making a 'purchase'. One risk may be that a foreign-spawned tool or principle, which may be based on a chain of possibly contingent choices, could exacerbate pre-existing problems. For example, a green light for territorial restrictions agreed between non-competitors, which flashed on in the United States in the late 1970s, was deemed inapposite in the European context, where markets

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I am grateful to the editors of this collection and to all those who participated in the workshop organized by Julie Bailleux and Antoine Vauchez at the EUI in June 2013 for their helpful comments on a preliminary presentation. I would also like to thank Eleanor Fox, who provided very helpful feedback on an earlier draft of the paper.

1 Foreign competition law approaches imposed on Latin American countries, largely as part of conditional loan packages, illustrate how the leveraging of paradigms can backfire. See generally Eleanor Fox and D. Daniel Sokol, eds., *Competition Law and Policy in Latin America* (Oxford: Hart Publishing, 2009); Julian Peña, 'Competition Policies in Latin America', in Philip Marsden, ed., *Handbook of Research in Trans-Atlantic Antitrust* (Cheltenham: Edward Elgar, 2006) 732-758. The backlash and shift toward socialism is described in more political terms in Jorge Castañeda, 'Latin America's Left Turn', 85(3) *Foreign Affairs* (May-June 2006), http://sandovalhernandezj.people.cofc.edu/r21.pdf. The impediments to successful transplants, and the importance of adequate pre-conditions, have been highlighted in a substantial corpus of literature. See, e.g., Daniel Berkowitz, Katharina Pistor and Jean-François Richard, 'Economic Development, Legality, and the Transplant Effect', 47 *European Economic Review* 165-195 (2003); and similarly, Tay-Cheng Ma, 'Legal Transplant, Legal Origin, and Antitrust Effectiveness', 9 *Journal of Competition Law and Economics* 65-88 (2013). See also Franz Kronthaler, *Implementation of Competition Law in Developing and Transition Countries* (Baden-Baden: Nomos, 2007), for example at 89-90. Diffusion as a complex, multi-faceted phenomenon is discussed in William Twining, 'Diffusion of Law: A Global Perspective', 1 *Journal of Comparative Law* 237-260 (2004); William Twining, 'Social Science and Diffusion of Law', 32 *Journal of Law and Society* 203-240 (2005). For a legal anthropology perspective, see Julia Eckert, 'Who is afraid of legal transfers?', in Günter Frankenberg, ed., *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Cheltenham: Edward Elgar, 2013) 171-186.

across the Continent tended to be, and in many cases still are, highly fragmented (and not only because of enlargements to the East).[2] Another risk may be harm to competition law's perceived legitimacy if a particular form of competition law is pushed too hard on a culture deeply rooted on different prior beliefs and values.[3] The unreflexive assumption that convergence between systems, concepts and analytical approaches is desirable for its own sake has therefore understandably been criticized.[4] An

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2 The distinct, historically determined structure of the European economy is a factor relevant not just to vertical restraints doctrine but to other areas of the law as well such as the application of Article 102 TFEU. For example, fragmented markets may hinder the process of creative destruction or similar self-corrective mechanisms. *Cf.* Gustatvo Ghidini and Emanuela Arezzo, 'La prospettiva costituzionale della tutela della concorrenza', in Marilisa D'Amico and Barbara Randazzo, eds., *Alle frontiere del diritto costituzionale: Scritti in onore di Valeria Onida* (Milan: Giuffrè, 2011) 859-873, at 871 (Europe "thus appears reluctant to entrust the protection of competition to a merely *potential* perspective [...]") (translation and emphasis mine; the term 'potential' refers to pressures from potential competition). See also John Vickers, 'Competition Law and Economics: A Mid-Atlantic Viewpoint', 3 *European Competition Journal* 1-15 (2007), at 6 ('competitive self-righting mechanisms' in Europe may be less robust as compared to the U.S. because of Europe's history of extensively monopolized markets, largely as a result of government intervention). Vickers also tentatively raises the point that, since Europe had not developed its private enforcement capacities to any degree comparable to the enormous litigation apparatus in the U.S., more rigorous standards for unilateral conduct in Europe may be less apt to inhibit desirable aggressive competition on the part of dominant firms. See ibid.

3 See Thomas Cheng, 'Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law', 12 *Chicago Journal of International Law* 433-490 (2012), at 489 (advocating culturally sensitive convergence, and not opposing convergence as such). According to Cheng, the risk is linked to the relative permanence of local cultural values, which do not change fundamentally despite forces of globalization. In this regard, he cites Ronald Inglehart and Wayne Baker, 'Modernization, Cultural Change, and the Persistence of Traditional Values', 65 *American Sociological Review* 19-51 (2000), at 21-22. At page 22, Inglehart and Baker write: "Weber [in *The Protestant Ethic and the Spirit of Captialism* (1904)] argued that traditional religious values have an enduring influence on the institutions of a society. Following this tradition, Huntington [in *The Clash of Civilizations and the Remaking of World Order* (1996)] argues that the world is divided into eight major civilizations or 'cultural zones' based on cultural [and specifically, religious] differences that have persisted for centuries. […] Scholars from various disciplines have observed that distinctive cultural traits endure over long periods of time and continue to shape a society's political and economic performance. For example, Putnam [in *Making Democracy Work: Civic Traditions in Modern Italy* (1993)] shows that the regions of Italy in which democratic institutions function most successfully today are those in which civil society was relatively well developed in the nineteenth century and even earlier. Fukuyama [in *Trust: The Social Virtues and the Creation of Prosperity* (1995)] argues that a cultural heritage of 'low-trust' puts a society at a competitive disadvantage in global markets because it is less able to develop large and complex social institutions. Hamilton [in 'Civilizations and Organization of Economies', in Smelser and Sedberg, eds., *The Handbook of Economic Sociology* (1994) 183-204] argues that, although capitalism has become an almost universal way of life, civilizational factors continue to structure the organization of economies and societies: 'What we witness with the development of a global economy is not increasing uniformity, in the form of a universalization of Western culture, but rather the continuation of civilizational diversity through the active reinvention and reincorporation of non-Western civilizational patterns' (p. 184)."

Cheng would nevertheless likely agree that although culture is slow to change and path dependencies tend to be durable, it does not follow that efforts to engender a 'competition culture' are futile. Mindful of the point made by Inglehart and Baker, expectations and strategies of social change should be realistic and, to the extent possible, harmonious with the logic and philosophy of a particular 'cultural zone'. Furthermore, with respect to the developing world, some recommended 'building blocks' have been identified by, e.g., Sokol and Stephan: "In order to build competition culture, competition authorities must choose their cases carefully so as to maximize positive media coverage, information dissemination, and interest by ordinary members of the public. Bid-rigging cases [which most taxpayers can avidly applaud] may be a good place to start." D. Daniel Sokol and Andreas Stephan, 'Prioritizing Cartel Enforcement in Developing World Competition Agencies', in D. Daniel Sokol, Thomas Cheng and Ioannis Lianos, eds., *Competition Law and Development* (Stanford: Stanford University Press, 2013) 137-154, at 153. Sequencing, strategic planning, and the identification of genuine shared interests thus become avenues to dissolving or at least softening cultural barriers, rather than trying to break through them.

4 For broader discussion of the advantages and risks of participation in global convergence, see generally Cheng, 'Convergence and its Discontents' cited previous footnote. For discussion of the rhetoric and mechanisms of convergence and a variety of impediments to it, see David Gerber, *Global Competition: Law, Markets and Globalization* (Oxford: OUP, 2010), for example at 281-292. Within the specific context of competition laws and enforcement patterns in the European Union, the convergence process has rather unique dynamics which set it apart from the subject of global convergence. See, e.g., Laurence Idot, 'Réflexions sur la convergence des droits de la concurrence', novembre 2012, *Concurrences* n° 4-2012 (www.concurrences.com, article n° 49321).

additional critique that has been aired is that if convergence were adopted by all actors and jurisdictions as an overriding goal, desirable innovation might be suppressed. Kerber and Budzinski therefore plead for diversity and experimentation as part of a discovery procedure needed to address Hayek's problem of constitutional ignorance.[5] Furthermore, even supposing convergence were desirable, as things stand today there are some areas of law (abuse of dominance in particular) in which differences in objectives, implementation capabilities and institutions appear to preclude the identification of any truly universal approach and thus render the convergence enterprise, even as between developed countries let alone the rest of the world, largely illusory.[6]

Taking account of the risks, drawbacks and in some cases the impracticability of convergence, and particularly where the 'country of import' is a developing or least developed country, its historical-cultural, social and economic conditions may be so different that they are advised to be eclectic with their choices, and to "develop their own brand of competition law, resisting pressures to copy 'international standards' without regard to fit".[7] As noted later, some of them are following this advice. Meanwhile, starting from somewhat different, or rather overlapping, premises – and responding to the counter-risk that this recommended diversity might lead to excessive fragmentation – one of the catch phrases circulating in recent years is 'informed divergence'.[8] This reference to divergence may in reality be a long-term convergence strategy.[9] But it is a 'soft' strategy that allows

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5 Wolfgang Kerber and Oliver Budzinski, 'Competition of Competition Laws: Mission Impossible?', in Michael Greve and Richard Epstein, eds., *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (Washington, D.C.: AEI Press, 2004) 31-57, for example at 36-39 and 55 (Hayekian "knowledge problem requires that an international system of competition laws must sustainably produce variety and generate new knowledge"). See also Oliver Budzinski, *The Governance of Global Competition: Competence Allocation in International Competition Policy* (Cheltenham: Edward Elgar, 2008) 72-80; Wolfgang Kerber, 'The Theory of Regulatory Competition and Competition Law', in Karl Meessen, ed., *Economic Law as an Economic Good: its Rule Function and its Tool Function in the Competition of Systems* (Munich: Sellier European Law Publishers, 2009) 27-44.

6 See Giorgio Monti, 'Unilateral conduct: the search for global standards', in Ariel Ezrachi, ed., *Research Handbook on International Competition Law* (Cheltenham: Edward Elgar, 2012) 345-368. *Cf.* Alden Abbott, 'Competition Policy and its Convergence as Key Drivers of Economic Development', 28 *Mississippi College Law Review* 37-50 (2009) (emphasizing growing agreement on basic principles as regards unilateral conduct).

7 Eleanor Fox, 'Competition, development and regional integration: in search of a competition law fit for developing countries', in Josef Drexl, Mor Bakhoum, Eleanor Fox, Michal Gal and David Gerber, eds., *Competition Policy and Regional Integration in Developing Countries* (Cheltenham: Edward Elgar, 2012) 273-290, at 273. Fox recognizes that an internal evaluation, sensitive to local conditions and needs, may lead a jurisdiction to conclude that the benefits of copying or otherwise embracing a global standard outweigh the disadvantages. But she stresses the importance of making an informed choice. See ibid. at 286 and 290; and see Eleanor Fox and Michal Gal, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience', New York University Law and Economics Working Paper 14-11 (need for eclectic, tailored solutions); forthcoming in Mor Bakhoum et al., eds., *The Unique Characteristics of Developing Economies and Their Effects on Competition Laws* (Cheltenham: Edward Elgar). The costs and benefits to be considered by a developing country when deciding whether to move closer to a competition model based on neoclassical economics are discussed in detail by David Gerber, 'Economic Development and Global Competition Law Convergence', in Sokol, Cheng and Lianos, eds., *Competition Law and Development,* cited above note 3, 13-34.

8 Strictly speaking, and as originally used, 'informed divergence' operates at the level of the diverging actor, which (as highlighted in the previous footnote) should be making well-informed choices about whether to follow global standards. See (in a different context) Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* 273-392 (1997), at 287 and 374. The popularity of the term 'informed divergence' stems from Slaughter's later use of it in *A New World Order* (Princeton: Princeton University Press, 2004), at 24 and 172. However, the term is helpfully also used 'multilaterally' to imply that the relevant community of interest is or should be equally informed of, and that it understands or should understand, the divergence and the reasons for it. *Cf.* John Fingleton, 'Competition agencies and global markets: the challenges ahead', speech of 5 June 2009, http://www.oft.gov.uk/shared_oft/speeches/2009/spe0909paper.pdf, 1-30, at 27. Of course, if no brakes were applied to the informed divergence concept, then the risk of unravelling would rear its head again, but the group dynamics of the ICN tend to serve as a buffer against disintegrative tendencies.

9 Fingleton refers to the "interplay" between convergence and informed divergence. He also seems to assume that divergent approaches will ultimately be phased out, in particular when developing economies reach a certain stage of

for flexibility, which is meant in part to be a pressure valve enabling the convergence process to advance.[10] The concept of informed divergence seems to exhibit an inherent tension that is unlikely ever to be fully resolved, even if such full resolution were desirable. It is not inconceivable that one day we may see a move from markets toward 'hierarchies' or quasi-hierarchies: some form of top-down (and partial) harmonization in some areas of competition law may occur. Such a development would substantially change the character of discussions about convergence, and the locus of debate might then shift to processes of splintering and drift. But most would agree that top-down global harmonization of broad scope, e.g., via a WTO framework agreement or via some new international institution, will not happen in the foreseeable future.[11] For some, this is just as well.[12]

While convergence is often a central point of emphasis in the modern global antitrust conversation and cannot be ignored, the present essay develops a related but different theme: the interest here is on the supply side, and the drive to increase market share, which may perhaps also be interpreted as the drive to project soft power, to borrow Joseph Nye's popular term. In this context, the self-interest of key actors, in a broad sense, is not the whole story but it plays a central role.[13] Another related

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development. See 'Competition agencies and global markets', cited previous footnote, at 27 (specifically, points 87 and 90). For the notion that informed divergence is intended to 'lay the groundwork' for possible long-term convergence, see Eleanor Fox, John Fingleton and Sophie Mitchell, 'The past and future of international antitrust: gaps, overlaps and the institutional challenge', in David Lewis, ed., *Building New Competition Regimes: Selected Essays* (Cheltenham: Edward Elgar, 2013) 163-182, at section V of the chapter. The interplay between convergence and divergence has also been noted by other authors. See, e.g., Anu Piilola, 'Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation', 39 *Stanford Journal of International Law* 207-251 (2003), at 246.

10 A flexible margin for divergence is, of course, a reflection of the global preference, thus far, for soft law solutions and soft institutions. In some cases, it may be that the divergence is not easily discerned from an external point of view, as it emerges through a more subtle process of adaptation. *Cf.* D. Daniel Sokol, 'International Antitrust Institutions', in Andrew Guzman, ed., *Cooperation, Comity and Competition Policy* (Oxford: OUP, 2011) 187-213, at 196 ("In soft law antitrust, broad principles in antitrust allow for each country to adopt the language and theoretical underpinnings behind it in a manner that can be more easily incorporated within the existing legal and political traditions. This flexibility allows for 'fit' within an existing tradition and is not a pure transplant across legal systems […]."). If broad principles are adopted with the possibility to frame them within different theoretical perspectives, then a degree of divergence seems likely given high degrees of heterogeneity across a large number of jurisdictions and 'culture zones'. That is to say, 'informed divergence' may be a strategy of managed convergence but at the same time it is a conceptual description of what may be an endemic feature of the international system when hard obligations have not been undertaken.

11 See, e.g., Fingleton, 'Competition agencies and global markets', cited above note 8, at 18; D. Daniel Sokol, 'Antitrust, Institutions, and Merger Control', 17 *George Mason Law Review* 1055-1141 (2010), at 1099; Daniel Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford: OUP, 2011) 229. Crane suggests laying a foundation for plurilateral or multilateral hard law gradually and issue-by-issue, beginning with procedure and progressing to substance and institutions. His example is pre-merger notification, which could be standardized as a step toward a treaty on substantive merger norms. See ibid. at 243. On the need for hard law solutions for certain issue-specific challenges, see also note 48 below.

12 One risk with a multilateral consensus-based agreement is to get stuck with a bad deal that can't feasibly be reversed, although a carefully crafted agreement might provide for a workable solution by its own terms. Apart from this, some argue that global hard law is in fact undesirable and inferior to the voluntary system of soft convergence and cooperation that has developed in the last dozen years. See Anu Bradford, 'International Antitrust Cooperation and the Preference for Nonbinding Regimes', in Guzman, ed., *Cooperation, Comity and Competition Policy*, cited above note 10, 319-343, at 343 ("First, as cooperation under nonbinding agreements is largely self-enforcing, the added value of a binding agreement with provisions for monitoring, enforcement, and sanctions is trivial. Second, in the absence of coordinated domestic interest group support for international antitrust cooperation, a binding agreement would not provide states with any domestic political economy rents and therefore will remain a low national priority. Finally, the emerging voluntary convergence will slowly eradicate negative externalities stemming from decentralized antitrust regimes, making the case for a binding international agreement less compelling.").

13 The term 'self-interest' is not primarily a reference to national welfare- or budget-maximizing strategies, or profit-shifting in the sense of strategic trade theory. A government (and/or legislator) may well be guided by such strategies, and if it (they) can (openly or subtly) dictate the policies of the competition authority established in the jurisdiction concerned, the authority would no doubt act self-interestedly in this narrow sense as well. Similarly, a competition authority may be co-opted directly by (globally active) commercial interests. Without denying these possibilities, the reference to self-interest in the main text is concerned with a wider range of motivations including, for example, the

dynamic at play is the distorted lens through which many if not all of us see the world, a lens of self-certified enlightenment, or *satori*. Many American antitrust lawyers seem pre-disposed to the sentiment that they understand antitrust in a privileged way; after all, the U.S. was the undisputed antitrust heavyweight champion for 70 years until the 1960s finally witnessed the incipient influence of competition authorities in Bonn and Brussels. In Europe, meanwhile, many at some level hold to the view that while competition law principles and antitrust-type analytical tools took longer to develop in Europe, lawyers here have surpassed the Americans in competition enlightenment, for example because in Europe there is a somewhat richer history of competition law ideas from which to draw. At least some European competition experts may feel that while Chicago, or an alloyed version of Chicago, has been the slow death of American antitrust, Europe has largely escaped this fate; and that even in the age of the *more economic approach* (thought by many to be a post- or anti-ordoliberal approach with de-ethicizing overtones), it is the EU competition law regime that keeps an otherwise largely unaccountable global industry honest.[14]

The theme here, then, is the conscious/unconscious will to compete for influence via the diffusion of ideas, paradigms, techniques, norm and institution design, and so on. The term 'competition' may fail to capture the simultaneous cooperative efforts made among competition authorities, and in this sense the alternative term 'co-opetition' could be used.[15] However, with some exceptions the emphasis in this text is on competition and not cooperation; since the co-opetitive dimensions are not explored in detail, this terminology is not used either.

With regard to competition among competition authorities, the aim is not to set out to prove that such competition produces good results, as it tends to do in most real markets. Previous work suggests that 'yardstick' competition among competition law institutions (as opposed to the usual Tieboutian competition among legislators analysed in most discussions of regulatory competition, where regulatees/voters can relocate or otherwise select laws) will indeed tend, in general, to be welfare-enhancing.[16] This is a sensible view; it seems quite improbable that adequate agency self-improvement

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desire to achieve prestige and gain influence in a global community of interest, and to respond to or anticipate competitive pressures generated by the activities of rival authorities engaged in a similar game. These motivations seem particularly relevant to the extent that competition authorities engaged in the global promotion of their own competition law regimes operate with relative independence from globalized industry and from other organs of government.

14 A side note here is that, by its own terms, a 'more economic approach' is not an 'exclusively economic approach' (which probably cannot be practiced even in the U.S., not least because subtextual content will always seep into competition law as conceived or as applied, as it can do in practically all areas of law). Giorgio Monti has commented on this, explaining that "there are good reasons for the Commission to insist in its public communications that its approach is only about using *more* economics, because contemporary EC competition law is governed by: a distributive concern about ensuring consumer welfare (which is very difficult to implement in certain instances); other non-economic values; a policy choice (at present at least) in favour of efficiency in the short term over long term dynamic efficiencies; and a wish to see the law enforced to protect the process of competition" (emphasis added; footnote omitted). Monti, 'EC Competition Law: The Dominance of Economic Analysis?', in Roger Zäch, Andreas Heinemann and Andreas Kellerhals, eds., *The Development of Competition Law: Global Perspectives* (Cheltenham: Edward Elgar, 2010) 3-28, at 12-13. Later in the text we return to consider further the last of Monti's themes, the protection of the "process of competition".

15 See Daniel Esty and Damien Geradin, 'Regulatory Co-Opetition', 3 *Journal of International Economic Law* 235-256 (2000); Damien Geradin and Joseph McCahery, 'Regulatory co-opetition: transcending the regulatory competition debate', in Jacinta Jordana and David Levi-Faur, eds., *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Cheltenham: Edward Elgar, 2004) 90-123, at 93 ("a flexible mix of competition and cooperation between governmental actors, as well as between governmental and non-governmental actors"). The regulatory co-opetition perspective does not *require* a mix of competition and cooperation. It is a broad framework that accommodates pure competition, pure cooperation, and combinations of the two.

16 See generally Kerber and Budzinski, cited above note 5, with references. This is not to say that competition law authorities never compete in ways comparable to interjurisdictional competition between legislators (e.g., to attract scarce capital). For example, as suggested above (in note 13), it may be that competitive pressures on legislators sometimes create derivative pressures on competition authorities; where this is so, a risk of regulatory degradation may arise. However, in general, the assumptions that must hold in order to draw a direct analogy with regulatory competition may be either unrealistic or too uncertain, or both. *Cf.* Eleanor Fox, 'Antitrust and Regulatory Federalism: Races Up, Down,

could take place in the absence of competitive forces. I take the desirability of such yardstick competition as a given and do no more than conduct an indicative survey of the modes in which competition authorities compete globally through their activities.

### *Structure of this essay*

The remaining text proceeds first by setting out how the structure of the 'market' is evolving and who the main players are (section 2). Then, more expansively it considers the processes by which competition in this sense manifests itself (section 3). In this context, reference is made first of all to the contrasting grand visions (hard law versus soft law, supranational versus *souverainiste,* etc.) that have been embraced and pushed by the most prominent rival jurisdictions as to how antitrust should be governed at the global level (section 3.1). The analysis then turns to international antitrust cooperation, another competitive field where different strategic formats are employed and where interest has intensified in the absence of formal multilateral antitrust governance (sections 3.2 and 3.3). A final focal point concerns 'competition in competition ideas' (section 3.4). This form of competition concerns alternative models with regard to what antitrust law should seek to achieve, and consequently how it should be shaped. A summary of the main points concludes the essay (section 4).

## 2. Which market players?

Inevitable reference is made above and below to the United States and the European Union. Historically, since most of the few then-existing competition law regimes worldwide tended to be weak in terms of political power and/or legal powers, and since they amounted in some cases to extensions of the economic policies of the dominant political party (which in turn was beholden to industry), the number of (generally) functional and influential regimes was arguably three: those in the US, the EEC and Germany. As Claus Ehlermann says in a recent book review,[17] DG IV faced two competitors, the most prominent initially being the Bundeskartellamt (BKA), followed later by the federal American agencies (counting the DOJ and FTC, which certainly compete *inter se*, as a single rival[18]). Others have similarly referred (albeit without reference to the BKA) to the 'duopolistic' market on which the Community and the U.S. operated as competitors.[19]

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and Sideways', 75 *New York University Law Review* 1781-1807 (2000), at 1789 ("[U]nlike the phenomenon of corporate charters, states or nations are not in direct competition with one another to have the most desirable competition law from the viewpoint of a firm that is a target of opportunity of that nation or state.").

17 Claus-Dieter Ehlermann, Review of Kiran Klaus Patel and Heike Schweitzer, eds., *The Historical Foundations of EU Competition Law* (Oxford: OUP, 2013), in 51 *Common Market Law Review* 326-328 (2014).

18 With an already quite chequered history behind it, the influence and stature of the FTC from the 1960s to the 1980s was at another low ebb, meaning that during this period DG IV's perceived rival would have been principally the DOJ. It may be added that U.S. federal antitrust enforcement also competes to some extent with enforcement at the state level. See, e.g., Richard Posner, 'Federalism and the Enforcement of Antitrust Laws by State Attorneys General', 2 *Georgetown Journal of Law and Public Policy* 5-15 (2004), at 8, 10, 11 and 13. The unstructured federalist governance in the US is contrasted with the EU's more juridified framework in Firat Cengiz, 'Management of Networks between the Competition Authorities in the EC and the US: Different Polities, Different Designs', 3 *European Competition Journal* 413-436 (2007). In further detail, see Firat Cengiz, *Antitrust Federalism in the EU and the US* (Abingdon: Routledge, 2012), chapter 4.

19 See William Kovacic, 'Dominance, duopoly and oligopoly: the United States and the development of global competition policy', *Global Competition Review* (December 2010), 39-42. Only a dozen years ago, after the European Commission had attracted the notice of U.S. newspapers with its handling of the *Boeing/McDonnell-Douglas* and *GE/Honeywell* merger cases, Fred McChesney made the rather anachronistic observation that the U.S. was "still the dominant antitrust enforcer" but that the European Community was "striving to create a niche for itself". McChesney, 'Talking 'Bout My Antitrust Generation: Competition For and in the Field of Competition Law', 52 *Emory Law Journal* 1401-1438 (2003), at 1436; McChesney, 'Talking 'Bout My Antitrust Generation', 27 *Regulation* 48-55 (2004), at 55 (same quoted language).

But today we live in a multipolar world, to use an already-stock phrase, and the transformation has occurred in a breathtakingly short time span. Against a background of (i) globalized markets, (ii) increased exposure to international trade including, occasionally, cartelized trade, (iii) sometimes, a perceived need to attract foreign investment to support local development (although FDI arguments are double-edged), and (iv) a process of reincarnation in Eastern Europe following the disintegration of the USSR, the antitrust idea has grown and reproduced,[20] with the adoption of over 60 new competition laws in the 1990s alone.[21] Today there are more than 120 jurisdictions outfitted with competition laws,[22] even if it is important to recognize that the implementation and (funding of) enforcement of such laws remains in many cases inadequate.[23] With this dispersion and diffusion of laws, the supply side of the market has become, as Kovacic says, oligopolistic.[24] China has risen – or pounced, and seems to have the better part of the antitrust world mesmerized.[25] In Japan, the JFTC in the last decade has started to shake free of its dog-that-didn't-bark past and to become a serious, though still idiosyncratic institution.[26] Competition authorities in, for example, Brazil and South Korea

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20 The term 'antitrust idea' is borrowed from Lawrence Sullivan and Wolfgang Fikentscher, 'On the Growth of the Antitrust Idea', 16 *Berkeley Journal of International Law* 197-233 (1998).

21 See, e.g., Imelda Maher and Anestis Papadopoulos, 'Competition agency networks around the world', in Ezrachi, ed., *Research Handbook,* cited above note 6, 60-88, at 87. David Lewis has observed that in many countries the adoption of a competition law came too late: "[W]hat is remarkable is how frequently liberal market policies were implemented without first introducing the competition rules necessary to underpin the effective functioning of the newly 'liberalized' markets. This latter omission has opened the door to monopolization and concomitant abuses, which have caused a great deal of the misery and inequality that often accompanied liberalization." Lewis, 'Embedding a Competition Culture: Holy Grail or Attainable Objective?', in Sokol, Cheng and Lianos, eds., *Competition Law and Development*, cited above note 3, 228-248, at 229. Two additional points seem nearly self-evident: first, it is not just competition rules but a constellation of policies, which by purpose or effect become a country's competition *policy*, that deserve attention; second, without a minimal development of functioning institutions, the simple adoption of competition rules will likely have only symbolic value, if any. See, e.g., William Kovacic, 'Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement', 77 *Chicago-Kent Law Review* 265-315 (2001); Michal Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries', in UNCTAD, *Competition, Competitiveness and Development: Lessons from Developing Countries* (New York and Geneva, 2004) 21-52.

22 See Hugh Hollman, William Kovacic and Andrew Robertson, 'Building global antitrust standards: the ICN's practicable approach', in Ezrachi, ed., *Research Handbook*, cited above note 6, 89-109, at 92.

23 For a cross-country statistical and econometric analysis of around 100 countries, of whom 80 had competition laws and 21 did not, see Abel Mateus, 'Competition and Development: What Competition Law Regime?', in Sokol, Cheng and Lianos, eds., *Competition Law and Development*, cited above note 3, 115-136, at 123-134. Sixty-seven of the 80 countries with a competition law had established a competition authority, but in only 30 countries did the authority appear to have resources suitable for its tasks; indeed, by a stricter measure only 12 did. Mateus concludes at page 24 that "governments around the world have not placed competition law enforcement among their highest priorities and have generally not endowed their [competition authorities] with sufficient resources for effective enforcement". (footnote omitted)

24 See Kovacic, 'Dominance, duopoly and oligopoly', cited above note 19.

25 Two recent edited volumes indicate the torrent of competition law activity in China during the first five years of its application. See Adrian Emch and David Stallibrass, eds., *China's Anti-Monopoly Law: The First Five Years* (Alphen aan den Rijn: Wolters Kluwer, 2013); Michael Faure and Xinzhu Zhang, eds., *The Chinese Anti-Monopoly Law: New Developments and Empirical Evidence* (Cheltenham: Edward Elgar, 2013).

26 For arguments as to why the enforcement of competition law in Japan has been experiencing a long-awaited renaissance, see Mel Marquis and Tadashi Shiraishi, 'Japanese Cartel Control in Transition', *CEU San Pablo Madrid working paper*, available at the SSRN website: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407825, 1-21 (also discussing the December 2013 amendments to the Antimonopoly Act); Simon Vande Walle, "Competition and competition law in Japan: between scepticism and embrace", in Michael Dowdle, John Gillespie and Imelda Maher, eds., *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge: Cambridge University Press, 2013) 123-143.

have become very active and punch above their weight.[27] Australia, another significant antitrust jurisdiction, has had remarkable regional and global influence, the pending 'root and branch' review notwithstanding;[28] and for the future, India could potentially become yet another important jurisdiction if the efforts of the Competition Commission can gain credibility and provoke cultural change. (This will likely take years to accomplish; several factors will have to conspire if the necessary environment is to be created.) Meanwhile, among the EU Member States it is no longer only the Bundeskartellamt that commands attention; intra-regional competition occurs routinely in the sister jurisdictions of the EU, paradoxically in parallel with an intensification of interaction and cooperation, a sort of grand 'concerted practice' established formally by, and informally in connection with, Regulation 1/2003.[29] (Here again one could refer to 'co-opetition' among European competition authorities – both horizontal and vertical, since the Commission is not free from co-opetitive pressures from 'below' despite its central role and ultimately superior powers.)

It therefore seems that, more than ever before, except perhaps in 1962 when the European Commission was endowed with substantial enforcement powers,[30] competition is breaking out in the global antitrust 'space'. The European Commission and the U.S. agencies remain the market leaders, certainly. As Sokol says they still "compete for dominance" in relation to "system design and analytical presumptions",[31] and inevitably they are used as the main examples in this paper. Nevertheless, there is a growing field of other significant players, and a general dynamism in the market for market governance.

## 3. Modes of competition

If the global antitrust field is now characterized by oligopolistic competition with two market leaders, a key question to be explored is: in what arenas, or through which mechanisms, does global competition take place? In this third section, we take a tour through these arenas and mechanisms, or

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27 On Brazil, see Marcelo Calliari and Denis Alves Guimarães, 'Brazil: Toward a Mature Cartel Enforcement Jurisdiction?', in Adrian Emch, Jose Regazzini and Vassily Rudomino, eds., *Competition Law in the BRICS Countries* (Alphen aan den Rijn: Wolters Kluwer, 2012), 13-25, at 13 ("Brazil has experienced a veritable revolution in antitrust enforcement in the last 10 years, particularly in relation to cartel enforcement"). On South Korea, see Jaemin Lee, 'Korea', in Mark Williams, ed., *The Political Economy of Competition Law in Asia* (Cheltenham: Edward Elgar, 2013) 47-87, at 47 (while the KFTC answers to the Korean Prime Minister, the enforcement of competition law based on a consumer welfare criterion but also encompassing fair trade rules "has become one of the major tasks of the Korean government and the KFTC has been the vehicle to implement this objective" – which it is doing with notable verve).

28 See, e.g., Gerber, *Global Competition*, cited above note 4, at 262 (attributing Australia's influence, like that of Canada, to the country's neutrality, independence, eclecticism, and "lack of power", i.e., the ability to relate to other countries without necessarily causing them to assume a defensive or suspicious posture, an advantage hegemons often do not have). For further discussion of Australia, see Deborah Healey, 'Australia', in Williams, ed., *The Political Economy of Competition Law in Asia*, cited previous footnote, 344-378, for example at 344 ("Australia has a strong competition law, well-developed competition policy and a significant ongoing commitment to markets and competition"). In early 2014 the Australian Government launched a far-reaching review of national competition laws and policy. See further the Competition Policy Review Issues Paper of 14 April 2014, http://competitionpolicyreview.gov.au/files/2014/04/Competition_Policy_Review_Issues_Paper.pdf. A final report is expected in 2015.

29 For a thumbnail statistical 'scoreboard' of how various Member States have performed in the post-2004 'modernization' era (taking numbers of envisaged final decisions notified to the Commission as an indicator), see Wouter Wils, 'Ten years of Regulation 1/2003 – A Retrospective', 4 *Journal of European Competition Law and Practice* 293-301, at 295-296 (2013) (with the 'top ten' on this admittedly decontextualized index being France, Germany, Italy, Spain, the Netherlands, Denmark, Greece, Romania, Slovenia and Hungary; the UK was 12th; Poland was 15th).

30 For the story surrounding the adoption of Regulation 17/62, see Lorenzo Federico Pace and Katja Seidel, 'The Drafting and the Role of Regulation 17: A Hard-Fought Compromise', in Patel and Schweitzer, eds., *The Historical Foundations of EU Competition Law*, cited above note 17, 54-88.

31 D. Daniel Sokol, 'International Antitrust Institutions', cited above note 10, at 211.

to cut syllables, these 'modes' of competition. The tour is not exhaustive, but a sense of the 'multi-market' nature of competition among antitrust enforcers seems to emerge from a consideration of the modes discussed below.

### *3.1. Competing visions of a global framework for antitrust law*

By the 1990s, one of the big questions being debated was: which vector of governance ought to apply to the enforcement of antitrust? Considering, for example, that (i) effective policing of internationally active cartels and efficient merger control often require significant coordination among agencies from various jurisdictions (the number of which was growing fast, as noted above), or that (ii) divergence of rules across jurisdictions tends to create externalities, or that (iii), inconsistent application within one and the same jurisdiction can result in discrimination and competitive distortions, was there a need for supranational institutions? Or was it better to preserve decentralized, sovereignty-based enforcement? Relatedly: was it desirable to have formal frameworks of cooperation, or was informal and spontaneous cooperation the better approach?

Sensing a window of opportunity sliding open, then-Competition Commissioner Leon Brittan in 1992 began to advocate the envelopment of certain aspects of antitrust enforcement within the structures of what was to become the World Trade Organization,[32] just months after twelve legal experts led by Wolfgang Fikentscher had begun to give the idea shape in a far-reaching Draft International Antitrust Code (DIAC), eventually published in July 1993.[33] For a while, Commissioner Brittan's initiative gained some momentum and was supported by the incoming Competition Commissioner in 1993, Karel van Miert (if not always by DG IV officials). In December 1996, competition law became a 'Singapore issue' (in retrospect a dubious honour), and in submissions to the WTO's Working Group on Trade and Competition Policy, the Commission took the (revised) position that multilateral WTO rules should be developed to ensure the prohibition of hard core cartels and to ensure that each WTO Member's competition law met common standards of non-discrimination, transparency and due process.[34]

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[32] See Leon Brittan, *Competition Policy and International Relations* (Brussels: Centre for European Policy Studies, 1992). Following a reallocation of portfolios within the Commission in 1993, Brittan assumed responsibility for trade matters and became the European Community's lead negotiator in the Uruguay Round.

[33] See Wolfgang Fikentscher, 'Competition Rules for Private Agents in the GATT/WTO System', 49 *Swiss Review of International Economic Relations (Aussenwirtschaft)* 281-325 (1994); Wolfgang Fikentscher, 'The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration - The Institutional and Jurisdictional Architecture', 72 *Chicago-Kent Law Review* 533-543 (1996); Daniel Gifford, 'The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry', 6 *Michigan Journal of Global Trade* 1-66 (1997); Eleanor Fox, 'Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade', 4 *Pacific Rim Law and Policy Journal* 1-36 (1995), at 29-36; Eleanor Fox, 'Toward World Antitrust and Market Access', 91 *American Journal of International Law* 1-25 (1997), at 15-16. The members of the Munich Group understood that political constraints likely precluded the full realization of their proposals but proceeded deliberately on a normative (*de lege ferenda*) basis to establish "the best that world antitrust law and institutions could be". Eleanor Fox, 'A Liberal Competition Code for the World Whose Time Has Not Yet Come', remarks delivered at the Global Competition Law Conference, Chicago, 28 October 2011 and reported in *Concurrences* N° 1-2013, at point 1. Fox and Lawrence Sullivan, also among the Munich Group participants, considered that the DIAC's substantive rules were too specific and failed to leave room for national diversity; they prepared an 'alternative DIAC' with rules they thought to be less intrusive. See generally ibid. (with points 16-52 reproducing and commenting in hindsight on the alternative Code).

[34] The drivers behind the EU's (or at that time the Community's) attempt to introduce a competition law discipline within the framework of the WTO included the natural affinity of European officials for supranational structures with binding rules and legal consequences such as the WTO, particularly given the analogy between WTO trade liberalization and the Community/Union's own internal fight against trade barriers. For the former point, see Matthew Baldwin, 'EU Trade Politics: Heaven or Hell?', 13 *Journal of European Public Policy* 526-542 (2006), at 533; on the latter, see Fox, 'Toward World Antitrust and Market Access', cited previous footnote, at 4-10; Anestis Papadopoulos, *The International Dimension of EU Competition Law and Policy* (Cambridge: Cambridge University Press, 2010), at 215-216. Papadopoulos adds other factors as well, such as the goal of promoting broad convergence through multilateralism, and

But it was not to be. In speeches beginning in 1996 and becoming more trenchant through 1999,[35] Joel Klein, the then-Assistant Attorney General for Antitrust (AAG), announced his scepticism at the proposal to extend the WTO's competences to competition law (i.e., to extend them beyond their current oblique application to antitrust issues[36]), and this set the stage for a key counter-move. In 1997, Klein enlisted an expert advisory committee – the International Competition Policy Advisory Committee (ICPAC) – to study and recommend to Klein and to the Attorney General ways of developing desirable forms of global antitrust governance. In a celebrated report of February 2000, ICPAC stated: "While recognizing that certain core WTO non-discrimination principles of national treatment and transparency would apply to the enforcement of domestic competition laws, the ICPAC Report specifically endorsed a more modest role for the WTO than the establishment of new competition rules subject to WTO dispute settlement."[37] At the same time, ICPAC unveiled its idea of, among other things, a new 'Global Competition Initiative' consisting of a voluntary network of competition enforcers (and non-governmental advisors but no trade officials) developing soft instruments and working toward cooperation, consultation and soft convergence on 'process' issues (but not initially on substantive rules[38]). This was of course the genesis of the International

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that of gaining greater market access abroad for European firms (ibid. at 216-217); and, less publicly, a desire to obviate the extraterritorial application of antitrust law by the U.S. agencies against European companies (217-218), and the possibility of using the Singapore issues as bargaining chips to delay agricultural reform (218-219).

35 See Joel Klein, 'A Note of Caution with Respect to a WTO Agenda on Competition Policy', speech before the Royal Institute of International Affairs, 18 November 1996, http://www.justice.gov/atr/public/speeches/0998.htm; Joel Klein, 'A Reality Check on Antitrust Rules in the World Trade Organization, And a Practical Way Forward on International Antitrust', in OECD, *Trade and Competition Policies: Exploring the Ways Forward* (Paris: OECD, 1999), 37-45.

36 A few scattershot rules in the WTO Agreements address certain matters that are also of concern to antitrust (see also note 48 below). For example, under Article VIII GATS, a WTO member is supposed to ensure that monopolies and exclusive service providers established in its jurisdiction operate consistently with the most favoured nation (MFN) principle, and that they do not abuse their monopoly position in a way that jeopardizes the value of any specific commitments the member has made. Article IX GATS requires a WTO member to consult upon request (but the obligation goes no further than this) if another member complains about other anticompetitive business practices causing harm to it. See Petros Mavroidis and Mark Wu, *The Law of the World Trade Organization (WTO): Documents, Cases and Materials*, 2nd edition (St. Paul: West Academic Publishing, 2013) 764. See also, e.g., Robert D. Anderson and Anna Caroline Müller, 'Competition Policy and the Multilateral Trading System: Three Propositions, an Observation and Some Questions for Reflection', in Philip Lowe and Mel Marquis, eds., *European Competition Law Annual 2012: Competition, Regulation and Public Policies* (Oxford: Hart Publishing, 2014); Eleanor Fox and Amadeo Arena, 'The International Institutions of Competition Law: The Systems' Norms', in Eleanor Fox and Michael Trebilcock, eds., *The Design of Competition Law Institutions* (Oxford: OUP, 2013) 444-487, at 452-460; Brendan Sweeney, *The Internationalisation of Competition Rules* (Abingdon: Routledge, 2010), at 330-352 and 375-377; Mitsuo Matsushita, 'Basic Principles of the WTO and the Role of Competition Policy', 3 *Washington University Global Studies Law Review* 363-386 (2004); Brendan Sweeney, 'Globalisation of Competition Law and Policy: Some Aspects of the Interface between Trade and Competition', 5 *Melbourne Journal of International Law* 375-433 (2004), at 401-413; Claus-Dieter Ehlermann and Lothar Ehring, 'WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body's Experience', 26 *Fordham International Law Journal* 1505-1561 (2003); Daniel Tarullo, 'Norms and Institutions in Global Competition Policy', 94 *American Journal of International Law* 478-504 (2000), at 489-494; Mitsuo Matsushita, 'Competition Law and Policy in the Context of the WTO System', 44 *Depaul Law Review* 1097-1118 (1995).

Few are under the delusion that the WTO agreements establish cohesive rules to ensure that WTO members punish, prevent or even discourage firms from engaging in most forms of anticompetitive behaviour. Outside of the telecommunications sector, where WTO members can opt in to the terms of a 'Reference Paper' and thereby undertake to police the conduct of major telecoms suppliers (see Eleanor Fox, 'WTO's First Antitrust Case - Mexican Telecom: A Sleeping Victory for Trade and Competition', 9 *Journal of International Economic Law* 271-292 (2006)), the limited experiments of WTO panels in solving antitrust problems have generally ended in disappointment. It could hardly be otherwise, given that, regardless of provisions such as the above-described Article VIII GATS, the WTO has no competence whatsoever to impose sanctions *directly* on private actors.

37 Merit Janow and James Rill, 'The Origins of the ICN', in Paul Lugard, ed., *The International Competition Network at Ten* (Cambridge and Antwerp: Intersentia, 2011) 21-38, at 30.

38 See chapter 6 of the Report, http://www.justice.gov/atr/icpac/chapter6.htm (PDF), for example at 282-285. Merit Janow and Jim Rill, two of the ICPAC members, explain that they had several meetings with U.S. officials, including AAG

Competition Network, which has been a powerful magnet, more so than many might have thought possible when it made its first imagined appearance in the ICPAC report.[39] Meanwhile, the idea of bringing some aspects of competition law firmly under the wing of trade law was rejected in the fall of 2003 in Cancún amidst Doha Round talks.[40] It has not been revived, and it is hard to imagine a change

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Klein, and reassured them that "the objective of the GCI was to provide a consultative forum focusing initially on process and it was not designed to force substantive harmonization". Merit and Rill, cited previous footnote, at 32. On the other hand, the ICN's later work has perhaps inevitably crept into substantive fields and has generated thinly veiled messages to the ICN membership about where their substantive rules and application thereof should be moving. See G. Monti, 'Unilateral conduct', cited above note 6, for example at 354 and 360.

[39] Obviously, the success of the ICN does not mean it is free of deficiencies. For example, as several observers have pointed out, the competition authorities of small and developing countries have sometimes found themselves sidelined in the ICN's activities and decision-making, while the bigger and more established players, quite plausibly acting on impulses emanating in part from global commercial interests, set the agenda or attempt to set it. See Michal Gal, 'Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions', 33 *Fordham International Law Journal* 1-56 (2009), at 46-54; Eleanor Fox and Amadeo Arena, 'The International Institutions of Competition Law', cited above note 36, at 483 (but also noting at 483 and 485 that the ICN is accountable to its members); Eleanor Fox, 'Linked-In: Antitrust and the Virtues of a Virtual Network', 43 *International Lawyer* 151-174 (2009), at 167-168 and 171; Eleanor Fox, 'Economic Development, Poverty and Antitrust: The Other Path', 13 *Southwestern Journal of Law and Trade In The Americas* 211-236 (2007), at 235; Kathryn McMahon, 'Competition law and developing economies: between "informed divergence" and international convergence', in Ariel Ezrachi, ed., *Research Handbook,* cited above note 6, 209-237, at 233-235; Pablo Iglesias-Rodríguez, 'The political economy of global competition law and policy: an institutional approach', this collection, 43-52, for example at 52-54 (portraying the development of the ICN as a progressive and, it is argued, deliberate attempt to protect the agenda and prerogatives of OECD countries despite the ICN's formally open and inclusive membership). Asymmetric influence in international organizations – not only because Great Powers and medium powers can overwhelm and thus tend to inhibit any dissent but also simply because participation has high relative costs for small countries – is hardly a problem unique to the ICN or competition law. Furthermore, Sokol points out that some minimal threshold of asymmetric power may be a condition of the ICN's success, as it ensures the necessary investment on the part of the U.S. and the EU. See D. Daniel Sokol, 'Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age', 4 *Berkeley Business Law Journal* 37-122 (2007), at 107. In that sense, a symbiotic relationship, of sorts, may develop between the powerful and less powerful members. On the other hand, given the ICN's voluntary nature, the possibility of a widespread feeling of lack of 'ownership' among its members bears risks, as reflected in the discourse of the ICN's leadership. See, e.g., Andreas Mundt, 'The ICN's 12th Birthday – What's New?', *Competition Policy International* (October 2013), at 3 ("focus and *inclusiveness* will remain indispensable elements of our path forward") (emphasis added).

For the likely reasons why the ICN has been rapidly accepted by the global community of antitrust enforcers (save the authorities established in China, which I surmise may be seeking (i) to consolidate their standing, while making the political point that China can resist international norms if it so wishes, leaving themselves the option (ii) to join the ICN later in a position of increased strength and prestige, and thus possibly greater 'bargaining power', even if entry is formally free with nothing to bargain about), see Sokol, 'Monopolists Without Borders', cited above, at 105-116 and 121-122; Sokol, 'International Antitrust Institutions', cited above note 10. For further reflections on the ICN, see, among others, Hugh Hollman and William Kovacic, 'The ICN: Its Past, Current and Future Role', in Lugard, ed., *The International Competition Network at Ten,* cited above note 37, 51-91; Hollman, Kovacic and Robertson, 'Building global antitrust standards', cited above note 22; Oliver Budzinski, *Competence Allocation*, cited above note 5, at 142-147; Yane Svetiev, 'The Limits of Informal International Law: Enforcement, Norm-generation, and Learning in the ICN', in Joost Pauwelyn, Ramses Wessel and Jan Wouters, eds., *Informal International Lawmaking* (Oxford: OUP, 2013) 271-294; and the assessments of Marie-Laure Djelic in papers such as 'International Competition Network', in Thomas Hale and David Held, eds., *Handbook of Transnational Governance: Institutions and Innovations* (Cambridge: Polity Press, 2011) 80-87 or Marie-Laure Djelic and Thibaut Kleiner, 'The international competition network: Moving towards transnational governance', in Marie-Laure Djelic and Kerstin Sahlin-Andersson, eds., *Transnational Governance: Institutional Dynamics of Regulation* (Cambridge: Cambridge University Press, 2006) 287-307. See also Marie-Laure Djelic and Sigrid Quack, 'Overcoming Path Dependency: Path Generation in Open Systems', 36 *Theory and Society* 161-186 (2007), at 177-179 (discussing the ICN).

[40] Among many others, see Josef Drexl, 'International Competition Policy after Cancún: Placing a Singapore Issue on the WTO Development Agenda', 27 *World Competition* 419-457 (2004); Taimoon Stewart, 'The Fate of Competition Policy in Cancun: Politics or Substance?', 31 *Legal Issues of Economic Integration* 7-11 (2004); Andrew Guzman, 'Global Governance and the WTO', 45 *Harvard International Law Journal* 303-352 (2004); Aditya Bhattacharjea, 'The Case of a Multilateral Agreement on Competition Policy: A Developing Country Perspective', 9 *Journal of International Economic*

in the wind in the coming years. A multilateral trade deal agreed in Bali in December 2013 is of little moment. That agreement may come as a relief from a trade perspective, having spared multilateralism in trade from an ignominious demise; but on the whole it is unambitious and does not address cross-border competition law issues.[41] There is simply no political momentum at present for the development of a WTO-level competition law initiative of a scope comparable to those contemplated in the discussions from 1996 to 2003.[42]

With the WTO relegated to the background as far as competition issues are concerned, the ICN is riding a wave of popularity and good will (the term 'bubble' is best avoided). It has been described as not just successful but *dramatically* successful and it continues to perform important roles.[43] Unavoidably, the organization puts further strain on the resources of smaller authorities.[44] But it has clearly not been made redundant by (nor has it made redundant) the host of criss-crossing policy networks engaged in some of the same activities, like those organized under the aegis of the OECD or UNCTAD,[45] or those meeting in newer fora such as, e.g., the African Competition Forum.[46] As time

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*Law* 293-324 (2006); Anu Bradford, 'International Antitrust Negotiations and the False Hope of the WTO', 48 *Harvard International Law Journal* 383-439 (2007); Fox, 'Linked-In', cited previous footnote, at 154-157; Papadopoulos, *International Dimension*, cited above note 34, at 225-242; Alberto Heimler, 'Competition Policy as a Tool of EU Foreign Policy: Multilateralism, Bilateralism and Soft Convergence', in Federiga Bindi, ed., *The Foreign Policy of the European Union : Assessing Europe's Role in the World* (Washington, D.C.: Brookings Institution Press, 2010) 82-98; Gerber, *Global Competition*, cited above note 4, at 101-107; Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (Oxford: 2011, Hart Publishing) 1246-1247.

41 See Bridges Daily Update # 5 (7 December 2013), http://ictsd.org/i/wto/wto-mc9-bali-2013/bridges-daily-updates-bali-2013/180991/.

42 The ultimate effects of future preferential trade agreements such as the Transatlantic Trade and Investment Partnership are difficult to predict; most likely, such PTAs bode ill for multilateralism in general (though it is not *entirely* inconceivable that they could prompt key developing countries to engage more seriously with multilateral initiatives). This is not to suggest that there is no pending discussion of a return to the WTO as a forum for developing some kind of system to deal with issues of international competition law. For example, it is argued that a functioning competitive order on a worldwide basis is a global public good and that, given the limits of other global solutions (soft law, soft convergence and extraterritorial application of domestic laws), the WTO seems to be a logical forum in which to hammer out such competition law disciplines. See Lúcio Tomé Féteira, 'Right to Development and International Transfer of Technology: a Competition Law Perspective', in Mario Viola de Azevedo Cunha, Norberto Nuno Gomes de Andrade, Lucas Lixinski and Lúcio Tomé Féteira, eds., *New Technologies and Human Rights: Challenges to Regulation* (Farnham: Ashgate, 2013) 91-120. In the latter essay, Tomé Féteira carries forward Josef Drexl's proposal of a new perspective in which the protection of competition in its global dimension assumes a "quasi-constitutional character" in the WTO system. See Drexl, 'International Competition Policy after Cancún', cited above note 40, at 456. As discussed below (see note 48), and in light of the political climate alluded to here in the main text, the WTO may conceivably prove relevant for initiatives drawn more narrowly than the proposals that were on the table in the run-up to Cancún.

43 Fox, 'Linked-In', cited above note 39, at 173. Fox describes the ICN as a success when judged by its own organizational mission and as a success relative to other international organizations. See ibid. at 165-166. In another essay she emphasizes the subsidiarity principle as a key factor behind this success. See Eleanor Fox, 'Antitrust without Borders: From Roots to Codes to Networks', in Guzman, ed., *Cooperation, Comity, and Competition Policy*, cited above, 265-285. Her references to subsidiarity are not accidental, as subsidiarity can operate not only as a decentralizing force but as a justification for centralized solutions, depending on the particular problems requiring a response and the distribution of capacities within a given system (in this case the international system of competition law jurisdiction).

44 Agencies that belong to both the ICN and other competition policy networks participate to varying degrees in these organizations if they have, despite tight budgets, the money and personnel to do so. Although financial aid is sometimes generated by ICN fundraising activities, smaller agencies are nonetheless typically faced with resource dilemmas and must sometimes choose between investing in one forum or another. On the phenomenon of 'overlapping networks', see Maher and Papadopoulos, 'Competition agency networks around the world', cited above note 21, at 84-86. See also Dan Sjöblom and Monica Widegren, 'ICN Membership – Opportunities and Challenges for a Competition Authority', in Lugard, ed., *The International Competition Network at Ten*, cited above note 37, at point 4 (discussing the resource dilemmas of the Swedish authority, as it is granted no additional funds or personnel by the government for its ICN work; and as the attention the authority gives to the ICN must compete with its other activities).

45 As the theme of this essay is competition, one might note that in some senses the ICN, as a new entrant (or, with respect to some activities, as a potential entrant), has put a bit of pressure on the OECD and on UNCTAD to continue to innovate

goes on, however, the limitations and latent tensions of the ICN[47] may lead to a collective and parallel search for solutions to problems that cannot be addressed in an ICN context, in particular due to some of its defining features – no *de jure* power whatsoever, and a fundamentally modest albeit elastic mandate. It should not be ruled out that, despite the retreat from the WTO at Cancún and the prevailing wisdom that competition is to be kept out of that more formal environment, a cautious new impetus might arise in the coming years, leading to the launch of certain issue-specific initiatives that could generate (possibly plurilateral) WTO rules in a circumscribed field.[48] In such a scenario, and

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and supply high quality services. *Cf.* Eleanor Fox, 'From Roots to Codes to Networks', cited above note 43, 265-285, at 273; Fox, 'Linked-In', cited above note 39, at 166, footnote 46. On the other hand, Jenny stresses the complementarities of the ICN and the OECD Competition Committee, and explains that: "The overlap between the two institutions is minimal (some may be found in the area of technical assistance) even when the two organizations take up issues that seem similar." Frederic Jenny, 'The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities', in Lugard, ed., *The International Competition Network at Ten*, cited above note 37, 93-104, at 104.

46 The inaugural meeting of the African Competition Forum convened in Nairobi on 3 March 2011. Delegates from 19 African countries participated, together with representatives of several international organizations and other guests. The introductory speech on that occasion by Uhuru Kenyatta, at that time Kenya's Minister of Finance (and today a highly controversial figure), is posted on YouTube at http://www.youtube.com/watch?v=UX7LtqGA__w (linking competition policy in Africa to allocative efficiency, consumer welfare and the de-concentration of economic power to promote an economic equivalent of political democracy). As Maher and Papadopoulos explain, the African Competition Forum is "expected to be the basis for the development of agency capacity in the region and to promote awareness and appreciation of competition principles among government officials and other market participants. It will facilitate interactions between African competition agencies, enabling them to share experiences, expertise and knowledge. The scheme may, in the long term, lead to the harmonisation of competition laws of the participating countries." Maher and Papadopoulos, 'Competition agency networks around the world', cited above note 21, at 83-84. The activities of the Forum are described, and an informative first newsletter of July 2013 is available, on a dedicated website: see http://www.africancompetitionforum.org/.

47 Given the inescapable heterogeneity among the ICN's members, it has been suggested at least with regard to some areas of the law that working toward 'superior practices', and the implicit expectation that ICN members can and will conform as far as possible to them, is an inappropriate basis for the ICN system. On this view, it would be better if the goal pursued in the ICN were simply for its members to (better) understand each other's laws. See G. Monti, 'Universal conduct', cited above note 6. If this more modest aim were adopted, the term 'informed divergence' would acquire its more natural meaning, as opposed to its current significance (see above notes 9-10 and accompanying text) as a kind of pressure valve that moderates the pace of and to some extent 'legitimates' a broader convergence process. On overcoming obstacles of selectivity and bias in communication between different social groups, such as lawyers and economists but more generally between actors who disagree, see Akihiko Nakagawa, 'Toward a Dialogistic Competition Policy', 20 *Hokkaido Journal of New Global Law and Policy* 171-197 (2013).

48 To cite just one example, there are the bitter experiences of developing countries that have been exploited by export cartels. The term 'export cartels' in this context excludes exporters colluding on the direct or delegated instructions of a government, since the latter may constitute a measure subject to challenge under Article XI:1 GATT, as experience in the raw materials sector shows; the reference is thus limited to export cartels falling outside of that provision. Many scholars have written about the virtues and vices of export cartels, including recently Ariel Ezrachi, 'Domestic and Cross-Border Transfer of Wealth', in Sokol, Cheng and Lianos, eds., *Competition Law and Development*, cited above note 3, 199-211. Not all export cartels are pernicious; but some have been compared to 'hazardous waste' (borrowing Fox's term), and here there is a troubling international regulatory gap. Externalities imposed on developing countries – in particular, those lacking the capacity for credible extraterritorial law enforcement – can result in exorbitant wealth transfers in favour of foreign price-fixers, transfers likely exacerbated in the age of severe penalties for cartelists that get caught in developed jurisdictions (since credible sanctions tend to encourage 'trade diversion' in illegal conduct where there is sufficient capital mobility). Certain WTO provisions, including for example Article 11.1(b) of the Agreement on Subsidies and Countervailing Measures, could conceivably be interpreted in a manner that disciplines export cartels in a few countries, including large ones. See Daniel D. Sokol, 'What Do We Really Know About Export Cartels and What is the Appropriate Solution?', 4 *Journal of Competition Law and Economics* 967-982 (2008), at 977-978. Article 11:3 of the Agreement on Safeguards could potentially be invoked to challenge *explicit* exemptions for export cartels, such as those provided for in U.S. law. But it is almost inconceivable that Article 11:3 could be applied against the more common form of implicit exemption, such as one finds under EU law – which arise *de facto* from the Westphalian tradition that states do not normally regulate (mis)conduct with purely foreign consequences (i.e., where the 'effects test' fails). *Cf.* Roland Weinrauch, *Competition Law in the WTO: The Rationale for a Framework Agreement* (Antwerp: Intersentia, 2004) 147 ("For example, [the question of] whether the mere non-enforcement of competition law against import cartels falls within

depending on the enterprise taken up, it may be expected that certain industrial interests in the developed world would mobilize against and seek to sabotage, or seek at least to persuade governments to water down, any such rules.[49] A strong effort should therefore be devoted to stimulating a cultural change, reinforced if necessary by *quid pro quos* to alter the incentives of developed countries.[50]

Further digressions about the ICN's nature, work and capabilities could be added. But I leave these items to other contributions in this collection and return to the central theme. In this regard it may be said that one perceives, in the episode described above regarding the emergence of the ICN,[51] a contest between two models, each championed by a different jurisdiction. They were not just two models that happened to 'be there'. The search for and development of a new global initiative was really a search for an *American* global initiative (all sovereignty, all the time), and a strategic response to Europe's

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the scope of [Article 11:3] is highly doubtful."). And if implicit exemptions or non-enforcement cannot be challenged under Article 11:3, then even a successful challenge of an explicit exemption does not really remove the possibility for the defendant WTO member to maintain an exemption. Furthermore, since non-violation complaints at the WTO constitute a notoriously weak discipline, it must be concluded that the current ensemble of WTO provisions is inadequate to address the export cartel problem. Particularly in the developing world – i.e., where many countries opposed and derailed a WTO-level competition law regime – there have been calls for an issue-specific WTO-level solution involving new provisions, or for the development of a joint solution by the WTO and UNCTAD. According to one approach, a high-level commission could be appointed to study and define the problem and focus objectives, following which it would prepare an initial draft of a multilateral agreement for further consideration. (See CUTS, Contribution to the UNCTAD Roundtable on Cross-border anticompetitive practices: The challenges for developing countries and economies in transition (2012), http://www.cuts-international.org/pdf/CUTS_contribution_at_UNCTAD-IGE_2012.pdf, at 6.) Sokol has advanced a more defined approach, suggesting an enforceable WTO obligation of notification and transparency, with clearance procedures for "legitimate export joint ventures" in home jurisdictions that would beneficially raise the cost of cross-border predatory collusion. It appears that other pure export cartels (it is not entirely clear which ones) would be bereft of any antitrust immunity. See Sokol, 'What Do We Really Know?', cited above, at 980-982. Solutions such as this seem fit for further consideration. However, not everyone accepts that a global solution is necessary to combat export cartels. See Crane, *The Institutional Structure of Antitrust Enforcement*, cited above note 11, at 231 (taking the view – questionable, to my mind – that extraterritoriality and bilateral trade agreements can adequately address the problem).

For further examples of leftover issues from the years of trade-and-competition discussions that seem, in the main, insoluble in the framework of the ICN, see, e.g., Fox, 'Linked-In', cited above note 39, at 168 and 173. In addition to export cartels, Fox refers to the adverse effects of antidumping used as a trade remedy, market access impediments, the use of state authority to immunize private conduct from antitrust attack, and more generally, issues at the intersection between competition law and trade law (whereas the ICN is supposed to be all antitrust all the time, a formula meant to exclude trade matters). See also Fox, 'From Roots to Codes to Networks', cited above note 43; Fox, Fingleton and Mitchell, 'The past and future of international antitrust', cited above note 9; Brendan Sweeney, 'Global Competition: Searching for a Rational Basis for Global Competition Rules', 30 *Sydney Law Review* 209-244 (2008), for example at 219-226 and 243-244, with references; Brendan Sweeney, 'International Competition Law and Policy: A Work in Progress', 10 *Melbourne Journal of International Law* 58-69 (2009), at 61-62 and 69; Brendan Sweeney, *The Internationalisation of Competition Rules*, cited above note 36, for example at 399-401 and chapter 9 generally.

49 *Cf*. Bradford, 'Preference for Nonbinding Regimes', cited above, at 327 ("The United States would also likely oppose rules banning export cartels […]"). Sokol recalls the strident objections of the U.S Department of Commerce (reflecting those of certain private interests) to any attempt to curtail the Webb-Pomerene Act during the Antitrust Modernization Commission hearings. See Sokol, 'What Do We Really Know?', cited above note 48, at 975, footnote 42.

50 See Sokol, 'What Do We Really Know?', cited above note 48, at 981 ("To provide an incentive for [exporting countries] to agree to the WTO solution, developing world countries would need to provide increased market access in other areas."); Bernard Hoekman and Kamal Saggi, 'Tariff Bindings and Bilateral Cooperation on Export Cartels', 83 *Journal of Development Economics* 141-156 (2007) (showing that *ceteris paribus* a developing country could offer greater market access through tariff reductions but recognizing that tariff bindings required by trade agreements already in force constrain this possibility, effectively raising the 'price' of the pecuniary or non-pecuniary *quid pro quo*).

51 The above version of events is quite abbreviated. For a fuller discussion of the rise of the ICN, see generally Lugard, ed., *The International Competition Network at Ten*, cited above note 37; and *cf*. Iglesias-Rodríguez, 'The political economy of global competition law and policy', cited above note 37, at 48-49.

attempt to promote supranationalist governance in international antitrust.[52] The choice of the ICN as the leading framework for global cooperation in this field has been quite a coup for the U.S. DOJ, even though DG Comp itself was ambivalent about DG Trade's WTO gambit,[53] and even though all the EU Competition Commissioners from Mario Monti and Neelie Kroes to Joaquín Almunia have fully supported the ICN's activities. At the same time, the ICN's broad appeal has furnished scholars focusing on Slaughter's 'new world order' and related ideas with a useful case study of transnational network governance and communities of interest.[54]

The question of whose preferred model prevailed is however of little importance for our purposes. What seems significant is the emergence in the 1990s of two competing and possibly incompatible visions of global governance,[55] arguably reflecting the anxiety of a former hegemon about its influence and leadership role being diverted to its chief rival. One might perhaps say something similar about the Commission's full self-immersion in the ICN: to ignore it would have assured American dominance in an emerging, high-stakes sector.

### *3.2. Bilateral relationships*

In the field of antitrust, and to oversimplify a bit,[56] bilateral relationships are established in two main ways: (i) by concluding a bilateral cooperation agreement ('BCA'), nearly always with non-binding terms and no dispute resolution mechanism (amounting *de facto* to 'soft' commitments from the perspective of international law[57]), or its cousin, a Memorandum of Understanding ('MOU', signed at the agency level),[58] or (ii) by concluding a trade agreement with competition provisions ('TACP'),

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52 See Oliver Budzinski, *Competence Allocation,* cited above note 5, at 143. *Cf.* also Gerber, *Global Competition*, cited above note 4, at 111 and 115 (ICN launch "had the strategic effect of further undermining support for a multilateral competition law project"; some interpreted ICPAC's hearings in Washington, D.C. "as a means of reasserting [U.S.] control of the agenda of transnational competition law development").

53 See Anestis Papadopoulos, *The International Dimension of EU Competition Law and Policy* (Cambridge: Cambridge University Press, 2010), at 243-245. Furthermore, DG Trade's support for the WTO option sat awkwardly next to the opposition of significant business interests, as expressed by UNICE in position papers. See ibid., at 214-215.

54 See Pierre-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits', 34 *Yale Journal of International Law* 113-172 (2009); Svetiev, 'Enforcement, Norm-generation and Learning', cited above note 39. For an early exposition of network governance as a response to the 'globalization paradox', see Anne-Marie Slaughter, 'The Real New World Order', 76 *Foreign Affairs* 183-197 (September-October 1997).

55 Informal networks can undoubtedly operate side by side with formal institutions and binding multilateral rules. When a WTO framework agreement on competition law issues was being discussed, the European Commission considered that the ICN could function as a complement to what would have been the relevant WTO disciplines. See Fiona Marshall, *Competition Regulation and Policy at the World Trade Organisation* (Nottingham: Cameron May Ltd, 2010), at 147. Nevertheless, one may argue that reliance on the ICN as a central competition agency network and reliance on the WTO as a dispute resolution forum spring from quite different philosophies about antitrust sovereignty, and it may be argued furthermore that the full expression of the ICN concept as we know it and the formal incursion of the WTO into the antitrust field would at the very least pose some mutual tension. Hypothetically speaking, if a broadly framed WTO agreement on competition law were adopted, the ICN's role and functioning would likely have to be redefined to some extent.

56 For a more taxonomical discussion, see Valerie Desmedts, 'International Competition Law Enforcement: Different Means, One Goal?', 8(3) *Competition Law Review* 223-253 (2012), at 237-249.

57 See Mitsuo Matsushita, 'International Cooperation in the Enforcement of Competition Policy', 1 *Washington University Global Studies Law Review* 463-475 (2002), at 468-469.

58 'First generation' BCAs have been concluded on the basis of somewhat diverse legal authority depending on the jurisdiction concerned. For example, in the U.S., such agreements have taken the form of executive agreements; therefore, in the absence of ratification by the U.S. Senate they do not constitute international treaties. By contrast, so far as the European Commission is concerned and with respect to agreements reached with third countries (but not agreements of lesser stature, i.e., so-called 'administrative arrangements'), jurisprudence of the European Court of Justice requires the intervention of the EU legislator, which first authorizes the Commission to negotiate the terms and later 'concludes' the agreement, thereby making it definitively valid under the Treaty on the Functioning of the European

whose terms create international obligations but whose competition chapters may be either binding or, not uncommonly, merely discretionary.[59] In addition, with or without such agreements in place, agencies frequently engage in regular or *ad hoc* informal cooperation within the bounds of their legal capacities.[60] Informal cooperation of this kind may follow the general contours of more formal agreements while avoiding their less expedient provisions, and it is also often inspired by or based on the Recommendation of the OECD Council on international enforcement cooperation[61] or based on other instruments such as Best Practices documents.[62] The observed popularity of 'soft' commitments worldwide in the cooperative competition-related frameworks just described is the flipside of the story recounted above in relation to the failed WTO framework agreement, which would have entailed binding obligations and dispute settlement procedures. Particularly in an environment of uncertainty, the softer the obligation, the lower the risk of entering into a cooperative arrangement (and of unintended consequences and costly exit, if any); and possibly the greater the capacity of the parties to bypass lawmaking formalities that might end in deadlock (which also implies a correspondingly weaker base of legitimacy for the softer solutions).[63]

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Union. The 1991 cooperation agreement with the United States thus had to be approved by a joint decision of the Council and the Commission in 1995. See Case C-327/91, *France v Commission* [1994] ECR I-3641, para. 43 (Commission lacked competence to conclude agreements with third countries). That does not mean, of course, that the mutual promises in the U.S./EU agreement are binding; to the contrary, the provisions are designed deliberately to avoid non-discretionary obligations and any kind of binding dispute settlement. As for the enhanced commitments undertaken in 'second generation' BCAs (see below notes 74-77 and accompanying text), such an agreement must be authorized *ex ante* by legislation or *ex post* by ratification, or both.

59 For example, in the free trade agreements concluded by the U.S. with other countries (mostly on a bilateral basis with the exception of NAFTA and, looking ahead, the Trans-Pacific Partnership), there are generally enforcement cooperation provisions but these are 'soft', non-binding terms within a broader 'hard law' instrument. By contrast, some competition-related terms – in particular, those relating to state-owned/controlled enterprises or privileged monopolies – embody firmer commitments, and dispute settlement may be invoked by either contracting party. For more detail and nuance regarding forms of bilateral cooperation, see generally Guzman, *Cooperation, Comity and Competition Policy*, cited above note 10; Papadopoulos, *International Dimension*, cited above note 34, at 52-92. For a detailed examination of the 'soft' competition chapters in preferential trade agreements with a focus on Latin America, see D. Daniel Sokol, 'Order without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements', 83 *University of Chicago-Kent Law Review* 231-292 (2008) (underlining the contrast between the non-enforceable competition provisions and the harder commitments covering other areas pertaining to trade policy in the same agreements).

60 The most important legal limitation concerns the exchange of confidential information, a delicate matter both legally and politically, not least because powerful business interests tend actively to oppose the development of lawful mechanisms by which such information may be shared. In the absence of authorized sharing, agencies can however exchange not just public information but also 'agency confidential' information, i.e., information generated internally regarding issues such as market definition, theories of harm or corrective remedies, or information, prior to any public announcement, concerning the fact that an agency is investigating a particular firm or group of firms. On the exchange of agency confidential information, see, e.g., Thomas Deisenhofer, 'International Cooperation in Merger Cases – An EU Practitioner's Perspective', in Philip Lowe and Mel Marquis, eds., *European Competition Law Annual 2010: Merger Control in European and Global Perspective* (Oxford: Hart Publishing, 2013) 227-242.

61 OECD Council Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade (1967; last revised 1995), http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=192&InstrumentPID=188&Lang=en&Book=False. On the Recommendation, see, e.g., Bruno Zanettin, *Cooperation between Antitrust Authorities at the International Level* (Oxford: Hart Publishing, 2002), at 56.

62 See, e.g., Revised Best Practices for Coordinating Merger Reviews (2011), adopted by the European Commission and by the U.S. agencies, http://ec.europa.eu/competition/mergers/legislation/international_cooperation.html.

63 *Cf.* W. Michael Reisman, Remarks (panel on 'A Hard Look at Soft Law'), 82 *American Society of International Law Proceedings* 373-377 (1991), at 377. See also, among others, Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance', 54(3) *International Organization* 421-456 (2000), at 423 and 434-450 (discussing how soft law permits parties to calibrate lower levels of obligation, precision and/or delegation, and giving examples of different permutations); Sokol, 'International Antitrust Institutions', cited above note 10, at 196-197.

### 3.2.1. Bilateral cooperation agreements

With regard to the first category, after the U.S. had already been party to BCAs with Canada, Germany and Australia since 1959, 1976 and 1982 respectively, the U.S. and the European Community in 1991 concluded a well-known BCA which included *inter alia* positive comity provisions[64] and which has served as a template for many of the BCAs that followed in the next two decades.[65] The EU has subsequently concluded similar agreements with Canada in 1999, Japan in 2003 and South Korea in 2009.[66] The U.S., which has a strong proclivity for bilateral agreements as a matter of foreign policy,[67] struck agreements with Canada in 1995, then with Brazil, Israel and Japan in 1999 (together with a second-generation BCA with Australia the same year – see below), Mexico in 2000, and with Chile's competition authority in 2011. These agreements apply in addition to those with Germany and Australia, which remain in place.[68]

Several authorities have suggested that the various 'first generation' BCAs have been of limited value, for example because they don't provide for the exchange of confidential information absent the consent of relevant parties, or because positive comity has never gained any traction in practice.[69] Without denying the limitations of first generation agreements, one may also posit that the negotiation and use of such agreements has created real value for the jurisdictions concerned to the extent that it has enabled agencies to build a communicative infrastructure and to intensify personal contacts, develop trust and exchange expertise.[70] A related point is that an implicit and less visible benefit,

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64 The U.S. also entered into specific positive comity agreements with the EU in 1998 and with Canada in 2004. The provisions of these agreements have never been formally employed, although some informal positive comity requests have been made, to little effect.

65 In brief, the 1991 agreement provided for mutual notification of relevant cases; coordinated investigations (with the aid, in particular in cases involving merger control or in cartel cases where a leniency application has been made, of waivers of confidentiality by key parties to permit the sharing of sensitive information); continual dialogue on a wide range of matters; traditional comity (basically, abstention out of respect for the important interests of a foreign jurisdiction); and positive comity (i.e., the possibility to request a foreign jurisdiction to act against conduct harming the important interests of the requesting jurisdiction).

66 DG Competition also has MOUs with the competition authorities of Brazil (2009), Russia (2011), China (2012) and India (2013). An earlier MOU with South Korea (2004) foresaw and then ripened into a more formal BCA. A similar upgrade could conceivably take place with the Chinese authorities in 2015 when the MOU comes up for review.

67 See, e.g., Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Ann-Marie Slaughter and Duncan Snidal, 'The Concept of Legalization', 54(3) *International Organization* 401-419 (2000), at 401.

68 Like the EU, the U.S. agencies have also concluded a few MOUs with competition authorities of other countries, specifically those of Russia (1999), China (2011) and India (2012).

69 See, e.g., the ICPAC Report, cited above note 38, at Annex 1-C, xiii-xiv ("[I]n many respects, at present the bilateral agreements still remain limited instruments. Because they do not alter existing law or otherwise expand the powers of antitrust authorities, they do not expand the possibilities for the sharing of confidential or privileged information without the provider's consent […]. They may not provide a mechanism for resolving disputes that continue after the end of consultations. Further, the agreements do not implicate substantive law nor seek to reach any formal procedural harmonization between the signatory jurisdictions."). For discussion of the non-impact of positive comity, see, e.g., Philip Marsden, 'The Curious Incident of Positive Comity – The Dog that Didn't Bark (And the Trade Dogs that Just Might Bite)', in Guzman, ed., *Cooperation, Comity and Competition Policy*, cited above note 10.

70 In the workshop on which this contribution is based, I suggested that some first-generation cooperation agreements (including MOUs) might in this sense be regarded as 'seeding' agreements potentially preparing the ground for bolder steps. A similar perspective is put forward by Brendan Sweeney, who refers more specifically to positive comity: "Perhaps the greatest benefit of positive comity will be its intangible benefits, those that arise from the fact that states have agreed to communicate their competition concerns to one another. If this dialogue produces greater understanding, greater levels of trust and confidence and perhaps greater convergence, it will have served a useful purpose." Sweeney, *Internationalisation of Competition Rules*, cited above note 36, at 297. See also Randolph Tritell and Elizabeth Kraus, 'The Federal Trade Commission's International Antitrust Program', presented at the ABA's 61st Annual Antitrust Law Spring Meeting in Washington, 11 April 2013, at 4 ("In addition to providing a legal framework for cooperation, the agreements have been catalysts to facilitate closer working relationships."). Of course, two agencies can also develop trust and coordinated communication or working methods in the absence of any agreement. From this point of view, a

which was also an important driver of the earliest agreements but which today appears to be taken for granted, may be the avoidance or management of tension due to the actual or potential extraterritorial enforcement of competition laws.[71]

While it remains to be seen whether positive comity will ever come of age (which may depend on the jurisdiction pairs concerned), the obstacles to cooperation resulting from the confidentiality obligations imposed on competition agencies are in some limited measure addressed by other instruments, at least as concerns certain jurisdictions. In the first place, a country that has criminalized cartel conduct, e.g., the U.S., can employ the procedures provided for in (non-antitrust-specific) mutual legal assistance treaties, or 'MLATs', to obtain confidential information (and to cooperate in other relevant ways, such as by collecting evidence; evidence is gathered by police agents as opposed to competition authorities) if it has concluded an MLAT with another country, e.g., Canada.[72] However, a legal gap may remain in scenarios involving two countries X and Y where X seeks the transmission of confidential information by authorities in country Y but either Y has not criminalized cartels or it has done so but there is no MLAT or equivalent agreement between the two countries.[73] The constraints that limit the exchange of confidential information in the absence of an MLAT – which describes the vast majority of country combinations X and Y – have become increasingly acute, as anticompetitive behaviour with multi-jurisdictional effects are nowadays a pervasive or indeed an endemic characteristic of the globalized economy.

The response of certain jurisdictions to confidentiality constraints and to the frequent need for access to evidence located abroad has been to turn to 'second generation' agreements, which embody enhanced commitments in hard law instruments (i.e., treaties agreed on the basis of enabling acts) and which thus take the original BCAs a significant step further. These agreements are heterogeneous but among their key common elements are provisions authorizing the exchange of confidential information between competition authorities without need for any waiver from the party or parties concerned – generally subject to restrictions intended to preserve the rights of defence, to limit disclosure of business secrets, personal data and leniency materials, and to ensure that the use of evidence in the requesting jurisdiction does not exceed the powers of the transmitting agency. For example, in the second-generation BCA signed in May 2013 between the EU and Switzerland, the requesting party (in particular, Switzerland) is barred from using information received from the EU via

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first-generation agreement might be regarded by the agencies concerned as being superfluous; the same consideration would not apply, however, with respect to second-generation agreements (see below notes 74-77 and accompanying text), for which even systematic informal cooperation cannot substitute. *Cf.* Papadopoulos, *International Dimension*, cited above note 34, at 80-81.

71 See Tritell and Kraus, 'The Federal Trade Commission's International Antitrust Program', cited previous footnote, at 4 ("While the first agreements were motivated primarily by a desire to reduce and manage conflicts arising from extraterritorial enforcement of antitrust laws, modern agreements seek mainly to enhance enforcement cooperation."). Conflicts have of course arisen, and have fed media frenzies, but overall what seems more remarkable is the *absence* of conflicts that boil over. The potential for conflict may however depend on various factors including among others the substantive field of law, geographic overlap, frequency of interaction and the magnitude of the commercial stakes, which may have political economy implications.

72 Technically, the 1990 MLAT between the U.S. and Canada, which has been used several times (in addition to their 1995 and 2004 comity agreements), does not require that the underlying conduct be of a criminal nature in the country receiving the request (a feature which is not common to all the MLATS that the U.S. has concluded). However, requests between these countries are evaluated case-by-case and limitations are imposed on the use to which the transmitted information may be put. At least in the realm of antitrust, since requests between the U.S. and Canada are made essentially in relation to horizontal cartels, which are criminally illegal in both countries, the absence of a dual criminality requirement is academic.

73 For further details on MLATs, see, e.g., ABA Section of Antitrust Law, *International Antitrust Cooperation Guide* (ABA, 2004). More recently, see Sweeney, *Internationalisation of Competition Rules*, cited above, at 314-317; and OECD, Improving International Co-operation in Cartel Investigations, DAF/COMP/GF(2012)16 (November 2012), 29-30 and 267-271.

the treaty mechanism as evidence to put individuals in prison.[74] Another second-generation agreement is being negotiated between the EU and Canada.[75] Australia concluded a second-generation agreement already in 1999 with the U.S., and in 2007 concluded another one with New Zealand. In the case of the U.S., despite its agreement with Australia, the underlying enabling legislation is problematic in that it appears to require foreign treaty partners to allow the use of shared information for purposes beyond the competition matter animating the request of the U.S. enforcer, which would present a legal-political obstacle in many jurisdictions.[76] No country but Australia, which has its own enabling legislation in place,[77] has ventured to negotiate with the U.S. an agreement of the same intensity. Finally, Denmark, Iceland and Norway in 2001 concluded a second-generation trilateral cooperation agreement, made quadrilateral when Sweden joined the group in 2003.

### 3.2.2. Trade agreements with competition provisions

In addition to bilateral agreements that specifically concern cooperation in the enforcement of competition law, bilateral trade agreements with competition law provisions or chapters are another means of pursuing a range of related objectives.[78] Trade agreements with competition provisions (TACPs) are noteworthy because, among other reasons, they constitute a significant instrument of the EU's external relations policy. The number of such trade agreements has grown significantly in the last 20 years, and the EU has been one of their prominent promoters, originally in the wake of the Soviet Republic's disintegration and then, in the last decade, as a hedge against the remote odds of WTO members reaching consensus in the Doha Development Round.[79]

With the EU-Korea Free Trade Agreement (2010), the trilateral EU-Columbia-Peru Free Trade Agreement (2011) and the political deal on trade and investment announced in October 2013 between the EU and Canada,[80] the number of bilateral (or trilateral) TACPs to which the EU is a party is now around 30. In general, the U.S. seems to have been less concerned with concluding TACPs, although there are such agreements in force between the U.S. and Singapore (2004), Australia (2005), Peru (2006) and South Korea (2007).[81] Furthermore, the form of the EU's TACPs often goes beyond

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74 Article 8(4) of the Agreement between the European Union and the Swiss Confederation Concerning Cooperation on the Application of their Competition Laws. For the relevant and understandably elaborate provisions on the exchange of confidential information, see Articles 7(4) to 10. Further details are discussed in Patrik Ducrey, 'The Agreement between Switzerland and the EU Concerning Cooperation in the Application of their Competition Laws', 4 *Journal of European Competition Law and Practice* 437-444 (2013); David Mamane and Samuel Jost, 'Let's work together – An EU/Swiss co-operation agreement has far reaching implications', *Competition Law Insight* (13 November 2012), 8-10.

75 See Commission Staff Working Document Accompanying the Commission Report on Competition 2012, SWD(2013) 159 final of 7 May 2013, at 15.

76 The relevant legislation is the International Antitrust Enforcement Assistance Act of 1994 ('IAEAA'). See American Modernization Commission, *Report and Recommendations* (April 2007), at 39-40 (calling on the U.S. Congress to clarify that the IAEAA does not in fact require that treaty provisions must permit the U.S. authorities to use transmitted information for non-competition purposes), referenced in Edward Swaine, 'Cooperation, Comity and Competition Policy: United States', in Guzman, ed., *Cooperation, Comity and Competition Policy,* cited above note 10, 1-20, at 19.

77 The relevant Australian laws are called the Mutual Assistance in Business Regulation Act 1992 and the Mutual Assistance in Criminal Matters Act 1987.

78 See Papadopoulos, *International Dimension*, cited above note 34, at 93-144.

79 *Cf.* Beatriz Galindo-Rodriguez, 'European Competition Policy: Development and Protectionism', speech, Moscow, 29 May 2007, http://www.internationalcompetitionnetwork.org/library.aspx?page=37, at 3, point 5 ("Given that competition matters are off the agenda of the multilateral negotiations for now, we would try to move on competition issues bilaterally in the context of the new generation of market-access driven Free Trade Agreements […].").

80 The title of the EU-Canada agreement – the 'Comprehensive Economic and Trade Agreement' – reflects the extent of its ambitions.

81 If negotiations ultimately bear fruit, the Transatlantic Trade and Investment Partnership Agreement between the U.S. and the EU will contain competition provisions; their intensity remains to be seen. One may also mention the sector-specific

traditional free trade measures, and extends to a wide range of integration measures and other fields, particularly in the case of 'association agreements' (AAs) and 'stabilization and association agreements' (SAAs). In part this is explained by the fact that the agreements can serve as a pre-condition for joining the restricted club of EU Member States, but the EU also concludes broad agreements with countries that have little or no hope or desire to accede. Papadopoulos assigns the EU's bilateral trade agreements to three categories: (i) those with candidate or potential candidate countries; (ii) those with countries participating in the European Neighbourhood Policy (i.e., Euro-Med countries and countries in Eastern Europe and Central Asia); and (iii) those with selected trade partners, in particular Mexico (1997), Chile (2002), South Africa (1999), now joined by the above-mentioned agreements with Korea, Columbia-Peru and Canada (with still other agreements under negotiation).

The various agreements are heterogeneous not just across those categories but within the categories as well. The taxonomy will not be pursued further here in any detail, but some general observations can be made. One is the simple point that competition law is never neglected when the EU concludes bilateral (or trilateral) trade agreements. Even where the EU already has a bilateral cooperation agreement with the trading partner, as in the case of South Korea, a part of the trade agreement will nevertheless be devoted to competition, though typically with fewer details insofar as bilateral cooperation is concerned.[82] Second, some of the agreements, specifically those concluded with actual or potential candidates for accession to the EU, tend toward 'deep' integration, i.e., they focus on 'behind the border' issues. The EU enjoys sufficient political and economic leverage in these scenarios to make the trade agreements in some sense analogous to adhesion contracts, and the EU uses them to extend the reach of its internal market (although free movement, especially free movement of persons, may be subject to strict conditions and post-accession phase-ins). The EU thus tends to extract far-reaching obligations from such countries.[83] In the case of agreements between the U.S. and its trading partners, there may well be asymmetric bargaining power but, unlike the EU, the U.S. may not hold a comparable trump card strong enough to insist on an isomorphic remodelling of its trade partner's substantive arrangements in the field of competition law.[84] A third point is that while the EU may

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Open Skies agreement between these jurisdictions, which in Annex 2 contains specific cooperation provisions with regard to competition, administered by the Open Skies Joint Commission (with representatives of the European Commission and of the U.S. Department of Transportation). No provision is made for the exchange of confidential information. Joint work has been produced, however. See Report, Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches (November 2010), http://www.dot.gov/policy/aviation-policy/competition-data-analysis/alliance-codeshares.

82 The inclusion of competition provisions in trade agreements gives DG Trade an opportunity to negotiate on matters which in the context of bilateral cooperation agreements would be negotiated by officials of DG Competition. It is not entirely clear how policy coherence is managed between the two Directorates. It has been intimated that the process may be relatively haphazard given the small number of individuals (i.e., ten) working in the International Affairs Unit of DG Competition, who have a host of other duties to discharge. See Papadopoulos, *International Dimension*, cited above note 34, at 106, footnote 44.

83 The EU is undoubtedly alive to the risk that a potential candidate country will undertake to adopt or reform a competition law in such a way as to mimic EU rules but then fail to implement the reform in what the EU regards as an adequate manner. This may have been perceived as a risk particularly in the case of countries with illiberal economic legacies. *Cf.* David Gerber, *Global Competition,* cited above note 3, at 197-198 (noting the interest of the EU, in light of that risk, in exporting eastward its 'more economic approach'). Such implementation problems can rarely be solved by the content of international agreements alone; however, with regard to actual and potential candidate countries, the EU has the leverage of conditionality not just until the conclusion of an agreement but until the closing of accession negotiations and the subsequent ratification of the accession treaty on the EU side (i.e., by all the Member States and by the EU itself).

84 An interesting question is why the EU has in fact not gone farther and experimented with institutional engineering in its agreements with suitor countries. For example, in the 'Europe agreements' that applied between the EU and the countries that acceded to the Union in 2004 and 2007, there was no attempt to require those countries to establish an 'ideally' designed agency. *Cf.* K.J. Cseres, 'The Impact of Regulation 1/2003 in the new Member States', 6(2) *Competition Law Review* 145-182 (2010). Two possible explanations suggest themselves. First, institutional reforms may imply many more direct and indirect costs than legislative reforms of a lesser order, and may thus appear to be more difficult to extract absent side payments. Second, the adoption by the EU of a standard institutional model for 'export' might be seen as

enjoy only limited direct leverage with other trade partners, i.e., those that have no realistic prospect of accession, this does not necessarily mean that the EU is unable to influence them meaningfully. The record is uneven but the EU – particularly where it is in a position to offer financial aid and/or technical assistance – has been able to steer national outcomes in the general direction of its preferences, as it has done for example in Armenia and Azerbaijan. Even in relation to the third category enumerated above, i.e., countries that can negotiate with the EU on a more 'equal' footing (in particular because EU exporters are keen to gain access to their relatively larger markets), the EU can at least potentially shape outcomes in the 'socialization through cooperation (repeated game)' manner referred to in connection with first-generation bilateral cooperation agreements.

### 3.2.3. Conclusion on bilateral relationships

The idea proposed here is that the negotiation of a BCA or a TACP, and the corresponding cooperation that ensues thereafter – which can be either formal, with the actual triggering of the agreement's provisions, or informal and pragmatic in order to avoid the involvement of diplomatic channels or cumbersome procedures – provides a conduit through which influence is exerted. If the BCA or TACP is concluded between jurisdictions/authorities of asymmetric power (or even where relative symmetry prevails), it may well be motivated in part by the desire to maintain or spread influence. To a certain extent there seems to be an ongoing competitive game involving the U.S. and EU among others, in which 'getting to' jurisdiction X before a rival does may yield dividends to the extent that ideas, beliefs and techniques can be shaped through those processes of negotiation and cooperation. The cultivation of bilateral relationships may thus be regarded as another mode of global competition. Within this mode of competition one may furthermore observe some degree of product differentiation, with the U.S. tending to favour bilateral cooperation agreements with ultimately discretionary commitments, and using MLATs where they apply, whereas the EU has generally preferred to incorporate competition provisions (alongside political/democratic, social and cultural provisions) in more formal agreements with its commercial partners, its neighbours, and the countries that are or may one day be candidates applying for membership. That is not to say that commitments made between the EU and its trading partners need be formally obligatory; in general, the intensity of obligation depends on the relative bargaining power of the parties, which means that those countries seeking specific benefits from the EU will be subject to the greatest *de facto* pressure, and those seeking membership will accept *de jure* commitments.[85]

In addition to the varying degrees of normativity just mentioned, another feature that distinguishes the competition chapters of EU trade agreements compared to the provisions in U.S. agreements is the character and intensity of the *substance* of the relevant provisions. The EU agreements go further inasmuch as they provide that, when the common trade between the EU and its partner is affected by a given business practice, EU-compatible competition rules are to be applied to that conduct.[86] (Conversely, where the common trade is not affected, and where the trading partner is not an actual or candidate country harmonizing its internal regime with that of the EU, the foreign jurisdiction remains essentially free to maintain purely domestic rules that diverge entirely from the EU rules.[87]) Where the

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inconsistent with the fact that the shape of competition enforcement institutions across the incumbent Member States themselves is marked by considerable diversity. Nevertheless, despite the lack of obligations to embark on institutional reforms, most of the 'new' Member States have in fact responded to the system of networked governance in the field of EU competition policy by establishing institutional arrangements inspired by models typical of the older Member States (which are however in several cases currently experiencing significant or radical restructuring).

85 *Cf.* Papadopoulos, *International Dimension,* cited above note 34, at 138-141 (discussing the diverse methods of dispute settlement provided for in the EU's trade agreements, their intensity and their implications for the delegation/precision/obligation formula mentioned above in footnote 63).

86 See ibid., at 105.

87 As a matter of EU law even the Member States are permitted zones of substantive divergence when trade between them cannot be affected, and sometimes even when it can be. However, a comparison between third countries and EU Member

EU can bring significant pressure to bear, in the manner described above, it will go further still and oblige its partner to converge substantively on EU rules by reforming national competition laws or adopting new ones. This channel of 'exportation' is not limited to rules on restrictive agreements and abuse of dominance. The strong tendency of the EU to insist on rules concerning state aid, public undertakings and undertakings with exclusive or special rights further illustrates how the EU seeks to use its trade agreements as vehicles of international (one-way) harmonization.[88]

But there is another dimension of product differentiation that may be signalled here as well, which is again linked to the philosophy behind the external policies of the U.S. and the EU. This relates to the idea that promoting competition law and policy within the context of a regional grouping, i.e., in a manner modelled on the EU itself, is normatively desirable. For the countries engaged in such initiatives, EU-style regionalism, including in this case regional competition law, is often seen as a strategy that can at least potentially enable them to overcome a variety of difficulties. With the growth of regional models of competition law in their various forms, an implicit rivalry emerges between regionalism and the quite different model generally employed and espoused by the U.S. in its global relations. The next sub-section briefly considers these alternative models.

### *3.3. Regional relationships*

On the one hand, the international community has been unwilling to move toward consensus on a formal multilateral framework for competition law (section 3.1 above). On the other, the shortcomings of nationally bounded competition law in a commercially globalized environment persist. In addition to the bilateral cooperation and trade agreements discussed above (section 3.2), a natural strategy for countries lacking the resources or experience necessary to maintain a credible enforcement system acting alone is to develop formal and/or informal cooperation mechanisms at a regional level. Lucian Cernat has observed that many developing and transition countries in Asia, Central and Latin America and above all Africa have in fact established such arrangements,[89] some of which have significant and problematic overlapping membership; and Michal Gal has outlined the many reasons why in regional competition law solutions there is vast potential waiting to be let loose.[90] The result is a feast for acronym enthusiasts: we may refer to, among others, ASEAN, CARICOM, OECS, CEMAC, SADC, SACU, WAEMU, EAC, ECOWAS and COMESA, and the possibilities multiply when other languages are used.

Apart from the sensible theoretical arguments in favour of regional initiatives, the countries that have experimented with regional approaches to competition law enforcement had a clear point of reference: the European Community or European Union.[91] The EU plainly embodies a regional

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States is doubtful since, in general, it seems more likely for any given anticompetitive transaction or practice in a Member State to be capable of affecting trade between Member States than it is for a given transaction or practice in a third country to affect trade with the EU. The direct impact of a convergence rule in a third country will thus depend to some degree on the volume of its trade with the EU as a proportion of its overall commerce.

88 See Papadopoulos, *International Dimension*, Table 4.3 at 116-117. Of course, rules designed to minimize or eliminate unnecessary public obstacles to competition have been seen (somewhat akin to David Gerber's point – see above note 83) as essential inoculants for countries formerly under soviet control. See ibid. at 115 (citing John Litwack, 'Legality and Market Reform in Soviet-Type Economies', 5(4) *Journal of Economic Perspectives* 77-89 (1991)).

89 Lucian Cernat, 'Eager to ink, but ready to act? RTA proliferation and international co-operation on competition policy', in Philippe Brusick, Ana Maria Alvarez and Lucian Cernat, eds., *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (New York and Geneva: UN Publications, 2005), 1-36.

90 Gal has written numerous thoughtful papers on the topic. See, e.g., 'Regional Agreements: An Important Step in International Antitrust', 60 *University of Toronto Law Journal* 239-261 (2010); 'International antitrust solutions: Discrete steps or causally linked?', in Josef Drexl, Warren Grimes, Clifford Jones, Rudolph Peritz and Edward Swaine, eds., *More Common Ground for International Competition Law?* (Cheltenham: Edward Elgar, 2011), 239-260, at 251-260.

91 See, e.g., Maher Dabbah, *International and Comparative Competition Law* (Cambridge: Cambridge University Press, 2010), at 412; David Gerber, *Global Competition*, cited above note 3, at 256-257.

competition law regime *par excellence*. And the European experience suggests that an indirect, if long-term benefit of a successful regional regime is the reinforcement of concurrent national regimes. For example, it can no longer be said that the Netherlands is a 'cartel paradise'.[92] Competition decisions in the UK are generally (i.e., putting aside extraordinary cases) no longer made according to public interest criteria.[93] And in France, invigorated public enforcement is matched by a 'competition culture' that has matured and is now almost taken for granted.[94] For its part, and anthropomorphizing a bit, the EU may be intoxicated by its own success (the term 'success' being necessarily relative given Europe's penchant for existential and constitutional crisis), and may be innately keen to encourage international efforts to develop facsimiles or derivatives of EU solutions with varying degrees of supranational content.

While the EU common market and competition model have influenced several groupings to some extent, most explicitly so in the case of the West African Economic and Monetary Union (WAEMU), a quite different model, that of the North American Free Trade Area (NAFTA), has by comparison been neglected. The NAFTA Agreement provides for free trade among Canada, Mexico and the U.S., but with respect to competition its provisions are unambitious.[95] Low-stakes cooperation in the NAFTA style also characterizes the South African Development Community (SADC) and the South African Customs Union (SACU); but nearly all other regional competition law frameworks have taken the EU approach as a source of inspiration (translating it, however, into highly diverse institutional structures and competences). The EU has not been a neutral observer of this tendency; to the contrary, the EU has financially underwritten some of the regional initiatives, including in particular the WAEMU, the Common Market for Eastern and Southern Africa (COMESA), and the Andean Community.

Despite the hopes one may have for regional competition law around the world, it must be acknowledged that all of the initiatives, with the exception of the EU itself, have yielded disappointing results. This seems to be the clear thrust of recent evaluations.[96] The situation is not hopeless. For

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92 For the background to the Dutch story, see Bram Bouwens and Joost Dankers, 'The invisible handshake: cartelisation in the Netherlands, 1930-1980' (2009) 1-23, presented at the XVth World Economic History Conference, Utretcht, http://www.wehc-2009.org/programme.asp?find=Nyb%F8. See also Wendy Asbeek Brusse and Richard Griffiths, 'Paradise Lost or Paradise Regained? Cartel Policy and Cartel Legislation in the Netherlands', in Stephen Martin, ed., *Competition Policies in Europe* (Amsterdam: Elsevier, 1998), 15-39.

93 See Stephen Wilks, *In the Public Interest. Competition Policy and the Monopolies and Mergers Commission* (Manchester: Manchester University Press, 1999).

94 See Laurence Idot, 'How has Regulation n 1/2003 affected the role and work of national competition authorities? The French example', Heft 1, *Neue Zeitschrift für Kartellrecht* 12-18 (2014).

95 Articles 1501(1) and 1501(2) NAFTA provide for mutual consultation from time to time regarding the effectiveness of competition law measures undertaken by each Party; and provides further that "[t]he Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information […]". However, Article 1501(1) specifically excludes recourse to dispute settlement under the Agreement in relation to all of the above principles of cooperation. For more on the competition provisions in the NAFTA agreement, see, e.g., Spencer Weber Waller, 'The Internationalization of Antitrust Enforcement', 77 *Boston University Law Review* 343-404 (1997), at 356-360. While it is not yet known what specific form the competition provisions of the Trans-Pacific Partnership Agreement (U.S. plus eleven others) will take, it seems unlikely that the agreement will go beyond mutual notification, the sharing of information (i.e., non-confidential information unless a waiver is obtained) and other general modalities of cooperation. The chapter on regulatory coherence may have competition policy implications in a broader sense for some of the countries concerned.

96 See the contributions in Drexl, Bakhoum, Fox, Gal and Gerber, eds., *Competition Policy and Regional Integration in Developing Countries,* cited above note 7; Alberto Heimler and Frédéric Jenny, 'Regional Agreements' in David Lewis, ed., *Building New Competition Law Regimes: Selected Essays* (Cheltenham: Edward Elgar, 2013) 183-203. See also Alberto Heimler, 'Effectiveness of enforcement cooperation in developing countries: what role can existing institutions play?' (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335919, at 6-13 (sceptical about supranational solutions and their cost, and suggesting a focus on simpler forms of cooperation); Dabbah, *International and Comparative Competition Law*, cited above note 91, at 409-410 and 412-417.

example, the tensions over jurisdictional claims regarding the application of competition and merger control rules by COMESA may be overcome with time and iterative adjustments. And a series of lessons may be drawn from the initial regional integration efforts, which may guide reforms in the coming years.[97] But a note of pessimism is yet in order. With exceptions, the failings of regional agreements thus far may be linked to problems that defy any remedy in the medium term. One obvious cause of difficulty consists of the resource constraints afflicting the countries and institutions that participate in the regional groupings, and the finite well of international solidarity. Some of these countries also find themselves in groupings with other countries of radically different character and level of development. A still more brutal reality is that many of the latter countries bear the unflattering title of 'basket case' economies and political regimes, or even borderline failed or failing states. Some are rife with corrupt institutions, some are embroiled in civil or international wars or conflicts. Many of these regional efforts thus face a grim horizon. Some may yet gain momentum and succeed: the current intensification of cooperation within ASEAN, for example, is fuel for rising expectations, although that organization too faces formidable challenges.[98] Others will likely go nowhere. They may have to be reborn or renounced, or they may quietly wither.

For present purposes, one may simply note that competing models for international cooperation were 'on offer', and the model promoted by the EU proved to be far more appealing for 'consumers' worldwide than the available alternative. The general failure of these consumers to use the EU prototype in a sufficiently imaginative way, or the failure to realize that local conditions in some areas likely required a new prototype or a sufficiently differentiated hybrid, is a separate discussion and is omitted here.

### *3.4. Competition in competition ideas*

In section 3.1 above, it was suggested that the U.S. and the EU endorsed competing visions for a global governance architecture, to use a popular term, in the field of competition law. At a different, more traditional level one may observe a competitive struggle concerning the question of how antitrust problems should be approached analytically by policy-making and decision-making institutions. This friendly rivalry inevitably reflects something of a cleavage in values and prior beliefs, and on each side of this cleavage a complex of smaller but significant second-order fault lines may also be found. The terms of discourse that follows are limited to 'approaches' and 'models'. Such an analysis can only scratch the surface of the discussion surrounding values, beliefs and systems of belief.[99]

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97 Careful syntheses of lessons are provided by Josef Drexl, 'Economic integration and competition law in developing countries', in Drexl et al., eds., *Competition Policy and Regional Integration,* cited above note 7, 231-252, and by Michal Gal and Inbal Faibish Wassmer, 'Regional agreements of developing jurisdictions: Unleashing the potential', in ibid., 291-319. See also Fox and Gal, 'Drafting Competition Law for Developing Jurisdictions', cited above note 7, at 41-42.

98 The ASEAN Economic Community is due to be launched in 2015. By that time each ASEAN member country is required to have promulgated a comprehensive competition law (some will fail to meet this deadline). One feature of the new initiative will be a coordination mechanism for competition law enforcement, the details of which remain to be worked out.

99 For a recent elaborate study, see Ioannis Lianos, 'Some reflections on the question of the goals of EU competition law', in Damien Geradin and Ioannis Lianos, eds., *Handbook on European Competition Law: Substantive Aspects* (Cheltenham: Edward Elgar, 2013) 1-84. From a normative perspective, Lianos stresses that the interminable debates on the goals of competition law too often omit the fundamental question of which institutions (markets, judicial process, political process and so on), or rather which mix of institutions, should be assigned the task of pursuing and implementing those goals. Comparing and then choosing among imperfect alternatives, he says, should in fact precede debates over goals. In addition to this Komesarian (and, as applied to the competition law sphere, Sokolian) normative perspective, Lianos' essay provides a helpful map of the 'goal structures' found in both U.S. antitrust (a narrower structure, though not free of ambivalence) and EU competition law (broader, evolving, contested). The essay covers utilitarian and welfarist traditions as well as deontological and process-based traditions, and casts doubt on some of the categories often taken for granted (raising, for example, the possibility that at least some strands of ordoliberalism are consequentialist and not deontological – see ibid. at 33).

### 3.4.1. The American approach

In the United States, the Supreme Court and the federal antitrust agencies (not to mention the heterogeneous state attorneys general) do not always see eye to eye. Occasionally, for example, a federal enforcer will express doubts or criticism regarding a Supreme Court judgment.[100] Furthermore, while the Supreme Court has shown rather little interest in applying techniques of modern industrial economics (particularly where they seem to be merely speculative 'possibility theorems', as the standard epithet describes them), the high degree of expertise within the federal agencies enables them to engage in sophisticated policy prescriptions (as in, e.g., the 2010 U.S. Horizontal Merger Guidelines) and sophisticated empirical work in connection with concrete cases (e.g., in challenging the *Staples/Office Depot* merger[101]). But although a majority of the Supreme Court may sometimes lean 'to the right' of the agencies, in particular when the Assistant Attorney General for Antitrust has been appointed by a Democratic President and given the mandatory bipartisan composition of the Federal Trade Commission,[102] the general paradigms and background assumptions embraced by each of these institutions are not very different. In-house, the agencies may engage routinely in game-theoretic exercises and may explore dynamic competitive effects in great detail, but the point of departure when analysing a competition problem is the same question that has been asked throughout the 1980s and the 1990s: when assessing competitive effects, what will be the net effect on output?[103] Doubt is resolved in favour of non-intervention, which reflects a faith in the relative superiority of markets (*vis-à-vis* occasionally frail institutions) that remarkably persists even today, dissenters 'on the left' notwithstanding, within the antitrust milieu.[104] This faith is captured in formulas that have been fondly recited on occasion by U.S. enforcers, such as 'First, do no harm' or 'Let the markets work'.

The output model, framed by the idea that type I errors are more costly than type II errors,[105] and that abstention is therefore the proper course when it is not clear – either on 'per se' logic or following

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[100] In several speeches, for instance, then-FTC Commissioner Tom Rosch questioned the wisdom of certain *obiter dicta* in the Supreme Court's *Trinko* judgment of 2004, which is notable for, among other things, its contention that rigorous antitrust constraints can dampen the incentive of companies to strive toward superior performance and enhanced innovation.

[101] See *FTC v Staples Inc,* 970 F.Supp 1066 (D.D.C. 1997); Jonathan Baker, 'Econometric Analysis in FTC v Staples', 18 *Journal of Public Policy and Marketing* 11-21 (1999).

[102] Bipartisan here means 3:2, or 2:2 if the 5th seat is temporarily vacant.

[103] It will be plain that no significant investigation of output effects is conducted in cases involving, in particular, naked anticompetitive conspiracies between competitors.

[104] It is said that one need not dig deep to find, underneath the economics-based claim that non-intervention in the absence of demonstrable output effects guarantees efficient case outcomes, a distinct political ideology. This political ideology attaches great weight to the "autonomy of the dominant or leading firms", and it produces a stylized concept of efficiency that systematically excludes the possibility that efficiency (in particular, dynamic efficiency) could best be served by protecting rivalry, mavericks and "upstarts". See Eleanor Fox, 'The Efficiency Paradox', in Robert Pitofsky, ed., *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford: OUP, 2008) 77-101, at 86 (quoted phrase) and throughout. The paradox, then, is that, as it has come to be understood and applied, the efficiency orientation that dictates antitrust law in the U.S. "protects monopoly and oligopoly, suppresses innovative challenges, and stifles efficiency" (ibid. at 77), and "thus protects inefficiency" (ibid. at 88).

[105] Error-cost reasoning is the influential legacy of work done especially in the 1980s by then-Professor Frank Easterbrook. While this reasoning seeks to minimize both type I and type II errors, there is also a common tenet, suggested by Easterbrook himself (inspired by Ronald Coase's work) according to which a type I error (false conviction) is more costly than a type II error (false acquittal). The basic point rests on two assumptions: on the one hand, although a false acquittal will result in or prolong an anticompetitive practice (and its related rents), the marketplace will ultimately resolve the matter through self-healing (e.g., new entry, perhaps enabled by efficient access to capital); on the other hand, a false conviction will amount to a distorted market interference by government that cannot be corrected through the same self-healing properties of the market. See, e.g., Easterbrook, 'The Limits of Antitrust', 63 *Texas Law Review* 1-40 (1984), at 2. Courts and agencies might thus ironically become 'anticompetitive' instrumentalities of consumer harm. The idea that the risk of false positives should be accorded greater weight than the risk of false negatives is of course

a (full or truncated) 'rule of reason' inquiry – that a practice will lead to a net loss of output, may be encapsulated by the term 'Chicago school antitrust' (even though Chicago is composed of different strands of thought not free of internal tensions). But the idea of a Chicago-based output model must be nuanced because an ulterior question can determine non-intervention even where it is found that net output would suffer as a result of a given practice. The ulterior question is: even if we can say abstractly that certain behaviour can yield either greater or lesser output depending on a variety of factors that have to be examined case-by-case, is a typical judge (or a lay jury) capable of engaging in such inquiry, admittedly with the aid of an adversarial process, and reaching the right result within a tolerable margin of error? In the United States, the approach to the latter question is influenced by the consequences of erroneous judgments, as they can by statute lead to heavy civil liability (or to out-of-court settlements in the shadow of that liability risk). Although this concept of 'administrability' – i.e., the question of whether tools and concepts (as applied to liability rules but also to remedies) can be applied workably in concrete settings – has driven first and foremost the Supreme Court, the federal agencies necessarily internalize the concept in their own decision-making. It is remarkable that with regard to both values just described (output is to be maximized, and liability rules must be administrable), doubt is to be resolved in favour of abstention. Two different 'schools' thus have common ground to stand on. Bill Kovacic has captured this confluence of ideas with the metaphor of a double helix.[106] Beyond the pruning of liability rules and the strengthening of procedural filters to minimize the number of cases that survive, the double helix is also reflected in the Supreme Court's philosophy of the *scope* of antitrust: in particular, in sectors governed substantially by regulation, such as network industries or markets subject to security laws, antitrust has in effect been relieved from its post.[107]

To abbreviate, and though certain authors have sometimes used other labels, the U.S. model of antitrust can be summed up roughly as an 'output' model or a 'double helix' model, as nuanced above. What of the European Union?

### 3.4.2. Europe's approach(es)

Here too, distinctions should be drawn between the way EU competition law is understood by the EU Courts, and especially the ECJ, and the way it is understood by the 'agency', i.e., the European

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pointedly contested. See, e.g., John Fingleton and Ali Nikpay, 'Stimulating or Chilling Competition', in Barry Hawk, ed., *Fordham Competition Law Institute: International Antitrust Law and Policy 2008* (Juris Publishing, 2009) 385-417, at 388-390; Alan Devlin and Michael S. Jacobs, 'Antitrust Error', 52 *William & Mary Law Review* 75-132 (2010). In the context of themes running through the present paper it is worth underlining that Easterbrook's point of view is clearly based on what he perceived as robust markets, which may be true in the U.S. but is hardly a universally reliable assumption. See Philippe Brusick and Simon Evenett, 'Should Developing Countries Worry about Abuse of Dominant Power?', [2008] *Wisconsin Law Review* 269-294, at 274-277. David Lewis, for example, describes a quite different balance between over-enforcement and under-enforcement in 'Chilling Competition', in Hawk, ed., *Fordham Competition Law Institute 2008*, cited above, 419-436, at 420-425. *Cf.* also Alberto Heimler and Kirtikumar Mehta, 'Monopolization in developing countries' (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335653. In the latter paper, Heimler and Mehta make a similar observation about the distinctiveness of the U.S. and add, at the last page of the draft, that an empirical review reveals that young jurisdictions have "well understood" the risk of false positives in abuse of dominance cases. They point out that the focus of competition authorities in these jurisdictions has been actual foreclosure "rather than a preoccupation with restrictions of competition that may give grounds for assuming potential foreclosure".

[106] William Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix', [2007] *Columbia Business Law Review* 1-82. See also William Page, 'Areeda, Chicago, and antitrust injury: economic efficiency and legal process', 41 *Antitrust Bulletin* 909-933 (1996); Herbert Hovenkamp, 'The Rationalization of Antitrust', 116 *Harvard Law Review* 917-944 (2003). For recent discussion, see Nicola Giocoli, 'Old Lady Charm: Explaining The Persistent Appeal of Chicago Antitrust', as yet unpublished (2013).

[107] See, e.g., Douglas Ginsburg and Daniel Haar, 'Resolving Conflicts between Competition and Other Values: The Roles of Courts and Other Institutions in the US and the EU', in Lowe and Marquis, eds., *Competition, Regulation and Public Policies,* cited above note 36.

Commission.[108] A further distinction may be made with respect to the authors of the competition rules contained in the Treaty of Rome, today known as the Treaty on the Functioning of the European Union. At least traditionally there has been a widespread belief in Europe that the competition rules were of ordoliberal content.[109] There are good reasons to doubt that the shaping of the competition rules was driven solely by ordoliberal ideas. More accurately, their genesis reflected a compromise between very different competition-related values (e.g., on the one hand the desire to have an 'economic constitution' protecting economic liberty against coercion from private and public sources of power, and on the other hand the desire to promote industrial upsizing, efficient production and global competitiveness).[110] However, those who underline the ordoliberal character of European competition law are on firmer ground when referring to the policies and agency culture of DG IV within the European Commission, in particular during the period from the 1960s through the 1980s.[111]

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[108] The importance of considering differences between courts and agencies in any analysis of competition law where courts play a significant role is likewise highlighted in Eleanor Fox, 'Monopolization and Abuse of Dominance: Why Europe is Different', 59 *Antitrust Bulletin* 129-152 (2014) (discussing, *inter alia*, the divergent case law in the U.S. and the EU).

[109] It is always useful to recall that the ordoliberal tradition comprises diverse strands with occasionally quite distinct points of emphasis. Elaborate discussion is out of place here but it may be noted that the crucial 'Hayekian turn' in ordoliberal studies occurred only after the composition of the competition rules of the Treaty. To the extent that those rules bear some ordoliberal paternity, therefore, the link would appear limited to the 'formative' ordo era, which preceded the fusion of many of the original concepts with Austrian ideas about competition, liberty, the State and the social order.

[110] Researchers scrutinizing the archived preparatory documents have reached rather different conclusions, but one author has argued strenuously that there is little evidence of ordoliberal influence in the relevant documents. See Pinar Akman, 'Searching for the long-lost soul of Article 82 EC', 29 *Oxford Journal of Legal Studies* 267-303 (2009). While the latter paper is an illuminating and essential contribution, my own impression, due to the context of the negotiations as a whole (whose linkages included a significant agreement to postpone decisions on fundamental issues such as how the enforcement of the rules should be structured, who should enforce them and with what powers, etc.), is that smoking gun evidence of an ordoliberal programme with regard to Articles 101 and 102 is indeed scarce (other than the final, 'trump' condition contained in Article 101(3), whose activation however has normally been pre-empted by the way Article 101 and the other conditions of Article 101(3) have been applied) because the German negotiators who were ordoliberally inclined may not have been particularly doctrinaire to begin with (at least as regards Müller-Armack; as for von der Groeben, his views seem to have become more resolutely 'ordo' at a later stage when he was made DG IV's chieftain), and because the compromises made (which were conditioned in part by the long-running legislative debate in Germany) may have diluted what otherwise might have been rules of more distinct ordoliberal character (although, as regards Article 102, it has been noted that as of the late 1950s the ordoliberals had not fully worked out an approach to the treatment of dominant firms: see Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC', in Claus-Dieter Ehlermann and Mel Marquis, eds., *A Reformed Approach to Article 82 EC* (Oxford: Hart Publishing, 2008) 119-164). That dilution does not mean that the ordoliberal influence was absent. Widening the lens beyond Article 101 and 102, one could take the view that, apart from the Common Agricultural Policy, the Treaty as a comprehensive instrument, and especially its common market planks (including the free movement rules but also state aid and tax discrimination rules), coincided rather closely with ordoliberal views. The difficulty lies in separating out causal elements, since one could make a similar point about any orientation (in particular, Ricardian trade theory) that was based on the classical liberal tradition, to which the ordo scholars decidedly belonged. Even with respect to Article 106 (which provides that Member States must respect the rules of the Treaty including in particular its competition rules), although I have elsewhere followed J.O. Haley in recognizing its affinity with ordo values, that provision was originally proposed by the negotiators from the Benelux countries (as an antidote to France's intimidating public sector); the German delegation merely endorsed the idea once it had been introduced. Having drifted too far already, the excursus may be cut short with two quick points. First, notwithstanding the above observations, Akman's point that the ordoliberal genesis of Article 102 has been greatly exaggerated is easy to accept; it is now being incorporated into textbooks, for example. See Richard Whish and David Bailey, *Competition Law*, 7th edition (Oxford: OUP, 2012), at 22 and 196. Second, as EU lawyers know but as others may not, the 'original intent' of the Treaty of Rome counts legally for nothing. (See, e.g., Schweitzer, 'History, Interpretation and Underlying Principles' cited above; Lianos, 'Some reflections', cited above note 99, at 71-72, with references.) The canons of interpretation developed by the ECJ leave it free to follow a path completely contrary to any discernible original design if this contrary path were divined by the Court to be the Treaty's true *telos*.

[111] Historians do not unanimously support this claim, however, since, for example, DG IV also had its share of social democrats, for example of a Dutch persuasion. For contrasting views, see the various contributions in Patel and Schweitzer, eds., *The Historical Foundations of EU Competition Law,* cited above note 17.

Since the 1990s, DG IV (now DG Competition) has absorbed many influences that have shaped its policies. It has drawn eclectically on 'modern' approaches that it perceives to be consistent with its mission as a competition enforcer. Famously, it decided to break with old institutional habits and to turn toward a 'more economic' approach,[112] a vague expression which has at least two related dimensions. First, in (i) selecting and de-selecting cases, (ii) resolving or settling selected cases, and (iii) building policy approaches, DG Competition has embraced tenets and techniques associated with certain branches of economic theory and research. Since the late 1990s, for example, its policies on the control of vertical agreements have been palpably influenced by transaction cost economics. And DG Comp has been open to the theoretical advances of post-Chicago industrial organization studies. Post-Chicago concerns regarding unilateral conduct, vertical foreclosure in general, and, in the field of horizontal merger control (and like the U.S. agencies), unilateral effects from concentrations in differentiated markets, have shaped both the policies and practice of the Commission. A second dimension of the 'more economic' approach concerns the choice of policy *objectives*.[113] In a move of both practical and symbolic significance, the Commission, particularly under the leadership of Mario Monti and Neelie Kroes, adopted 'consumer welfare' as its magnetic North. Consumer welfare, however, can be understood in different ways.[114] In the U.S., consumer welfare is sometimes confusingly used as a synonym for the (generally short-run) welfare of society as a whole.[115] As used in the EU, the standard view is that the term consumer welfare reflects a criterion of distributive justice[116] and tends to denote a narrower concept in which producer welfare is important but ultimately of a lower rank.[117] Truer to its name, consumer welfare thus does not refer to an 'output' model but to a long-run consumer welfare criterion more consistent with the idea of a dynamic 'competitive process' in which potential threats to competition, such as where new entrants or 'mavericks' might be suppressed or brought to heel, are treated seriously. The idea that defending the 'competitive process'

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[112] DG Comp's policy turn toward 'more' economics has provoked a significant field of critical literature. See, e.g., Heike Schweitzer, 'The role of consumer welfare in EU competition law', in Josef Drexl, Reto Hilty, Laurence Boy, Christine Godt and Bernard Remiche, eds., *Technologie et concurrence: Mélanges en l'honneur de Hanns Ullrich* (Brussels: Editions Larcier, 2009) 511-539.

[113] As noted earlier, the term 'more economic approach' appears to leaves room for the Commission to factor in non-economic concerns, and the boundaries of the Commission's discretion in this regard are not entirely clear. See above note 14.

[114] In further detail, see Lianos, 'Some reflections', cited above note 99, at 20-23.

[115] This very loose use of language is associated with the Chicago school and with Robert Bork in particular. See, e.g., Rudolph Peritz, *Competition Policy in America*, revised edition (Oxford: OUP, 1996), 240-245 and 374, footnote 25. See also J. Thomas Rosch, 'I say Monopoly, You say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics?', speech, Fiesole, 8 September 2007, http://www.ftc.gov/speeches/rosch/070908isaymonopolyiba.pdf, at 16; Charles Rule and David Meyer, 'An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers', 33 *Antitrust Bulletin* 677-712 (1988).

[116] See Lianos, 'Some reflections', cited above note 99, for example at 26-29. However, as Lianos points out, lurking in even the most aseptic version of a maximum efficiency norm is a choice about distributive effects. See ibid. at 9 and 57, footnote 188.

[117] In the context of the exemption contained in Article 101(3) as understood by the Commission, Whish and Bailey explain that "[i]t is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration […] Negative effects on consumers in one geographic or product market cannot normally be balanced against and compensated by positive effects for consumers in unrelated markets [unless the markets are related and] the consumers affected by the restriction and benefiting from the efficiency gains are substantially the same." Whish and Bailey, *Competition Law*, cited above note 110, at 163. In order for the exemption to apply, it is not necessary to show that a particular consumer who is harmed is then compensated for his particular injury. Giorgio Monti fleshes this out further in a hypothetical vertical restraint scenario where the restraint purports to expand the market: "[O]ne looks at the 'overall impact' on consumers affected by the agreement. So if before the vertical restraint 100 consumers bought the good, and after the restraint there are 200 new customers, the overall effect is positive and the practice benefits from Article [101(3)]. Yet it may not be easy to do this kind of calculation at all (it will necessarily be an ex ante assessment in that one will want to enjoin the restraint before it has a significant market impact), and when comparing qualitative improvements and price increases the Commission acknowledges that this will be a matter of 'value judgment.'" Monti, 'The Dominance of Economic Analysis?', cited above note 14, at 9.

in the sense of maintaining ongoing rivalry and an 'effective competition structure'[118] (which today is often linked to competition from hypothetical equally-efficient rivals as opposed to competition from all comers irrespective of relative efficiency[119]) takes precedence over short-term efficiency gains is thought to be consistent with the Treaty; and at the same time it may preserve some (limited) degree of continuity with DG Comp's 'ordoliberal' past, in which the policy paradigm depended on the conception of competition as a dynamic process (which in turn is partly informed by the notion of competition as a discovery procedure). The Commission's interest in post-Chicago approaches and its tendency to avoid overvaluing short-term efficiency gains results in a greater readiness to intervene in competition cases, and implicitly signals a greater faith in its own relative ability to secure desired outcomes compared to the ability of 'the market' to do so. In this regard the Commission's slogan, '*making* markets work better'[120] (emphasis added), is quite telling.

Finally, there are the EU Courts, and in particular the ECJ. Contrary to what is sometimes loosely asserted, the idea that the Court was in its heyday (or was then and still is) an ordoliberal institution has never been convincingly established.[121] It is submitted, rather, that perhaps with some exceptions any ordoliberal-inflected judgments of the Court were produced not on any endogenous basis resting on the identity or predilections of the judges individually or collectively, but rather because a disposition of a given case that was consistent with ordoliberal views fit well under the circumstances with the Court's vision of the Treaty, in particular its free movement and competition rules and

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[118] The 'competitive process' idea seems necessarily to require an approach to competition law that is sensitive to market structure, but any parallel to be drawn with the 'structure-conduct-performance' paradigm (pioneered and pursued by economists such as Edward Mason, Joe Bain, Corwin Edwards, Carl Kaysen and economist/lawyer Don Turner among others) must be qualified because of the generally static conception of the latter, from which the former diverges *entirely*. See, e.g. (in English), Erich Hoppmann, 'The Development of an Idea on the Norm for a Policy of Competition', 13 *Antitrust Bulletin* 61-82 (1968); and for a concise account, Roger Van den Bergh and Peter Camesasca, *European Competition Law and Economics: A Comparative Perspective*, 2nd edition (London: Sweet & Maxwell, 2006) 89-90 (also referring to post-Hoppmann approaches that differ on details). The idea of the competitive process is closely linked to that of the 'freedom to compete', or *Wettbewerbsfreiheit*. A recent description is provided in Roger Zäch and Adrian Künzler, 'Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law', in Zäch, Heinemann and Kellerhaus, eds., *The Development of Competition Law*, cited above note 14, 61-83. As the authors state, "[t]he goal of competition law […] is to ensure the freedom to compete of individuals and thus to safeguard the competitive process". Ibid at 61. The freedom to compete then "generally leads to competition and competition leads to an efficient allocation of resources and thus to consumer welfare". Ibid. Although it appears that protecting the freedom to compete is "thus to safeguard the competitive process", this can be understood the other way around: if the competitive process is protected then individuals are guaranteed the possibility to exercise their economic liberty. But the central point for the European 'efficiency versus freedom' debate is that consumer welfare is expected to be no more than, and no less than, an anticipated by-product of the freedom to compete paradigm. For a discussion of varying views within the economic freedom tradition, see Lianos, 'Some reflections', cited above note 99, at 30-36.

[119] Traces of the idea that foreclosure of equally efficient competitors may deserve closer scrutiny because their exclusion has more serious consequences for consumers may be seen in its earlier case law, but the ECJ now seems to be embracing the idea more firmly. See Case C-280/08 P, *Deutsche Telekom AG v Commission* [2010] ECR I-9555 (various paragraphs); Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527 (various paragraphs); Case C-209/10, *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-000, not yet reported, paras. 21, 25 and 38). As a matter of policy, the Commission takes a similar position but nevertheless reserves for itself some room for manoeuvre in cases where dominant firm conduct threatens to expel from the market a less efficient rival whose presence is apt to lead to a more competitive outcome relative to the counterfactual. See Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C45/7, para. 24 ("The Commission will take a dynamic view of [the constraint imposed by the less efficient rival], given that in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency.").

[120] This motto appears prominently on the Commission's competition home page. See http://ec.europa.eu/competition/index_en.html.

[121] A recent review of the ECJ's antitrust jurisprudence rejects the notion that the Court has been concerned with the (German and Hayek-derived) concept of a 'freedom to compete' (see above note 118), which is an important but not the only version of an ordoliberal programme. See Pinar Akman, 'The role of 'freedom' in EU competition law', 34 *Legal Studies* 183-213 (2014).

associated doctrines such as the '*effet utile*' of those rules, and of European integration. Here one could cite judgments such as those in *Continental Can*, *Dassonville* and perhaps *Säger* and *France v Commission*.[122] It must be added, though, that in recent years the ECJ has embraced a notion which, among other interpretations, may appear to be compatible with ordoliberal thought. It is the idea that the EU legal order must protect competition "*as such (as an institution)*".[123] When taken literally, this idea seems to transform competition from a medium through which ulterior values such as social welfare or consumer welfare are pursued into a self-justifying end goal. The adoption of the 'as such' formula by the Court in its *T-Mobile* judgment[124] may have seemed to vindicate, to some extent, the popular criticism that the ECJ was an 'ordoliberal' Court and was therefore (i) biased against concepts such as anticompetitive foreclosure, whereby foreclosure would only be a concern if the excluded rival were efficient, since otherwise consumers would not in general be any worse off, and (ii) biased, more generally, against any tradeoffs between liberty and efficiency.[125] It is not clear that ordoliberalism is really at play here,[126] but it *is* clear that there is a concern for market structure and for the plight of at least some competitors and some consumers, all of which if interpreted in a certain way can be reconstructed, by those who wish to do so, as being part of an ordoliberal approach. In any event, the ECJ's preoccupation with competition 'as such' now seems to be a staple of Article 101 jurisprudence.[127] In the context of Article 102 the Court has not (yet) seized the opportunity to

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[122] Respectively: Case 6/72, *Europemballage and Continental Can v Commission* [1973] ECR 215; Case 8/74, *Procureur du Roi v Dassonville* [1974] ECR 837; Case C-76/90, *Säger v Dennemeyer & Co Ltd* [1991] ECR I-4221; Case C-202/88, *France v Commission* [1991] ECR I-1223.

[123] This formula originated in the Opinion of Advocate General Kokott in Case C-95/04 P, *British Airways plc v Commission* [2007] ECR I-2331, paras. 68, 86 and 125 of the Opinion. As the Advocate General states in para. 68: "Article [102 TFEU], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus competition *as such (as an institution)*, which has already been weakened by the presence of the dominant undertaking on the market." (Emphasis in original; citations to case law omitted.) The foregoing quote, which on the surface appears to reflect an ordoliberal commitment to competition's 'constitutional' nature, should be considered in light of the text that immediately follows in the same paragraph: "In this way [i.e., by protecting competition as such], consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared." The latter idea – that the structure of the market is protected in pursuit of an ulterior objective (i.e., the avoidance of consumer disadvantage) – appears to be at odds with the standard ordoliberal view that consumer benefits, while important, materialize as a subsidiary by-product of the competitive process (see above note 118). Similarly, the counterintuitive idea that the 'competition as such' imperative in fact instrumentalizes competition in service of efficient resource allocation and the diverse aims of the EU has been noted as a plausible interpretation. See Lianos, 'Some reflections', cited above note 99, at 53.

[124] Case C-8/08, *T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 38: "[A]s the Advocate General pointed out at point 58 of her Opinion, [Article 101 TFEU], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such." For her part, Advocate General Kokott had directly transposed to the instant case the "as such (as an institution)" concept that she had announced in *British Airways* (quoted in the previous footnote). Paragraph 58 of her Opinion in *T-Mobile Netherlands* states: "[Article 101 TFEU], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus *competition as such (as an institution)*. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared." (Emphasis in original.)

[125] However, the Court in *British Airways* also confirmed that dominant firms could come forward in Article 102 cases with evidence of efficiencies counterbalancing the anticompetitive effects of their behaviour. See *British Airways*, ibid., para. 86.

[126] There is a risk that the "as such (as an institution)" language will be decontextualized. See above note 124, particularly where Kokott's coda to the quoted language appears.

[127] See Cases C-501/06 P etc., *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, para. 63 ("like other competition rules laid down in the Treaty, Article [101 TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such"); Case C-68/12, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.,* judgment of the ECJ of 7 February 2013, not yet reported, para.

'reimport' the 'competition as such' logic, even if it is where firms are dominant that the presumed 'weakness' of the market structure is most likely to be a concern.[128] An opportunity for such a 'reimport' presented itself in a 2012 case that attracted some attention, but the Court took a different tack and proceeded to clarify that Article 102 in no way precludes dominant companies from competing 'on the merits'.[129] This normally ambiguous phrase – on the merits – is now defined by the ECJ as competition on the basis of features appreciated by consumers: better offers in terms of price, quality, choice and innovation.[130] The fate of the 'competition as such' concept remains to be seen, and the Court might well decide to incorporate it within its Article 102 case law (rather than allowing the apparent asymmetry of the two fields to persist). But whether it is 'competition as such' or 'competition on the merits' as now defined (or an awkward admixture of the two) that guides the Court's future jurisprudence, neither concept is likely to alter the Court's trademark approach in cases where agreements or practices have the actual or potential impact of dividing the internal market along territorial lines coinciding with national borders.[131] Here all bets are off, and the integrationist 'genome' of the Treaty will in most cases pre-determine the outcome. In the absence of very exceptional circumstances any practice that significantly hinders the free movement of goods or services will be held unlawful. This special and crucial zone of jurisprudence also aligns the Court, for 'exogenous' rather than 'endogenous' reasons, with the ordoliberal idea that public and private constraints on economic liberty must be prevented or dismantled.

While the US model can be reduced either to the words 'output model', which is simplistic but on the whole reasonably accurate, or to the more nuanced 'double helix' model, it is more difficult to capture the EU model in a short phrase, especially since it may be an amalgamation of several models. A point of departure is that EU competition law is not statutory law subject to *lex posterior derogat*, but 'primary' law. It is elevated, in material though not formal terms to the rank of constitutional law (since by judicial interpretation the Treaty, materially but not formally, establishes a constitutional

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18. Similarly, see Case T-461/07, *Visa Europe and Visa International Service v Commission* [2011] ECR II-1729, para. 126 (interests of competitors and of consumers, the structure of the market and "competition as such").

128 The conventional judicial wisdom has been that, in Europe, dominant firms have a 'special responsibility' not to distort competition any more than the very existence of the dominant position has already distorted it. This line of thinking is sometimes portrayed as quite innocuous but it seems to establish a kind of informal and unconscious suspicion of aggressive competitive behaviour by dominant firms; it has occasionally led to dangerous conclusions. For example, in Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601, para. 664, the then-Court of First Instance stated that "Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market". This improvident remark, when taken literally, evinces a gross misunderstanding of Article 102, under which a firm can by no means infringe the provision *merely* by gaining market share or even growing to become a monopoly in a given market. For further discussion of the 'special responsibility' doctrine, see Kathryn McMahon, 'A Reformed Approach to Article 82 and the Special Responsibility Not To Distort Competition', in Ariel Ezrachi, ed., *Article 82 EC: Reflections on its Recent Evolution* (Oxford: Hart Publishing, 2009) 121-145.

129 Case C-209/10, *Post Danmark A/S v Konkurrencerådet,* cited above note 119, paras. 22 and 25. See also para. 21. For discussion of *Post Danmark*, see Ekaterina Rousseva and Mel Marquis, 'Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU', 4 *Journal of European Competition Law and Policy* 32-50 (2013). While the judgment is welcomed as a positive development, Rousseva and Marquis point out at pp. 47-48 that the case law of the ECJ seems to be moving simultaneously in different directions, particularly when its jurisprudence on conditional rebates granted by dominant firms is taken into account. It appears likely that the Court will have the opportunity to rectify this, or to fail to do so, within a few years.

130 See *Post Danmark,* ibid., para. 22.

131 As Barry Hawk said, the aim to establish and maintain a single market was the "first principle" of European competition law. As Arved Deringer said, impeding market integration was a "basic sin". See for references Clifford Jones, 'The Second Devolution of European Competition Law: Empowering National Courts, National Authorities, and Private Litigants in the Expanding European Union', presented at the European Union Studies Association Conference, Nashville, Tennessee, 29 March 2003, http://aei.pitt.edu/2882/, at 3. Many have written about the centrality of the market integration objective in the sphere of EEC/EC/EU competition law. For a recent summary, see Lianos, 'Some reflections', cited above note 99, at 17-19.

order).[132] This implies, among other things, that from a legal point of view, and contrary to the U.S. position (see above), it would be entirely objectionable if the Court of Justice were to hold simply that the presence of sector-specific regulation renders application of the EU competition rules in the given sector redundant or wasteful. To the contrary, in the EU system, competition rules co-habit with regulation (whether of national or EU legislative origin), and will generally take precedence in case of conflict.[133] The rules can be applied in particular where, for example for public choice reasons,[134] such regulation is incompatible with the competition rules or where a regulatory system has failed, systematically or as applied in a given case.[135] This system of hierarchy follows from basic principles

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[132] The premise here that while the Sherman Act may be a potent social symbol it is not legally imbued with constitutional status may be contrasted with the less orthodox view presented in Roger Zäch and Adrian Künzler, 'Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law', in Zäch, Heinemann and Kellerhaus, eds., *The Development of Competition Law*, cited above note 14, 61-83. According to Zäch and Künzler, antitrust legislation in the U.S. "came to be viewed as a charter of freedom on a par with the Bill of Rights. The constitutional status of American anti-trust legislation is emphasized in the paradigmatic arguments of the US Supreme Court ruling in the case of *United States v Topco Associates*: 'Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete […]' The goal of [the Sherman Act, as amended by the Clayton Act] is to protect the individual's freedom to compete. In contrast, consumer welfare as such is not mentioned. Thus the legislation correctly implemented the constitutional mandate." Ibid. at 65-66.

From the standpoint of constitutional law, it cannot be concluded that the lush language used by the Supreme Court in *Topco* elevated the Sherman Act to the rank of constitutional law, or even to any intermediate super-statutory status. First, as a matter of context, and putting aside the *obiter* nature of the quote (and putting aside the Court's studied neglect of the judgment in its later case law on horizontal restraints), Justice Marshall in *Topco* spoke for five justices; Chief Justice Burger dissented, Justice Blackmun concurred only in the result (not the reasoning), and neither Powell nor Rehnquist participated in the judgment. Against that background, consider a case decided shortly after *Topco* but before the Court's *volte face* in the well-known *Sylvania* case in 1977. Specifically, in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 685-686 (1975), the same Supreme Court justices (but with Powell and Rehnquist this time) held unanimously that a law adopted by Congress after it adopted the Sherman Act – in this case the Securities and Exchange Act of 1934 – had repealed the Sherman Act insofar as SEC implementing regulations allowed a stock exchange to determine the commissions charged by member brokerage firms; in essence, the Congress was thereby able to carve out an exemption for such an agreement, which otherwise would have been *per se* illegal, from the application of Section 1 of the Sherman Act. There is a conspicuous absence of the Magna Carta language of *Topco*, or of any comparable language, and the Sherman Act was treated as an ordinary statute. Several other (and more recent) examples of both express and implied repeal of the Sherman Act by the Congress – including even the Clayton Act itself, which trimmed the scope of the Sherman Act in relation to labor unions and agriculture – could be mentioned. See further Ginsburg and Haar, 'Resolving Conflicts between Competition and Other Values', cited above note 107.

[133] There is a well-known derogation for services of general economic interest, but it does not apply automatically and it does not entail sector-wide exemptions. Indeed, the sectoral exemptions (or partial exemptions) that apply today under EU law are comparatively few. The Euratom Treaty creates a special regime in the field of non-military use of nuclear materials, but this does not establish a blanket exemption for the nuclear industry; in light of Article 106a(3) Euratom, and despite a textual deletion made by the Treaty of Lisbon, Euratom precludes the application of the TFEU competition rules where supply or pricing activities are specifically regulated under the latter Treaty (agreements concerning the supply of nuclear equipment and agreements between producers of nuclear materials are not so regulated). The TFEU establishes partial derogations for agriculture and transport (where secondary law is relevant) and for military equipment. Secondary law establishes limited exemptions in the insurance and motor vehicle sectors. To consult the relevant provisions, see Commission, Rules Applicable to Antitrust Enforcement, Volume III: Sector Specific Rules (2013), http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_3_en.pdf.

[134] See, e.g., Heimler, 'Competition Policy as a Tool of EU Foreign Policy', cited above note 40 (highlighting the option of insulating competition law from the vagaries and distributional effects of special interest politics by way of constitutionalizing competition rules framed in general terms, as the Treaty of Rome does (and citing the 'Hilmer Report': Frederick Hilmer et al., National Competition Policy (Australian Government, 1993), available at http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf)).

[135] If the regulation (or the relevant public authority's decision) has the effect of removing an undertaking's autonomy so that the undertaking is essentially compelled to act contrary to the competition rules, the undertaking will legally be free

of EU law.[136] Sometimes, in discussions of institutional design the crucial question of the rank that should be assigned to competition law is neglected,[137] but this simple example of differences in the scope of U.S. law and that of EU law underlines the importance of that issue. Moving beyond the matters of scope and hierarchies of norms, Eleanor Fox emphasizes that EU competition law protects rivalry and 'openness' of markets,[138] and in doing so she describes the enforcement tendency without needing to identify the underlying philosophy. It is sometimes said that Europe embraces a 'competitive process' model,[139] but this immediately poses difficulties because in the US, the term 'competitive process' has very different, often Darwinist connotations linked closely to short-term welfare and output.[140] For that matter, this problem of language is being compounded in the sense that the protection of an 'effective competitive process' has become a popular formulation of competition law objectives for a variety of jurisdictions and is thus becoming increasingly entrenched, as seen in the work of the ICN.[141]

Perhaps a way to avoid that confusion, which has already caused significant damage, is to say that EU competition law is driven by a 'dynamic competitive process' model. But EU competition law is ultimately inseparable from the Treaty in which it is embedded (whose character is revealed through the Court's well-known canons of interpretation, including selectively applied teleology[142]). From the

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of fault but the Treaty rules may nevertheless potentially apply as against the author of the regulation (or the against the authority, as the case may be).

136 See Case C-280/08 P, *Deutsche Telekom,* cited above note 119; Damien Geradin, 'Limiting the Scope of Article 82 of the EC Treaty: What can the EU learn from the U.S. Supreme Court's Judgment in *Trinko* in the wake of *Microsoft, IMS*, and *Deutsche Telekom*?', 41 *Common Market Law Review* 1519-1553 (2004), at 1549; Pierre Larouche, 'Contrasting legal solutions and the comparability of EU and US experiences', in François Lévêque and Howard Shelanski, eds., *Antitrust and Regulation in the EU and US* (Cheltenham: Edward Elgar, 2009) 76-100, at 84-86; Alexandre de Streel, 'Background Paper' in OECD, The Regulated Conduct Defence, DAF/COMP(2011)3 (September 2011), 21-54, at 39-40 (Box 3); G. Monti, 'Unilateral conduct', cited above note 6, at 355; Ginsburg and Haar, 'Resolving Conflicts between Competition and Other Values', cited above note 107, at footnote 13 and accompanying text. For further discussion on the relationship between the EU competition rules and sectoral regulation, see, e.g., Alexandre de Streel, 'Interaction between the Competition Rules and Sector-Specific Regulation', in Laurent Garzaniti and Matthew O'Regan, *Telecommunications, Broadcasting and the Internet - EU Competition Law and Regulation*, 3rd edition (London: Sweet & Maxwell, 2010) 867-885.

137 One can appreciate the pragmatic reasons for this neglect. Constitutional reform tends to be a rare event, and building up the necessary momentum to reform a constitution merely to embed competition rules within it is not realistic. Any such reforms would normally have to accompany wider discussion of constitutional change. Furthermore, the conventional idea of constitutional law tends to pre-suppose that the rule of law is firmly in place, which is certainly not universally so.

138 Eleanor Fox, 'We Protection Competition, You Protect Competitors', 26 *World Competition* 149-165 (2003), section III. This is a recurring theme in Fox's work. See, e.g., 'The Efficiency Paradox', cited above note 104, at 86; 'Linked-In', cited above note 39, at 153 (the European institutions protect "dynamic rivalry, market access, and the competitive structure of the market").

139 See above note 118.

140 One way to underline the difference in usage is to note that in the EU, the term 'competitive process' is used when an authority seeks to intervene, whereas in the US the term is more often used to caution against false convictions in cases of aggressive market conduct. By way of digression, protecting the competitive process in the EU context must be reconciled with the prohibition of excessive prices under the EU case law, whereas even the highest monopoly prices cannot be touched by Section 2 of the Sherman Act outside the realm of *de facto* essential facility cases. Although it may not be immediately obvious how the excessive pricing offence can fit with the competitive process paradigm, one could say that an appropriate remedy in such a case under Article 102 TFEU is the dismantling of (artificial) entry barriers that enable the dominant firm to charge exorbitant prices. Such a remedy would then permit the competitive process to reassert itself.

141 See G. Monti, 'Unilateral conduct', cited above note 6, at 352-354 (discussing the ICN Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-created Monopolies of 2007, and noting the language difficulty).

142 See, e.g., Joxerramon Bengoetxea, *The Legal reasoning of the European Court of Justice: towards a European jurisprudence* (Oxford: Clarendon Press, 1993) 233-270 (discussing the Court's various interpretive techniques). The idea that the Court uses teleological reasoning selectively may arguably be supported by its recourse to literalism in some

point of view of the ECJ, the objectives of the competition rules must be situated coherently within the objectives pursued by the Treaty as a whole.[143] Therefore, even the designation 'dynamic competitive process' is a simplification that should be used with caution. An alternative term that has been put forward aspirationally is 'holistic' competition law.[144] This too calls for caution, as holism might be overinclusive and could be turned into an epithet by critics quick to equate a complex goal structure with rule by expansive discretion, unpredictability, and errors in both directions resulting in overdeterrence as well as underdeterrence.

### 3.4.3. Competition between the American and European approaches to competition law

The US model (emphasizing outcomes first and last) and the more complicated EU model (treating outcomes as important but giving process the final word) are rivalrous and ultimately, it would seem, irreconcilable[145] – even if in general they may converge on case results.[146] How have the two models fared? It may come as no surprise that the European Community/European Union model of competition law has enjoyed far more success on the 'market' than has the U.S. model. Although further research should detail jurisdiction-by-jurisdiction why the 'output' or 'double helix' has not been more readily accepted in the majority of jurisdictions worldwide, the general reasons may be stated without difficulty. In the 1970s, when antitrust was transformed in the U.S., the few jurisdictions elsewhere with fully functional competition law systems (essentially, Germany and the European Economic Community[147]) already had intellectual foundations underpinning their

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instances. See ibid. at 234-237. Many other studies are devoted to the styles of reasoning employed by the ECJ. See, e.g., Anthony Arnull, *The European Court of Justice*, 2nd edition (Oxford: OUP, 2006), chapter 13.

143 For a recent statement of the systematic interpretation argument, particularly with reference to the post-Lisbon era, see Suzanne Kingston, 'Competition and Environmental Protection: A Case of Ne'er the Twain Shall Meet?', in Lowe and Marquis, eds., *Competition, Regulation and Public Policies,* cited above note 36. The significance of new or altered provisions in the Lisbon Treaty has been observed by other scholars as well. See, e.g., Ioannis Lianos and Arianna Andreangeli, 'The European Union: The Competition Law System and the Union's Norms', in Fox and Trebilcock, eds., *The Design of Competition Law Institutions*, cited above note 36, 384-443, at 406-407.

144 See Lianos, 'Some reflections', cited above note 99, at 47-62.

145 *Cf.* G. Monti, 'Unilateral conduct', cited above note 6, at 353 (referring to a "fundamental schism" between "those who believe that one should merely protect the process and not consider the likely outcomes (on the basis that beneficial outcomes will result provided we ensure markets remain competitive) and those who think that absent proof of anticompetitive effects in terms of higher prices or reduced output, one is likely to over-enforce the law, reducing economic welfare" (footnote omitted)).

146 Notwithstanding the relevant differences, Monti warns against assuming that a welfare-driven approach and a European 'traditionalist' approach will diverge on outcomes; such will be the case only on the margins. See Monti, 'EU Competition Law from Rome to Lisbon – Social Market Economy', in Caroline Heide-Jorgensen, Christian Bergqvist, Ulla Neergard and Sune Troels Poulsen, eds., *Aims and Values in Competition Law* (Copenhagen: DJøF Forlag, 2013) 27-66, at 45 ("Three beliefs underpin the traditionalist response: first, economic freedom is more important than efficiency; second, monopoly is less likely to yield economic benefit than competition; third, it is hard to predict all welfare effects. This is the essence of the difference, which will arise only rarely." (footnote omitted) Monti's example of where outcomes would diverge is a proposed 'merger to monopoly' that would be efficient inasmuch as it would reduce the production costs of the merged entity, which then may or may not entail reduced prices for consumers. Clearly, 'traditionalists' would decline to approve such a merger, whereas adherents of the efficiency paradigm would merely insist on rigorous evidence of the claimed efficiencies. This example highlights the fact that a *pure* efficiency approach, as opposed to a genuine consumer welfare approach, omits or at least yields to other policy domains the additional distributive question of whether consumers will truly benefit from the efficiencies gained as a result of the merger. The assumption, rather, is that society will be better off when such efficient elimination of rivalry is allowed.

147 In Japan, the JFTC in the 1970s reasserted itself and began to make a rather dramatic impact (until competition policy faded again in the 1980s), but nevertheless it would be a stretch to characterize Japanese competition law even in the 1970s as fully functional. There were other competition law regimes in place in the 1970s, of course, but each was held back by a variety of factors such as faulty legislative drafting, institutional and political economy factors, overbroad exemptions and so on. For example, competition law enforcement in India under the Monopolies and Restrictive Trade Practices Act 1969 was notoriously weak. Another example is Australia, where, despite competition rules going back to

competition law paradigm which precluded a reductionist output model. In the 1980s and especially the 1990s, when interest in competition law around the world began to surge, the countries adopting new competition laws – mostly developing countries – realized that their needs and background conditions were quite different from those of the U.S. As Dan Crane suggests, for example, "many developing countries weren't ready to adopt an antitrust policy that seemed designed to do very little".[148] Crane adds that the EU "arguably filled the gap and became a much more important source of ideas for developing antitrust regimes like China, India, South Africa, and Brazil".[149] Eleanor Fox – who was herself instrumental in the early development of the competition laws of certain developing countries such as South Africa – shares Crane's assessment: "The EU has a more copious view than the U.S. of harm to competition. It seeks to preserve competitive rivalry in concentrated markets and to safeguard openness and access (albeit sometimes without a sufficient rudder). Openness of markets is in the DNA of Europe. EU law is more sympathetic to economies that have suffered severe blockage of markets as a result of pervasive state ownership, privilege, cronyism, and discrimination."[150] Of course, the U.S. has not failed in all respects when promoting competition policy ideas. The use of leniency programmes by competition agencies worldwide in their efforts to detect cartels, and the punishment of cartels by sanctions of 'felony' rather than 'misdemeanor'

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1906, enforcement under the amended Trade Practices Act 1974 did not gain strong momentum until the 1990s (largely by virtue of the recommendations in the 1993 Hilmer Report, cited above note 134).

148 Crane, 'Interview with Eleanor Fox: Networking the world', *Concurrences* N° 4-2011, at 2. It is likely that Crane's words, "designed to do very little", are deliberately caricaturized in order to capture popular perceptions of the Chicago school that might colour its image abroad. In the first place, it has been argued that Chicago's normative edifice was not 'designed' but was (re)constructed following successive analyses of antitrust-relevant business practices conducted by, above all, Aaron Director and his students and associates in the 1950s and 1960s. See Richard Posner, 'The Chicago School of Antitrust Analysis', 127 *University of Pennsylvania Law Review* 925-948 (1979) at 926; William Page, 'The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency', 75 *Virginia Law Review* 1221-1308 (1989), at 1228. (That seems to be a valid argument as far as the grand Chicago syntheses of Posner and Bork are concerned: these were achieved in 1976 and 1978.) Second, the question of whether Chicago antitrust essentially prescribes agency inaction (outside of cartel enforcement) and presumptive case dismissal of private claims depends on which of its adherents is taken to be its spokesman: Posner, whom Crane calls a 'Chicago School centrist', has by no means pleaded for a hands-off antitrust policy. See Daniel Crane, 'Chicago, Post-Chicago, and Neo-Chicago', 76 *University of Chicago Law Review* 1911-1933 (2009), at 1917-1918 (enumerating fact patterns to which Posner has suggested antitrust liability rules are relevant).

149 Crane, 'Interview', cited previous footnote, at 2. Michal Gal and Jorge Padilla provide evidence of this in 'The Follower Phenomenon: Implications for Design of Monopolization Rules in a Global Economy', 76 *Antitrust Law Journal* 899-928 (2010), at 903 and 920 (at least 43 jurisdictions have "copied" the EU's prohibition on the abuse of dominance). *Cf.* Heimler and Mehta, 'Monopolization in developing countries', cited above note 105 (noting the popularity among developing countries of an abuse of dominance provision that can be applied to excessive pricing scenarios, unlike Section 2 of the Sherman Act; but also highlighting that developing countries have followed the UNCTAD model law, which also covers compulsory contract terms that may directly or indirectly limit competitors). Of course, it is not taken for granted that the literal replication of a foreign provision of law such as Article 102 TFEU reliably indicates that its interpretation and enforcement will parallel or even compare with the emulated jurisdiction, not least because the institutions responsible for these tasks are different (i.e., legislators are not normally charged with interpreting or applying the law). Nevertheless, the notable frequency of the 'grafting' of the EU rule seems significant. In some cases, Article 102 may have been perceived as attractive on the strength of its own apparent merits and accepted spontaneously. In other areas, its acceptance likely reflects active promotion by the EU, including by way of bargaining and/or conditionality.

150 'Interview', ibid. at 3. With regard to the way US antitrust is perceived from the outside, see David Gerber, *Global Competition*, cited above note 4, at 204 ("US experience has long been at the center of the competition law story, but the path of US antitrust law development and the set of issues included within it appear narrow from a global perspective. In comparison with European experience and issues, they often have limited relevance to decision makers in other countries and to the issues of global competition law development that many others consider important."). Further discussion is provided in ibid. at 160-161 (pointing to factors that make the EU experience resonate more with numerous other jurisdictions, including, for example: the history of state ownership and privilege mentioned by Fox; the use of competition law to oppose excessive economic power; Europe's civil law tradition and its clearer dividing line between public and private law institutions; and the role competition law has played in Europe's process of political and economic integration).

intensity, seem to be quite successful U.S. exports,[151] even though the criminal law gambit for cartel conduct remains immature or embryonic in most 'importing' jurisdictions due to institutional impediments and/or reasons of culture.[152] Another idea that the U.S. has pushed with some success (in Europe and elsewhere) is that, as alluded to above, outside of hard core categories of irredeemable conduct – horizontal price fixing, market sharing, bidrigging and the like – competition problems should be resolved only after an assessment of their competitive effects has been conducted.[153] Nevertheless, by and large the picture presented by Crane and Fox rings true: the EU-oriented ideas of open market maintenance and faith in prophylactic market intervention by public institutions have been broadly accepted worldwide; the Chicago model has in general been studied more for its pitfalls than for its accuracy and appropriateness. Lest we leave the impression that the EU paradigm is a universally irresistible model, however, it may be added that many developing countries are searching for a competition policy that goes beyond that of the EU. The overriding imperative for these countries is economic development. Competition law is often seen as a tool of development policy insofar as having such a law in place can support growth,[154] and of wealth redistribution insofar as it can

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[151] It has been explained that beginning in the 1990s and roughly through 2001, while the U.S. succeeded in stirring up worldwide interest in the fight against cartels and secured at the OECD a 1998 Council Recommendation against 'hard core' cartels, the substantive areas to which the European Community had been seeking to draw attention – abuse of dominance and vertical restraints – faded into the background. See Fox, 'Linked-In', cited above note 39, at 156-157. In footnote 17 of her article, Fox describes this turn of events as a U.S. 'victory'. If this process is seen as a global struggle, one might also say that it reflected externally Europe's introspective modernization experience in the 1990s. That is to say, seeds had already been sown which eventually led to the European Commission to reassess priorities internally and to devote far more attention to hard core cartels than to vertical restraints. Arguably, this means that the 'victory' dynamic to which Fox refers partly manifested itself earlier, not so much in the global antitrust discourse but in complex diffusion elements that more directly concerned the interplay between U.S. and EEC/EC antitrust (which cannot be explained adequately in the context of this essay). The story with regard to abuse of dominance problems is somewhat more complicated, and this is where the 'victory' is arguably most apparent, as non-interventionism in this regard probably did not reflect the preferences of the EC/EU even taking account of its internal evolution and investigations.

[152] See Harry First, 'Your Money and Your Life: The Export of U.S. Antitrust Remedies', in Sokol, Cheng and Lianos, eds., *Competition Law and Development*, cited above note 3, 167-181 (discussing institutional variations in criminal penalties in a sample of 13 jurisdictions and noting that, with exceptions, few price fixers really go to jail outside the U.S.); Donald Baker, 'Trying to Use Criminal Law and Incarceration to Punish Participants and Deter Cartels Raises Some Broad Political and Social Questions in Europe', in Philip Lowe and Mel Marquis, eds., *European Competition Law Annual 2011: Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies* (Oxford: Hart Publishing, 2014) 41-61 (questioning the cultural ripeness of criminal sanctions in the European context and suggesting a variety of alternative administrative tools that could be used as substitutes to achieve deterrence objectives).

[153] This idea was actively promoted to undercut a tradition of competition law enforcement in the European (Economic) Community whereby many competition problems could be solved on the basis of categorical reasoning. For example, it was often assumed by EEC/EC enforcers that if restrictions in a vertical agreement were designed to provide territorial protection for a distributor, the agreement was *ipso facto* inimical to the ideal of market integration, and fell necessarily to be condemned irrespective of possible countervailing effects – an insufficiently nuanced view. In the field of unilateral conduct by a firm with a dominant market position, it was traditionally believed (and may still be believed by the EU Courts – a matter to be revealed when a pending controversy reaches final judgment) that conditional sales discounts that create fidelity on the part of customers were *ipso facto* inimical to the 'competitive process', and that there was no need to delve further into the presence/absence of anticompetitive distortions or efficiency effects.

[154] It seems clear that a functioning competition law regime is not, strictly speaking and all else equal, a *necessary* condition for economic growth. See, e.g., Thomas Ulen, 'The Uneasy Case for Competition Law and Regulation as Decisive Factors in Development: Some Lessons for China', in Michael Faure and Xinzhu Zhang, eds., *Competition Policy and Regulation: Recent Developments in China, the US and Europe* (Cheltenham: Edward Elgar, 2011) 13-44; Aditya Bhattacharjea, 'Who Needs Antitrust? Or, Is Developing-Country Antitrust Different? A Historical-Comparative Analysis', in Sokol, Cheng and Lianos, eds., *Competition Law and Development*, cited above note 3, 52-65, at 58-59. (The possibility of growth absent effective competition law, at least where conditions are ripe, is not confined to Asia. To cite just two examples: the U.S. economy grew at a rate of around 7% from 1869 to 1879; and the Italian economy grew at rates of 6% to 8% between the late 1950s and the late 1960s, thus ramping up essentially before the EEC competition law system could even partially compensate for the lack of a genuine Italian competition law.) Nevertheless, several studies have indicated a positive correlation between effective enforcement of competition laws in developing countries and increased economic growth. See, e.g., John Preston, 'Investment Climate Reform. Competition Policy and Economic

ameliorate inequitable wealth transfers and distortions associated with (possibly state-supported) market power.[155] The question of how to integrate development and social inclusion objectives (which may be commingled with cultural specificities as well) within a competition law framework is thus in many parts of the world an issue of immediacy and prime importance.[156]

### 3.4.4. Widening of the geographic field and of the competitive parameters

The implicit contest between U.S.-born and E.U.-born ideas does not exhaust the competitive field in this context. The impulse to develop and advocate competition-related ideas and concepts is also felt in other discrete jurisdictions. Examples of such jurisdictions can be mentioned only briefly here, but one of them is the United Kingdom. The now-retired Office of Fair Trading (OFT) for many years sought to provide intellectual leadership via its unusually prolific publication of studies, surveys and introspective initiatives on a variety of subjects.[157] The OFT's efforts had a persuasive impact in

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Development: Some Country Experiences', Report for the UK Dept. of International Development (November 2003) (but noting the need for more country-specific analysis); Fox and Gal, 'Drafting Competition Law for Developing Jurisdictions', cited above note 7, at 2-3, with references. And empirical research seems to confirm that sectors marked by competitive pressures tend to exhibit greater relative productivity. See, e.g., Mateus, 'What Competition Law Regime?', cited above note 23, at 117-118, with references. It may therefore be unsurprising that, when other growth models, such as Chalmers Johnson's 'developmental state' model, reach a point of exhaustion and diminishing returns, a government may consider a stronger commitment to competition, and a corresponding shift away from excessive intervention or discriminatory industrial policy, as essential factors contributing to productivity and growth or at least buffering against the possibility of worse conditions. *Cf.* Marquis and Shiraishi, 'Japanese Cartel Control in Transition', cited above note 26. In this sense, discussions of whether a functioning competition law regime is a necessary condition of growth should consider the prospects of *sustained* growth and should take account of a country's medium-term and long-term economic evolution.

155 One notable version of this perspective is that (notwithstanding the caveat of the previous footnote) effective competition law promotes functional markets, and well-functioning markets are essential to developing countries because of their intertwined instrumental and ethical characteristics. Markets produce wealth necessary for economic development and for the protection of human rights, each of which are necessary conditions for self-actualization and socioeconomic mobility; and they constitute (on both the supply and demand side) a social institution wherein, provided the possibility of participation is assured, personal freedom can flourish. For an earlier discussion of sets of opportunities (capabilities) as an alternative measure of well-being, see Amartya Sen, *Commodities and Capabilities* (Amsterdam and New York: North-Holland, 1985). More recently, see Amartya Sen, *Development as Freedom* (New York: Knopf, 1999) 4-6, also cited in several recent studies such as: Robert D. Anderson and Anna Caroline Müller, 'Competition and Poverty Reduction: A Holistic Approach', WTO Staff Working Paper ERSD-2013-02 (February 2013); Bhattacharjea, 'A Historical-Comparative Analysis', cited previous footnote, at 63; and D. Daniel Sokol, Thomas K. Cheng and Ioannis Lianos, 'Introduction', in Sokol, Cheng and Lianos, ibid. As Sokol, Cheng and Lianos state at p. 5: "If one were to subscribe to the freedom-based approach to economic development […], one might need to incorporate in competition law analysis special considerations about the impact of competitive behavior on the poor's access to education, health care, and other essentials in life". This could be done, perhaps controversially, at a micro level in individual cases, but at a minimum and more importantly it could be done as a matter of policy planning, prioritization, advocacy and joint international efforts (see also Anderson and Müller, 'A Holistic Approach', cited above; Bhattacharjea, 'A Historical-Comparative-Analysis', cited above, at 53 and 62-65; and Zsofia Tari and Jeremy West, Background Note, Competition and Poverty Reduction, DAF/COMP/GF(2013)1 (February 2013) 1-60). In any case, once again, a long-term and optimistic perspective would suggest that the role of equity-based redistributive concepts incorporated within competition policy as a means to address extreme socioeconomic inequality (and hence extreme political inequality) can be re-evaluated at a later point in time – particularly as applied, if at all, at the micro level – if a developing country 'graduates' to middle income status with tolerable levels of wealth distribution and mobility.

156 See Mor Bakhoum, 'A Dual Language in Modern Competition Law? *Efficiency Approach* versus *Development Approach* and Implications for Developing Countries', 34 *World Competition* 495-522 (2011) (advocating a hybrid concept of "efficient development"). See also See Dina Waked, 'Competition Law in the Developing World: The Why and How of Adoption and its Implications for International Competition Law', 1 *Global Antitrust Review* 69-96 (2008), at 82-84.

157 One may just cite here a small sample of these internally and externally prepared studies, with the following titles: The impact of reverse-fixed payments on competition; The Economics of Secondary Product Markets; Competition and Growth; Consumer behavioural biases in competition; The competition impact of environmental product standards; The

foreign quarters,[158] and were likely intended, in part, to do so. It will not be surprising if the new Competition and Markets Authority follows this pattern. Another example of a competition authority staking a claim for itself by providing intellectual leadership and thereby 'punching above its weight', to use this phrase again, is the Swedish Competition Authority (i.e., the Konkurrensverket). For the last decade the Swedish authority has been hosting annual conferences with noted experts ('the pros and cons of X practice') and publishing the proceedings.[159]

In a different vein but still in relation to the power of ideas, and with a clear connection to the contrasting 'systems of belief' marking U.S. antitrust and EU competition law, one may also refer to the alternative conceptions and objectives of the defence of competition in jurisdictions worldwide. A notable example in this regard is South Africa, where the idea of competition law cannot be confined exclusively to concepts such as economic efficiency, well-functioning markets, or the freedom to compete, among others. In South Africa antitrust has been partly conceived of as contributing to a post-Apartheid form of economic democratization, to borrow a phrase normally used in discussions of certain Asian countries.[160] Concerns relating to employment impacts, Black Economic Empowerment, and more generally protection of the public interest partly define its distinctive 'goal structure',[161] and understandably so. Apart from the terms of the law, the decision-making of the South African Competition Tribunal has been praised for being "specifically tailored to the goal of inclusive development".[162] In short, and although the appellate courts have occasionally rejected the purposive statutory interpretations of the Tribunal,[163] South Africa has produced a novel, culturally attuned philosophy of competition law.[164] The model may not travel well to other social settings that lack a history or present reality of extreme economic inequality and/or caste-like social strata analogous to those that have afflicted South Africa. Yet the idea that competition policy can be a tool to destabilize

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competitive effects of buyer groups. These publications are available at http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/OFTwork/publications/.

158 For example, the OFT's work on prioritization of agency activities and the resulting report issued in 2008 attracted the interest of the U.S. Federal Trade Commission. See William Kovacic et al., *The Federal Trade Commission at 100: Into Our 2nd Century – The Continuing Pursuit of Better Practices* (2009), www.ftc.gov/os.2009/01/ftc100rpt.pdf., at 88-89 and 116. The report reviews the approaches of several other authorities as well; it is not suggested that the OFT was uniquely influential.

159 Since 2002, the Konkurrensverket has hosted 'Pros and Cons' conferences covering a variety of competition-related subjects including consumer protection, standard setting, vertical restraints, high prices, low prices, information sharing, the pros and cons of merger control, and more pros and cons of merger control. For details, see Arvid Fredenberg, 'Ten Years of Pros and Cons Conferences', *CPI Antitrust Chronicle*, August 2012 (1).

160 The South African version of economic democratization is described in part by Lewis, 'Embedding a Competition Culture', cited above note 21, at 233 (robust antitrust was to be an instrument "whereby the economic kingdom would be conquered by the post-apartheid rulers. […] [C]oncentrated markets and centralized ownership structures, and the powerful interest groups that they supported, were going to be fragmented."). A Kenyan perspective on the idea of economic democracy to parallel political democracy is referenced in the speech of Uhuru Kenyatta, cited above note 46.

161 On the public interest objectives in the South African context, see Trudi Hartzenberg, 'Competition policy and enterprise development: the role of public interests in South Africa's competition policy', in Paul Cook, Raul Fabella and Cassey Lee, eds., *Competitive Advantages and Competition Policy in Developing Countries* (Cheltenham: Edward Elgar, 2007) 136-154. For a discussion of 'goal structures', see David Gerber, 'The Future of Article 82: Dissecting the Conflict', in Claus-Dieter Ehlermann and Mel Marquis, eds., *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Oxford: Hart Publishing, 2008) 37-54.

162 Fox, 'Competition, development and regional integration', cited above note 7, at 284. Moreover, competition law has been used in South Africa (by the Competition Commission) to remedy what may also have been a failure of public health policy, in particular in the context of the pharmaceutical sector and medicines for HIV patients. See G. Monti, 'Unilateral conduct', cited above note 6, at 364.

163 See Janice Bleazard, 'Pigeon-holed by precedent: form versus substance in the application of South African competition law', in Lewis, ed., *Building New Competition Regimes,* cited above note 9, 81-109.

164 For a fuller picture of competition law in South Africa and of the problems facing it, see Dennis Davis and Lara Granville, 'South Africa: The Competition Law System and the Country's Norms', in Fox and Trebilcock, eds., *Design of Competition Law Institutions*, cited above note 36, 266-328.

entrenched social structures, promote socioeconomic mobility and alleviate poverty may resonate in a large number of countries.[165] David Lewis argues, moreover, that a competition authority can be well-positioned to balance between competition issues, such as market power and efficiency, and seemingly incommensurable public interest issues such as employment impacts and small business concerns.[166] If a country follows in the footsteps of the South African legislator and competition authorities, it should however also plan for the accumulation of the necessary political capital and coalition partners, and ensure that it has the necessary legal mechanisms, to add to its portfolio the contestation and dismantling of unjustified state-imposed restrictions of competition.[167] Further, the authority entrusted to balance competition and non-competition concerns should be prepared for the possibility that such a mandate might attract *ad hoc* attempts by government officials to influence that balance.[168]

As yet another example in the context of alternative visions of competition policy goals one may also mention China. In the People's Republic, competition law is now presented as an integral part of the socialist market economy and serves, in tandem with (albeit in conflict with) industrial policy as an instrument of State-led capitalism.[169] China's competition law framework (which must be considered together with the country's institutional features, including a highly specific judiciary[170]) has borrowed some genetic materials from the EU model but it is in its present state a far cry from its cousin and bears only a slight resemblance. Chinese competition law presents yet another model from which to 'choose' – potentially a rather appealing one for countries not ready to cut their economies free from

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[165] The links between competition policy on the one hand and poverty reduction, inclusiveness and mobility on the other have stirred great interest. For example, the African Competition Forum states that its principal objective is "to promote the adoption of competition principles in the implementation of national and regional economic policies of African countries, in order to alleviate poverty and enhance inclusive economic growth, development and consumer welfare by fostering competition in markets, and thereby increasing investment, productivity, innovation and entrepreneurship". ACF Press Release of 8 March 2011. According to researchers at the OECD, the links between competition policy and poverty, and the possible ameliorative effects of competition policy, require further empirical research; in the meantime, competition authorities should prioritize their work taking into account impact on the poor (e.g., by focusing on essential goods and services, banking and communications), and they should actively engage in advocacy to encourage market-based policies and to counter-balance vested interests. See Zsofia Tari and Jeremy West, Background Note on Competition and Poverty Reduction, cited above note 155. See also Anderson and Müller, 'A Holistic Approach', cited above note 155.

[166] See David Lewis, Contribution to the Global Forum on Competition (Competition and Poverty Reduction), DAF/COMP/GF(2013)3 (January 2013) 1-13, at 7-11. In the context of the EU, the European Commission sometimes acts, theoretically under the control of the EU Courts, as mediator of a range of interests unconfined to competition concerns strictly defined. See G. Monti, 'The Dominance of Economic Analysis?', cited above note 14, for example at 15-16 (citing Giandomenico Majone, 'Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance', 2 *European Union Politics* 103-122 (2001) (Commission as a 'trustee' rather than merely an agent, and as a part owner of the policies for which it is responsible)). With specific regard to Article 101(3) TFEU, whose breadth continues to provoke debate, the Commission's role as mediator of interests raises questions as to how to define the role national courts and agencies ought to play when applying that provision (or when applying EU competition law generally). Different solutions could have different consequences for the principle of the uniform application of EU law. For a brief presentation of this set of dilemmas, see Whish and Bailey, *Competition Law*, 7th edition, cited above note 110, at 159-160.

[167] See Lewis, 'Embedding a Competition Culture', cited above note 21.

[168] See ibid., for example at 243 (describing intrusions by a senior official of the South African Department of Trade and Industry).

[169] For more on the theme of the socialist market economy, see, e.g., Mel Marquis, 'Abuse of administrative power to restrict competition in China: four reflections, two ideas and a thought', in Faure and Zhang, eds., *The Chinese Anti-Monopoly Law,* cited above note 25, 73-141, at 87-88.

[170] Recently and encouragingly, some efforts have been made at the level of the central government to rein in the habitual interference with the judicial process by local officials. See, e.g., Keith Zhai, 'Courts see less cadre meddling in judgments', *South China Morning Post* (13 December 2013), at A6. However, judicial independence in China is bound to remain merely relative in nature. There is little doubt that the judicial process will remain subject to intervention in politically sensitive disputes, whether the intervention is surreptitious and unapproved by the political hierarchy or whether it is done by order from above.

the umbilical cord of the State – or for countries with changing preferences wishing to restore a close connection that has been lost.

## 4. Conclusion

This essay was prepared for a workshop focusing on the transnational circulation of policy paradigms wherein the case study chosen was the field of competition law. The argument presented in the essay is that policy paradigms in this context are actively 'pushed' and 'pulled' according to forces analogous to those of the market, and that policy entrepreneurs (typically competition law agencies) operate in a setting where – notwithstanding various cooperative platforms – competition and rivalry occur and manifest themselves along a number of dimensions. An important premise of the paper is thus the notion advanced by other scholars that competition enforcers across jurisdictions compete among themselves on a global market. Building on that premise, the essay has sought to elaborate on certain arenas or 'modes' through which such competitive behaviour is pursued. With the multiplication of antitrust jurisdictions around the world, which may act simultaneously as both 'sellers' and 'buyers', new competitive opportunities may likewise emerge. While the paper has not dwelled upon the normative desirability of global 'yardstick' competition among rival agencies, the alternative would promise little if any dynamism, adaptability or motivation for innovation and agency self-improvement

QM-04-14-513-EN-N



Publications Office

DOI: 10.2870/12721

ISBN: 978-92-9084-218-7