

**THE EUROPEAN COMPETITION NETWORK: A
EUROPEAN REGULATORY NETWORK WITH A
DIFFERENCE**

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Regulatory networks have become an increasingly familiar feature within the EU. Linking actors at the EU and national levels, their emergence and proliferation is interpreted by some as a confirming instance of the spread of ‘network governance’ (Eberlein 2003, Eberlein and Grande 2004) and by others as a second-best solution to the problem of securing coherent implementation in the EU’s decentralised political system (Sutherland 1992, Hancher 1996). According to the two main accounts (Dehousse 2001, Coen and Thatcher 2008), European regulatory networks (ERNs) represent an improvised response by actors within a fragmented regulatory order to the organizational and functional pressures for improved coordination that have arisen in the wake of the single market project. While both national governments and the European Commission have acceded to these demands, they have eschewed the option of creating powerful supranational regulators and preferred instead to create networks connecting new or existing EU-level actors to authorities in the member states. As neither governments nor the Commission have been willing to grant strong powers to these new institutions, ERNs are weak, have limited resources, and are highly constrained. They have few prerogatives, no right of initiative, and little independence, acting for the most part under ‘the shadow of hierarchy’ (Héritier and Lehmkuhl 2008).

The European Competition Network (ECN) stands at odds with this picture. Its powers, design, and emergence are very different from the European regulatory networks (ERNs) examined in the existing literature. While regulatory networks have limited competences, the ECN wields significant powers. As an institution, it is powerful, independent and capable of initiative and innovation. It is, moreover, a complex, multilayered organisation, with a clear and detailed division of labour between members. Although it has a well-resourced ‘network manager’ (Kickert 1997, Cengiz 2007) in the form of the European Commission, the ECN exhibits genuine partnership between its members in a joint enterprise. Finally, and the key to understanding its singularity, the ECN was not an improvised solution to the problem of fragmented authority, but was born out of a process of careful planning and

calculation on the part of the Commission in an area where power has historically been concentrated in its hands.

Based on original research conducted by the authors, this paper examines the performance, structure and creation of the ECN. It makes two arguments. The first is that the ECN is a network of a different kind compared to the ERNs and is the product of very particular circumstances. This suggests that there are important limitations to the generalisations in the existing literature concerning the emergence of ERNs, In particular, the idiosyncratic setting of policy domains may influence the creation and character of ERNs, and ERNs are not created universally in response to 'structural logic' (Dehousse 2001) or the product of the second of two rounds of delegation (Coen and Thatcher 2008a). A second (minor) argument is that certain pessimistic predictions about the ECN made before its creation have not been borne out in practice.

European regulatory networks

Networks have long been advocated as a mechanism for delivering cooperation between national authorities and EU level actors and for achieving uniformity of action in the single European market (see, e.g. Sutherland 1992, Hancher 1996, European Commission 2001), though, as Jordan and Schout (2005) have demonstrated, little thought appears to have been invested in the organizational resources necessary to make them work effectively. Nonetheless, when the first ERNs were created in the late 1990s in a range of sectors including energy, financial services, telecommunications and transport, their emergence was interpreted as evidence of a shift towards ‘network governance’ (see Coen and Thatcher 2008a: 50).

Summarising the literature, Coen and Thatcher (2008a) suggest three attributes that are possessed by such networks: they link actors from different institutional levels and from the public and the private sector; they involve a shift of power from well-established levels to organizations or individuals whose main role is linking and coordinating actors (Schout and Jordan 2005; Jordan, Wurzel and Zito 2005, Peters 1998); and they involve change in mode of governance from hierarchy towards consultation, negotiations and soft law. However, examination of ERNs in practice reveals that they are at some distance from this conception (Coen and Thatcher 2008a). Not only do ERNs lack the power and resources that would enable them to act independently (see below), but their composition, bringing together regulators from the member states and the EU level, does not fit the model.

Yet this is not to deny that ERNs are a distinct organizational form. As Thatcher and Coen (2006) underline, ERNs have important properties that distinguish them from more informal networks that also bring regulators together (see below). ERNs are created on the basis of formal agreements, which define their functions, powers and structures. Their creation can be explained as a response by governments and the Commission to pressures to coordinate fragmented regulators, and their characteristics by the unwillingness of the same actors to delegate significant powers or resources to them.

Explaining the rise of European regulatory networks

Two main accounts of the rise of ERNs exist in the literature. According to the first, proposed by Renaud Dehousse, ERNs were created in response to a functional logic arising from a 'regulatory gap' that became especially pronounced with the completion of the 1992 project (2001: 247). Dehousse's explanation is grounded in an analysis where the Community confronts significant challenges to the achievement of its central ambition.

According to this account, the main aim of the Communities is to create a single market and the main tool under the treaty for its achievement is legislative harmonization. This is a complex process, which is two-stage -- a legislative exercise, followed by the approximation of substantive rules -- and two-tier: legislation takes the form of directives, which leave national authorities 'the choice of form and methods'. Though complicated, the Community's decentralised system has important virtues. First, decisions are made consensually by member governments in the Council. Second, their implementation respects the prerogatives of national administrations. Third, it embodies a crucial power balance. Since the Commission is restricted to the role of *administration de mission* -- its primary duty is *non pas de faire, mais de faire faire* (Dehousse 2001 : 249) -- Community competencies have been able to develop without compromising member state autonomy.

At the same time, legislative harmonization is slow and beset by a host of problems. Transposition is subject to bottlenecks, and directives cannot foresee all possible contingencies in a given area. In addition, differences in certification requirements, inspection procedures, recall mechanisms, and control systems, the resources available to national authorities, and regulatory traditions. Also, though the Community is competent in regard to the removal of trade barriers, member states retain authority in areas, such as health and safety, where national regulations may be an impediment to free movement. As a result, regulatory gaps are likely to emerge.

These gaps, and the limitations of legislative harmonization, became particularly apparent in the wake of the single market programme. The difficulty was to find a solution that respected the existing power balance. Though it was recognized that 'legislative harmonization is not enough to dismantle internal barriers to trade' (Dehousse 2001: 247), alternatives were in short supply. The legislative option was not a possibility, since legislation is no better than regulation at anticipating all contingencies, while the creation of a supranational regulator was 'politically inconceivable and probably undesirable' (Dehousse 2001: 246).ⁱ Nor were *ad hoc*

meetings of national officials likely to prove satisfactory. Regulation by networks was the most acceptable solution. This promised to achieve the uniformity necessary in the common market without doing away with decentralized implementation (Dehousse 2001: 254).

The second (not-necessarily competing) explanation is offered by David Coen and Mark Thatcher (2008a). They use principal-agent theory to argue that the creation of ERNs is best understood as the outcome of the second of two rounds of delegation. In the first round, which took place in the 1980s and 1990s, national governments in Europe withdrew from direct economic intervention and switched to regulated governance (Majone 1994). As part of this shift, which created the regulatory state in Europe, they made two parallel delegations of power: to the EU (Majone 1996, 2005) and to domestic IRAs (Majone 1996, Thatcher 2002, 2005, Radaelli 2004). At the EU level, the delegation of power led to the development of new, detailed sectoral regimes, often in areas in which the Union had not previously been active. At the national level, IRAs were ‘legally and organisationally separated from government departments and suppliers, are headed by appointed members who cannot be easily dismissed before the end of their terms and have their own staff, budgets and internal organisational rules’ (Coen and Thatcher 2008: 52).

According to Coen and Thatcher, ERNs were created in the late 1990s in order to harmonise the governance of the single market. This involved a double delegation of powers: from IRAs and from the European Commission. Their principal aim was to co-ordinate regulators and to increase ‘consistency of regulation across the EU’ (Coen and Thatcher 2008: 52). Moreover, ‘[t]hey appear to offer an important move towards formal network governance, one that goes beyond pre-existing delegations and/or the reliance on soft law in informal European networks’ (Coen and Thatcher 2008: 52). In many sectors, informal (and often horizontal) networks that brought together IRAs had already developed.ⁱⁱ However, ‘ERNs are considerably more formalised and involve greater delegation than the other networks (many of which continue to exist alongside them)’ (Coen and Thatcher 2008: 52).

In summary, both accounts suggest that the creation of ERNs belongs to a particular phase of European integration. They both cite the need for greater coordination between national and EU-level actors as the motivation for establishing these bodies, underline actor preferences for hybrid networks over other possible options – Coen and Thatcher note for example that ‘the creation of ERNs took place

after another solution, the creation of Euro-regulators, had been rejected' (2008: 66) – and emphasise the limited powers and resources that have been granted to ERNs.

Characterising European regulatory networks

Although they were an important addition to the EU's already complex architecture and part of the transformation of the regulatory landscape in Europe that has taken place since the late 1980s, ERNs were created as relatively weak bodies with limited competencies and few powers or resources. Contrary to what their nomenclature suggests, ERNs do not generally exercise regulatory responsibilities. Indeed, their main function has been to improve coordination, horizontally, between national regulators, and, vertically, between regulatory bodies at national and EU levels.

In two important comparative studies, Coen and Thatcher (2008a, 2008b) examine the roles, structure and operation of six ERNs in energy, financial services, telecommunications and transport.ⁱⁱⁱ Though there is some variation in their responsibilities, they find that ERNs have been entrusted with relatively modest functions. The networks considered by Coen and Thatcher (2008a) have an essentially advisory remit. They are intended to improve coordination by gathering information, which they then circulate to members of the network, to advise the Commission, and to ensure better implementation of community measures in the member states. The CESR in addition contributes to the drafting of secondary legislation. However, their responsibilities are essentially limited. For example, ERNs have no formal role in policy-making. Moreover, they have simple organizations. ERNs typically have flat structures, which may include a small dedicated secretariat.

The weakness of ERNs is easily explained: neither the member governments nor the Commission that created them have been ready to delegate key functions to ERNs as institutions. While governments are weary of agency drift and have not wanted to multiply the number of supranational bodies with decisional-authority whose interventions would be a source of potential political embarrassment, the Commission has been keen to limit the power granted to potential rivals. Thus, ERNs are weak structures with few resources that perform limited functions and are kept under tight control by member governments and the Commission. As Coen and

Thatcher contend: 'The institutional design of ERNs reflects their genesis' (2008a: 67).

The European Competition Network

The ECN is a quite different network, which was created under very different circumstances. It has important powers in a central area of EU competence, which it exercises independently and outside the shadow of hierarchy. Its responsibilities are extensive and well defined, and the duties of its members are clearly detailed. It is a complex organisation that is well resourced, and is regarded by its members as a genuinely joint enterprise. While the weakness of ERNs can be explained as a response on the part of governments and the Commission to the need to improve coordination between regulators in a decentralised system without threatening a delicate balance of power between the Community and national authorities, the ECN's strength derives from the decision of the Commission to share its monopoly over enforcement within a regime in which the Directorate-General for Competition (DG COMP) has been historically central.

Origins and creation^{iv}

Whereas in other sectors ERNs were created to coordinate the action of multiple regulators that had developed in areas where the Union's competencies were relatively new, the Community's competencies were long-established in competition policy. The founders of the Community had foreseen a key role for competition policy in building a common market. Convinced that the removal of trade barriers would not in itself be sufficient to bring about free circulation of capital, goods, persons and services (von der Groeben 1985: 59-64), they included rules under the EEC Treaty that prohibited anti-competitive behaviour on the part of private firms and state authorities. The European Commission was to be responsible for their implementation, subject to terms defined by a regulation to be agreed by the Council.^v The implementing measure in question, Regulation 17, was adopted by the Council in 1962 (Goyder 2003) and granted the Commission far-reaching powers of investigation and enforcement.^{vi}

Regulation 17 established a centralised antitrust regime with the Commission at its heart. The Commission was given virtual autonomy and vested with final decision-making authority, unchecked by the Council or the European Parliament, and subject only to the jurisprudence of the European Court of Justice (Gerber 1998). While Article 81 (1) [ex 85(1), now 101(1) TFEU^{vii}] of the EEC Treaty prohibited all agreements between undertakings that had ‘as their object or effect the prevention, restriction or distortion of competition within the common market’, Regulation 17 obliged firms to notify the Commission of all new commercial agreements that might affect trade between member states, and gave the Commission sole competence to grant exemptions from this general prohibition. This ‘centralised authorisation system based on the direct applicability of the prohibition rule in Article 81 (1) and prior notification of restrictive agreements ... under Article 81 (3)’ (Norberg 2007: 524) enshrined the Commission’s authority and status.

Moreover, the competition rules of the treaty were formulated at a time that few European states had measures to control anti-competitive action in place. Though over time, governments introduced their own competition rules, many modelled on the Community’s provisions, the enforcement of competition policy was never decentralised as was the case in other areas. The Commission enjoyed direct powers with respect to the Community competition rules (Gatsios and Seabright 1989).

The resources available to DG COMP were never commensurate with its responsibilities (Morgan and McGuire 2004), however, not least because the rules governing the agreements that had to be notified to the Commission were so widely drawn. From the early 1960s, it confronted a heavy caseload, worsened by successive enlargements, that it struggled perennially to control and it continually sought recourse to a number of devices to make its workload manageable (see Goyder 2003).^{viii} However, not only did these measures not clear the backlog, but they created a series of additional problems. Moreover, although experts in competition were few and far between in Europe in the 1950s, this was no longer the case in the 1990s when all member states had their own competition regimes. This had two consequences. First, the Commission had to be able to justify its practices against criticisms from national authorities, business and lawyers in private practice. Second, the emergence and spread of competition, growing experience, and the presence of a competition culture across Europe led to the realisation that the Commission no longer needed to carry the sole burden for the control of restrictive practices.^{ix}

Eventually, in the 1990s, with the prospect of a ‘big bang’ enlargement leading to the accession of a dozen or more countries, which carried the expectation of a flood of new cases, as well as several new official languages, threatened to exacerbate DG COMP’s problems in managing its caseload (Norberg 2007).^x DG COMP entrusted a modernisation group with the task of reviewing options for how a more permanent solution might be found (see Norberg 2007; see Kassim and Wright 2007). The proposals produced by the group formed the basis of a Commission White Paper and later the modernisation package adopted by the Council in 2002.^{xi}

The reform radically reformed the Community’s antitrust regime.^{xii} It abolished the centralized system of notification, making companies responsible for their own assessment of the legality of the agreements into which they enter, subject to the scrutiny of national competition authorities and national courts. It also ended the Commission’s monopoly by allowing competition authorities and courts in the member states authority to grant exemptions under Article 81 (3). These measures were intended not only to release resources in the Commission so that it could deal with hard cartels, but to harness the expertise and resources available in NCAs, and to take the enforcement of Community rules closer to suspected violators (Maher 2009).

Decentralisation to national authorities raised the question of how consistent enforcement of the Community’s antitrust rules across the Union could be ensured. The solution was found in the creation of a European Competition Network (ECN), comprising the Commission and NCAs of the member states. The ECN was created as a mechanism to minimise the risk of duplication and divergence within the new system, and to ensure the effective enforcement of competition rules throughout the Community. Thus, whereas ERNs were created by multiple actors in a setting where regulatory authority was fragmented and an existing balance of power had to be respected, the ECN was crafted by a single actor (the Commission) with monopoly power, but intent on sharing its authority with national agencies. Moreover, given the importance of enforcement of the policy in question, meticulous attention was paid to the design of the ECN.

Powers, responsibilities and operation

Although the ECN performs some of the functions that are carried out by ERNs – it provides advice to the Commission, provides forums at different levels (see below)

that allow national officials to discuss matters of common concern, and it ensures coordination between NCAs – its principal purpose is to ensure that Community law is uniformly enforced across the Union. Accordingly, the responsibilities of its members are clearly defined, as are their obligations to consult, cooperate and share information. A detailed body of rules govern its operation and the role played by the European Commission. The rules are set out in the various elements of the modernisation package, including Regulation 1/2003 and the Network Notice^{xiii}, which covers case allocation and consistent application. These measures were supplemented by a political declaration – the ‘Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities’^{xiv} – and a separate notice that establishes principles and procedures for cooperation between the Commission and national courts.^{xv}

Case allocation is managed through the notion of the ‘well-placed to act’ competition authority. An NCA is deemed well placed to act if it observes actual or foreseeable effects of the practice at issue on its territory, is capable of bringing the infringement to an end, and can gather the evidence needed to prove the infringement.^{xvi} In most cases, the authority that first receives the complaint or initiates an investigation will be well placed to act. However, cases can be opened and investigated by several authorities at the same time. Serving the dual goals of Commission monitoring and preventing duplication, NCAs are obliged to inform the Commission before or without delay after commencing the first formal investigative procedure [Art 11(3) Reg 1/2003]. The fact that one NCA is dealing with a case is sufficient grounds for another, or the Commission, not to continue its investigation into the same infringement [Art 13]. An NCA cannot be compelled to investigate. Equally, several NCAs may act in parallel on an investigation with one acting as lead authority. In cases where more than three member states are affected, the Commission is most likely to be in a position to handle the case. Other grounds for the Commission dealing with a case are where it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission; if Community interest so requires, to develop Community competition policy, for example where a novel issue arises; or to ensure effective enforcement throughout the Community (Joint Statement, para 19). This also contributes to consistent application.

Much has been made of the Commission’s power to relieve an NCA of its competence by initiating its own proceedings [Art 11(6)], and this will be discussed in

more detail below. After the allocation phase, the Commission states that in principle it will only invoke this provision in limited circumstances: for reasons of consistent application - where network members envisage conflicting decisions, or where an envisaged decision clearly conflicts with existing case law; where an NCA is “unduly” drawing out proceedings; where a Commission decision is necessary to develop Community competition policy; and, crucially, where the NCAs concerned do not object to this course of action (although one could argue this may be difficult where the NCA is accused of drawing out proceedings) [para 54 network notice]. In addition, it will give reasons to all members of the network. At least 30 days before adopting a decision requiring that a competition infringement be brought to an end, an NCA must notify the Commission, and other NCAs through the ECN, of its envisaged decision [Art 11(4)]. In this way consistent application of the rules can be monitored and there is an opportunity to raise the alarm if necessary by making observations before the decision is adopted.

According to the principle of parallel application, NCAs are obliged to apply Community competition law alongside national competition law where trade between member states is affected. By virtue of supremacy of EU law, an NCA may not allow a practice which is prohibited by Article 81 or 82. If an agreement, decision or practice is not prohibited under Article 81, an NCA cannot apply stricter national rules to prohibit it (but it may apply stricter rules in circumstances covered by Article 82) [Art 3 Modernisation Regulation]. Moreover, NCAs cannot contradict or overrule an existing Commission decision [Art 16]. The Commission can make a finding that Article 81 or 82 is not applicable to a practice, which binds all national competition authorities [Art 10].

Other provisions allow for exchanges of information to be used as evidence, including confidential information; mutual assistance in inspections and investigations; and extended Commission powers, for example to take statements and impose fines.^{xvii} Information on firms collected within the ECN can only be used as evidence when applying EC competition rules in respect of the subject matter for which it was collected, not in national cases (except where EC and national rules are applied in parallel). There are also limitations on use of information where sanctions may be imposed on individuals, such as fines or imprisonment.

The Commission thus plays a key a role in the ECN, defying the claim that DGs cannot be at the centre of networks (see Williams 2005: 88, cited in Wilks 2007)

and in contrast to ERNs where a committee of national officials is the main body (Coen and Thatcher 2008a). It has a series of important powers and the design of the network is intended to give it an overview of events and developments that fit with its responsibility as guardian of the treaties. At an administrative level, the ECN unit in the Directorate General for Competition of the Commission (DG COMP) is the main contact point for NCAs. The Commission's position in the ECN contrasts with the lower status that it has in other regulatory networks, where its attendance in meetings is not routine. Though it may attend meetings, except in some cases except where the discussion is deemed confidential, it stands somewhat apart from the member state representatives.

Structure

The architecture of the ECN is more complex than that of other regulatory networks. To a large extent it formalises meetings that took place before the adoption of the modernization package.^{xviii} Directors General of the NCAs and DG COMP, for example, met twice yearly prior to modernization, while national officials with shared interests in particular aspects or areas of competition policy also met regularly. The Advisory Committee, which performs a slightly different function, was an established part of the EU competition regime. However, the rules and day-to-day cooperation have been tailored to the new landscape following modernisation.^{xix}

The ECN has a loose, multilayered hierarchical structure of Directors General, plenary and working groups. The Directors General meeting is the most senior formation and deals with strategic issues, high-level policy, and the future agenda. It is the venue where new policy or operational guidelines, such as the Commission discussion paper on Article 82,^{xx} are discussed. It also hears presentations by officials on on-going work, receives reports from subgroups on sectors of the economy and from the plenary, and approves proposals from the working groups. The Directors General meeting decides on the creation of new working groups.

The ECN plenary, meanwhile, is a formal arena for all heads of ECN divisions from the NCAs. It meets every three months. It receives reports on projects from sectoral and horizontal groups, decides whether to create new sub-groups, and determines which issues are delegated to which working group. It takes a position on proposals from the working groups, exchanges information, and discusses practical

aspects of the ECN's operation. It is concerned with implementation rather than strategy, considers how information can be better circulated and cooperation achieved, and performs a horizontal coordination function, monitoring the working groups and reporting back to NCA Directors.

Working groups form the bottom level of the pyramid. They undertake technical work, are created organically around topics as they arise, and are not formal, like the plenary or other forums. Working groups are mandated with specific tasks, work by consensus and submit regular reports on their progress. They bring together officials from the NCAs, but not all NCAs are represented. Indeed, there is no working group where all 27 member states are represented. Most have 12-14 members. Currently there are nine working groups on horizontal cooperation issues and 15 sectoral sub-groups (Commission report 2009, para 73).

The Advisory Committee of member states is somewhat separate to the structure of the ECN. As under the status quo ante, it is part of an obligatory procedure set out in Regulation 1/2003. It hears and comments on the Commission's preliminary draft decisions, both cases and legislation. A rapporteur leads the discussion and records positions, and the Commission responds to questions. The Advisory Committee then delivers an opinion. The Advisory Committee is essentially a consultative body. An opinion does not have to be unanimous, and cannot block a Commission decision. The Commission need only show that it has taken "utmost account" of the opinion, which can be published.

Operation, performance and impact

The ECN is further distinguished from ERNs by the closeness of the partnership between its members, the perception of the network as a shared enterprise and the positive impact of the ECN on NCAs. Although the significance of size, resources and above all experience was highlighted by many respondents, they were at pains to underline that 'the opinion of small member states will not be dismissed', and that different levels of experience did not lead to domination, that 'everyone wants everyone else on board' (question 29). The views expressed by NCAs about the operation of the ECN have been largely positive whether they come from large (Germany, Italy, UK) or small (Austria, Denmark, Ireland, Slovenia) member states,

from countries with long-established competition policy traditions (Germany) or those where competition policy is newer (Czech Republic, Slovenia), and embodying different approaches to competition policy (Germany and the UK). Respondents universally considered the ECN to be a success.^{xxi}

This testimony to shared ownership and the vision of the ECN as a joint enterprise contrasts, on the one hand, with the observation made by Coen and Thatcher (2008a) that ERNs tend to be loose and operate according to an intergovernmental logic and, on the other, with the argument that the ECN represents an extension of imperium by the Commission. The latter view has been most trenchantly expressed in the legal literature:

‘[T]he Commission has orchestrated a political masterstroke. It has given the impression of radical reform to the member states by abolishing the notification procedure and offered decentralisation provisions ..., which in no way undermine its central role in the development of EC competition policy or enforcement of EC competition law. DG Competition has in fact managed to centralise European competition law even more than under Regulation 17 in its Rue Joseph II headquarters’ (Riley 2003a: 604; see also Riley 2003b).^{xxii}

Although, as the above discussion makes clear, the Commission plays a central role in the ECN, evidence from the first five years of its operation offers little support for the view that the ECN is an instrument aimed at increasing the Commission’s power or for the premise that underlies this viewpoint; namely, that the Commission is driven by an imperialist impulse to extend its authority and interactions between actors are motivated by power relations (Kassim and Wright 2007, 2009; Koeck and Karollus 2008; Sydorak 2008).^{xxiii}

Proponents of this view point to the Commission’s power to intervene and take over case investigation under Article 11 (6) of Regulation 1/2003.^{xxiv} That provision allows the Commission to relieve an NCA of its competence where the Commission initiates an investigation. Yet the Commission’s ability to mobilise this power is limited. For example, it is required to consult the NCA(s) concerned before taking over the case. Also, Article 11 (6) only applies up to level of the first instance decision, not to appeal or review.^{xxv} Most importantly, while it may pose a credible threat, the mechanism has never been used. Indeed, unsurprisingly, Commission officials have expressed reluctance about invoking it. One interviewee remarked that: “the worst case scenario would be the Commission intervening all the time”. The use

of Article 11 (6) as a “cherry picking provision” would not only generate (unnecessary) work, but could lead to a breakdown in trust that would jeopardize the operation of the network.

Nor is there evidence that the Commission has used the network in bureau-shaping fashion to reserve the most prestigious cases for investigation by its own officials. To date, the transfer of cases to and from the Commission under the case allocation rules has been rare, which undermines the suggestion that the Commission may seek to off-load the more mundane cases – or it may be simply too early to tell. One national official said that they “almost had to persuade the Commission to take over a case” where three or more Member State markets were involved. According to the 2008 FIDE report (Koeck and Karollus 2008), in at least one case, even though three NCAs were investigating, the Commission did not take over the case as might be expected according to the guideline example in the Network notice, but the NCAs coordinated the investigation amongst themselves.^{xxvi}

On the other hand, decentralised enforcement has freed up resources and allowed the Commission to strengthen its cartels directorate to focus its attentions more efficiently on hardcore competition abuses, monitor malfunctioning markets more broadly through sectoral investigations, and invest in the ECN itself. However, many of these developments were responses to external pressures. The pursuit of hardcore cartels, moreover, is certainly prestigious, but many serious cartels are global in nature, and the Commission is often genuinely in the best position to tackle them. Indeed, a complaint made widely before modernisation was that the Commission was failing to respond to the most serious antitrust breaches.^{xxvii}

More generally, while the modernisation regime creates an integrated system of formal rules on enforcement of substantive EC antitrust rules, there are no obligations regarding member states procedural rules. As a result there is potential for divergence in national procedural laws relating to investigations, litigation, and penalties, particularly leniency and fines. Moreover, the ECN’s structure is too complex and too open to allow domination by the Commission. At the high level Directors General meetings, as one interviewee put it, they are all “robust individuals”, public figures at the top of their profession unlikely to agree to something not in their interests. The Commission sets the agenda, but is very open to the Member States adding items. These meetings depend on goodwill and it is a dialogue. The ECN plenary is a formal arena meeting once every quarter year, in which the chair is held

by the Commission (specifically, a representative of the ECN unit in DG COMP). In practice, decisions are taken in the working groups, before being discussed in plenary where they are occasionally, but apparently not often, amended. The Commission drafts the plenary agenda but sends it out for approval and asks for comments. According to officials with whom we have spoken so far, there has been no situation where an issue was mutually irreconcilable. If the Commission finds an issue important it will get through plenary, by noting the Member States' positions and going ahead, but equally, member states do not back down. Working groups are created by the NCAs themselves as needs arise. The Commission is more or less a passive observer in the working groups, which are co-chaired by two NCAs who set the agenda. It is therefore not in a particularly strong position to steer the discussion.

Certainly, officials from the NCAs do not view the ECN as a power grab by the Commission. Most averred that the ECN represented a 'partnership of equals' (question 29).^{xxviii} When pressed on the influence of the Commission, of twelve NCAs that responded to the question 'In allocating cases, the Commission has always acted according to the spirit and letter of the Notice' (question 23), four strongly agreed, seven agreed and one, who indicated that he had had no experience in case allocation, expressed no opinion. Similarly, in response to the question, 'In stating its opinion on how Community law should be applied, the Commission has acted according to the spirit and letter of the Notice. Do you agree?' five agreed strongly and seven agreed. When asked whether 'In general, the Commission treats NCAs within the network as equal partners in a common enterprise. Do you agree?' four strongly agreed, three agreed and five partly agreed. No lesser figure than the President of the French Competition Council, could declare in September 2004 that: 'The Commission had not at all, as some had feared, used the network ... to become a "master among obedient dogs"' (Bruno Lasserre cited by Norberg 2007: 541).

Indeed, the evidence points to a strengthening of competition agencies (and national courts), where NCAs have been empowered, individually and collectively. The access to expertise and information permitted by the ECN is particularly important. Interviewees indicated variously that they 'were now better equipped' and 'able to ask for resources'; that the NCA was 'now expert' and enjoyed access to other authorities and the Commission unlike the ministry' (question 9). Seven of the thirteen NCAs in the sample indicated, moreover, that they had approached DG COMP for advice. Although most contacts within the network are vertical (FIDE

2008), the ECN has brought about horizontal interaction between NCAs that scarcely existed previously. All thirteen NCAs in the sample reported that they had either requested or been asked for formal assistance – a possibility that did not exist in formalized form prior to modernization – and most were frequently asked informally to supply information (question 8). Even if this interaction is not always intense, the ECN has created a sense of partnership and possibilities for cooperation that did not exist before they were formalized by the network.^{xxix} Moreover, respondents rejected the idea that the ECN had produced a zero-sum game. Although there was agreement that that power had shifted to the Commission, there was virtual unanimity that NCAs had gained more power as a result of modernization and specifically the parallel application of national and EC law. Furthermore, the structure of the ECN does not easily permit Commission domination. When asked about agenda-setting and the relative influence of actors in meetings at Directors General, plenary group and working group levels, respondents explicitly rejected the idea that the Commission dominates discussion. Although the Commission sets the agenda of the Directors General meeting, Directors General can add items. The meetings are aimed at finding technical solution to problems, reach common decisions and ‘the Commission cannot ride roughshod’. The Commission also sets the agenda of the plenary, but again member states can add items. Respondents indicated that the Commission was influential, but not all-powerful. It was likely to back down if faced by opposition from two or more NCAs. In the working groups, the Commission is regarded as ‘primus inter pares’, though again it cannot impose its views. Working groups are created by NCAs and the two chairs that coordinate each group either both come from the NCAs or one comes from the NCA, the other from DG COMP. The Advisory Committee, which, as noted above, performs a very specific function, was the only arena where the Commission’s influence was strong. However, this was based on experience and case knowledge. In general, respondents considered that the ECN’s multi-tiered architecture strengthened NCAs by providing their representatives with forums in which they can exchange views, learn and develop solutions to problems.

This is not to claim, however, that the Commission exerts no influence or that all its interventions are visible. As can be seen from this handful of examples, communication within the network often occurs informally, before proceedings are instigated. In practice NCAs discuss with each other informally well in advance before notification to network of the first formal investigatory measure and decide

which of them will take the case. The Commission's observations following notification of an NCA's envisaged decision under Article 11(4) Modernisation Regulation are also in practice given informally, contrary to what the provisions may suggest. Similarly, the Commission often gives an opinion on the application of Community law. While not formally stating that it is doing this under article 11(5), which provides for NCAs to consult the Commission on any case involving the application of Community law, according to one national official "everyone understands that this is what it is" – that is, these informal communications may have a certain persuasive force. Dekeyser and Jaspers (2007), authors from the ECN unit, remark that observations made to NCAs are often made over the telephone, occasionally followed up by letter, and that they "cannot be regarded as stating an official position of the European Commission" (9).

This degree of informal communication pulls in two directions. On the one hand, such contact may strengthen *internal* trust and identity within the network. On the other hand, there is a lack of transparency, which has implications for (legal) certainty in the system. In addition, these observations are confidential, and not communicated to the parties under investigation. It may be that these parties do not even know that the Commission has submitted observations in their case. This apparent lack of *external* transparency (to third parties – particularly firms and their legal representatives) is perhaps understandable given the network's function of monitoring and enforcing firms' competitive behaviour. Such external transparency may improve as the ECN becomes more involved in leniency applications.

In addition, several NCAs reported fairly regular contacts with industry (question 14). Most commonly, these contacts occur in market or sectoral investigations, for example through questionnaires or market testing of commitments. One Member State reported that such contacts are "daily", with nine others reporting consultations with business representatives in this context. Seven NCAs revealed that they also hold informal meetings requested by firms seeking advice on their compliance with competition provisions, albeit less frequently: one NCA reported around nine approaches from firms in a two year period, and another admitted that these contacts were "not very regular". According to our survey responses, in four Member States these contacts are supplemented by conferences, seminars and information bulletins. Two NCAs reported formally consulting business representatives on legislative amendments. A respondent from one NCA indicated the

involvement of business representatives as members of the Competition Council itself. However, business representatives and their legal advisors call for increased transparency about discussions within the ECN (Commission report 2009, para 249).

In contrast to ERNs, the ECN has demonstrated a capacity to innovate and initiate. In so doing, it has also assuaged concerns that it would stifle innovation (Fingleton n.d.). By virtue of regulatory competition and other factors, diversity can be a source of novelty (Sabel and Zeitlin 2008; Budzinski and Christiansen 2005), but fears were expressed before it came into operation on 1 May 2004 that the harmonization imposed by modernization and the pressures exerted by cooperation within the ECN were likely to function as a barrier to creativity and experimentation.

Though impossible to gauge what innovations have not materialized as a consequence of the creation of the ECN, there are a number of instances where cooperation within the network has led to initiatives that would perhaps not have been launched in its absence. Dekeyser and Jaspers (2007) note that the ECN has begun to formulate policy rather than simply to implement it. It has been especially active in the area of leniency (see Cengiz 2007). Applications for leniency from firms engaged in collusive behaviour are a major source of case information and therefore an important enforcement tool. In 2002 only four Member States had leniency programmes, whereas today 25 of 27 Member States have put them in place. A number of these programmes were introduced as result of the Model Leniency Programme adopted through the ECN in 2007, and of the Member States whose programmes preceded it, many are voluntarily harmonising their programmes. In general terms, the ECN may encourage NCAs to set policy, obliging them in some area to take positions on issues they would have ignored had the ECN not existed. Moreover, in such circumstances, some NCAs may be able to ‘punch above their weight’ and foster innovation (Budzinski and Christiansen 2005). In addition, there is evidence that new ideas are proposed by the NCAs in the working groups. Several respondents to our survey also reported a spill-over effect to cooperation in merger enforcement, which is not formally covered by the Modernisation Regulation.

Conclusion

The ECN exercises important powers in an area that is central to the single market project. It is governed by detailed rules, is capable of independent action, and its members regard it as an actor rather than merely a forum. Whilst the decision to

establish networks in other key areas represented an attempt to achieve effective coordination in a context of the decentralized enforcement of EU rules, the ECN was created as part of a project that involved the devolution to national authorities of powers that had previously been centralized at EU level.

In these respects, the ECN differs fundamentally from ERNs. Like them, however, its design is explained by the circumstances surrounding its creation. Whereas ERNs were created in order to improve coordination in settings where regulatory power was fragmented, but neither national governments nor the Commission were prepared to entrust them with major powers or resources, the ECN was designed by a monopolist wanting to share its regulatory burden with NCAs, but concerned to ensure consistency and coherence in the enforcement of Community antitrust rules. The ECN is a very different network.

REFERENCES

- Berg, W. and Ostendorf, P. (2003). 'The Reform of EC Merger Control: Substance and Impact of the Proposed New Procedural Rules', *European Competition Law Review*, 24:11, 594-603.
- Brammer, S. (2005) 'Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation', *Common Market Law Review* 42, 1383-1424
- Budzinski, O. and Christiansen, A. (2005) 'Competence Allocation in EU Competition Policy as an Interest-Driven Process', *Journal of Public Policy* 25:3, 313-337
- Cengiz, F. (2007) 'Management of Networks between the Competition Authorities in the EC and the US: Different Politics, Different Designs', *European Competition Journal*, 3:2, 315-338.
- Cini, M. and McGowan, L. (1998). *Competition Policy in the European Union*, Basingstoke: Macmillan.
- Coen, D. and Thatcher, M. (2008a) 'Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies' *Journal of Public Policy*, 28(1), 49-71
- Coen, D. and Thatcher, M. (2008b) 'Reshaping European Regulatory Space: An evolutionary analysis', *West European Politics*, 31: 4, 806 - 836
- Curtin, D. and Egeberg, M. (2008) 'European Government(s)-Executive Politics in Transition?' *West European Politics*, 31:1/2, 235-257
- Dehousse, R. (1997) 'Regulation by Networks in the European Community: The Role of European Agencies', *Journal of European Public Policy*, 4:2, 246-61
- Dekeyser, K. and Jaspers, M. (2007) 'A New Era of ECN Cooperation', *World Competition* 30(1), 3-24
- Drake, W. and Nicolaïdes, K. (1992). 'Ideas, interests, and Institutionalization: Trade in Services and the Uruguay Round', *International Organization*, 46: 1, 37-100.
- Eberlein, B. (2004). 'Formal and Informal Governance in Single Market Regulation', in T, Christiansen and S. Piattoni (eds.), *Informal Governance in the EU*. Cheltenham,UK: Edward Elgar.

- Eberlein, B. and Grande, E. (2005) 'Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State', *Journal of European Public Policy*, 12:1, 89-112
- Egeberg, M. (2006) *Multilevel Union Administration. The Transformation of Executive Politics in Europe*, PalgraveMacmillan
- Egeberg, M. and J. Trondal (2009) 'National Agencies in the European Administrative Space: Government driven, Commission driven, or networked?' *Public Administration* (forthcoming).
- Ehlermann, C-D. (2000) 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution', *Common Market Law Review* 37, 537-574
- Favell, A. (1998) 'The Europeanisation of Immigration Politics', *European Integration online Papers (EIoP)*, 2 (10), 15 December 15,
- Gerber, D. (1998). *Law and Competition in Twentieth Century Europe*, Oxford: Clarendon Press.
- Gerber, D. (2001) 'Modernising European Competition Law: A Developmental Perspective', *European Competition Law Review*, 22(4), 122-130
- Gerber, D. and Cassinis, P. (2006a) 'The "Modernisation" of European Community Competition Law: Achieving Consistency in Enforcement – Part I', *European Competition Law Review* 27(1), 10-18
- Gerber, D. and Cassinis, P. (2006a). 'The "Modernisation" of European Community Competition Law: Achieving Consistency in Enforcement – Part I', *European Competition Law Review* 27:1, 10-18.
- Gerber, D. and Cassinis, P. (2006b) 'The "Modernisation" of European Community Competition Law: Achieving Consistency in Enforcement – Part II', *European Competition Law Review* 27(2) 51-57
- Gerber, D. and Cassinis, P. (2006b). 'The "Modernisation" of European Community Competition Law: Achieving Consistency in Enforcement – Part II', *European Competition Law Review* 27:2, 51-57.
- Goyder, D.G. (2003). *EC Competition Law*. 4th edition, Oxford: Oxford University Press.

- Haas, P. (1992) 'Epistemic communities and international policy coordination', *International Organization*, 46:1, 1-35
- Hancher, L. (1996) 'The Regulatory Role of the European Union' in H. Kassim and A. Menon (eds) *The European Union and National Industrial Policy*, London: Routledge, 52-69.
- Harlow and Rawlings (2007) 'Promoting Accountability in Multilevel Governance: A Network Approach', *European Law Journal* 13(4), 542-562
- Heimler, A. (2008). 'Was the Change of the Test for Merger Control in Europe Justified? An Assessment (Four Years After the Introduction of SIEC)', *European Competition Journal*, 4:1, 85-94.
- Jordan, A. and Schout, A. (2006) *The Coordination of the European Union: Exploring the Capacities of Networked Governance*, Oxford, Oxford University Press, October 2006
- Karagiannis, Y. (2007). *Preference Heterogeneity and Equilibrium Institutions: The Case of European Competition Policy*, PhD thesis, EUI Florence.
- Kassim, H. (2003) 'The European Administration: Between Europeanisation and Domestication' in Jack Hayward and Anand Menon (eds) *Governing Europe*, Oxford University Press, pp. 139-161
- Kassim, H. and Dimitrakopoulos, D.G. (2006). 'Leader or bystander? The European Commission and EU Treaty Reform' in D. Beach and C. Mazzucelli (eds.) *Leadership in the Big Bangs of European Integration*, Basingstoke: PalgraveMacmillan, 94-114.
- Kassim, H and Wright, K. (2007). *Revisiting Modernisation: the European Commission, Policy Change and the Reform of EC Competition Policy*, UEA, Norwich: ESRC Centre for Competition Policy Working Paper 07-19.
- Kassim, H. and Wright, K. (2009). 'Bringing regulatory processes back in. Revisiting the reform of antitrust and merger control', *West European Politics*, special issue edited by D. Mabbett and W.Schelke
- Kassim, H. and Wright, V. (2003)?? (fn 32)

- Koeck, H.F. and Karollus, M.M. (eds) (2008). *The Modernisation of European Competition Law. Initial Experiences with Regulation 1/2003, FIDE XXII Vol 2*, Vienna: Nomos.
- Laudati, L. (1996). 'The European Commission as regulator: the uncertain pursuit of the competitive market' in G.Majone (ed) *Regulating Europe*, London: Routledge, 229-261.
- Levy, N. (2003). 'EU Merger Control: From Birth to Adolescence' *World Competition*, 26:2, 195–218.
- Lohmann, S. (2003) 'Why Do Institutions Matter? An Audience-Cost Theory of Institutional Commitment', *Governance*, 16:1, 95-110
- Maher, I. (2002). 'Competition law in the international domain: Networks as a new form of governance,' *Journal of Law and Society*, 29:1, 112-136.
- Maher, I. (2005). 'Networking competition authorities in the European Union: Diversity and change', in C-D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*. Oxford: Hart Publishing, 223-226 and commentary 161-164.
- Maher, I. (2007) 'Functional and the Normative Delegation to Non-Majoritarian Institutions: the Case of the European Competition Network', conference paper
- Majone, G. (1993). *The European Community: An "Independent Fourth Branch of Government"?* EUI Working Paper SPS no. 94/17 Florence: European University Institute.
- Majone, G. (1996). *Regulating Europe*, London: Routledge.
- Majone, G. (2005). *Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth*, Oxford: Oxford University Press.
- McGowan, F. (2000) 'Competition Policy: The Limits of the European Regulatory State' in H. Wallace and W. Wallace (eds) *Policy-Making in the European Union*, Oxford: Oxford University Press, 115-47.
- Metcalf, L. (1992) 'After 1992: Can the Commission Manage Europe?' *Australian Journal of Public Administration*, 51(1): 117–130

- Morgan, E. and McGuire, S. (2004). 'Transatlantic divergence: GE-Honeywell and the EU's merger policy', *Journal of European Public Policy*, 11:1, 39-56.
- Neven, D. and Röller, L-H. (2002). *Discrepancies between Markets and Regulators: an Analysis of the First Ten Years of EU Merger Control*. Institut Universitaire de Hautes Etudes Internationales, Geneva, HEI Working Paper No. 10/2002.
- Norberg, S. (2007). 'Making a Virtue out of Necessity and at the Same Time Strengthening European Competition Law Enforcement' in M.Monti, Prinz N. Von und zu Liechtenstein, B.Vesterdorf, J.Westbrook and L.Wildhaber (eds) *Economics Law and Justice in Times of Globalisation. Festschrift for Carl Baudenbacher*, Bern: Nomos, 523-541.
- Pijetlovic, K. (2004) 'Reform of EC antitrust enforcement: criticism of the new system is highly exaggerated', *European Competition Law Review*, 25:6, 356-69
- Riley, A. (2003a). 'EC Antitrust Modernisation: The Commission does very nicely – thank you! Part 1: Regulation 1 and the notification burden', *European Competition Law Review*, 24:11, 604-615.
- Riley, A. (2003b). 'EC Antitrust Modernisation: The Commission does very nicely – thank you! Part 2: Between the idea and the reality: decentralisation under Regulation 1', *European Competition Law Review*, 24:11, 657-672.
- Sabel, C. and Zeitlin, J. (2008) 'Learning from difference: the new architecture of experimentalist governance in the European Union', *European Law Journal* 14(3), 271-327
- Schout, A. and Jordan, A. (2005) 'Coordinated European Governance: Self-Organizing or Centrally Steered?' *Public Administration* 83 (1), 201–220
- Simanska, B. (2005) 'The Antitrust enforcement in the enlarged EU: Linking effectiveness with uniformity', Paper presented at EUSA biennial conference, 31 March-2 April, Austin, Texas
- Støle, O. (2006) 'Towards a Multilevel Union Administration? The Decentralization of EU Competition Policy' in M. Egeberg (ed) *Multilevel Union Administration. The Transformation of Executive Politics in Europe*, Basingstoke: PalgraveMacmillan

- Sutherland, P. (1992) 'The Internal Market after 1992: Meeting the Challenge. Report presented to the Commission by the High Level Group on the functioning of the Internal Market'. ('The Sutherland Report').
- Sydorak, A. (2008). 'Smooth cooperation or turf wars within the new European Competition Regime?' Paper presented at the UACES Conference, University of Edinburgh, 1-3 September.
- Szapiro, M. (2005) 'The framework for European Regulatory Agencies: A Balance between Accountability and Autonomy', Third ECPR Conference, Budapest, 8-11 September 2005)
- Trondal, J. (2009) 'Administrative Fusion: Less than a European "Mega-Administration"', *Journal of European Integration* (forthcoming).
- Trondal, J. and L. Jeppesen (2008) 'Images of Agency Governance in the European Union', *West European Politics*, Vol. 31, No. 3: 417-441.
- Van Waarden, F. and Drahos, M. (2002). 'Courts and (Epistemic) Communities in the Convergence of Competition Policy', *Journal of European Public Policy*, 9:6, 913-934.
- Venit, J. (2003) 'Brave New World: The Modernization and Centralization of Enforcement under Articles 81 and 82 of the EC Treaty', *Common Market Law Review*, 40: XX, 545-580
- Venit, J. (2003) 'Brave New World: The Modernization and Decentralization of
- Voigt, S. and A. Schmidt (2004). 'Switching to substantial impediments of competition (SIC) can have substantial costs – SIC!', *European Competition Law Review*, 25:9, 584-590.
- Volcker, S.B. (2004). 'Mind the gap: unilateral effects analysis arrives in EC Merger Control', *European Competition Law Review* 25:7, 395-409.
- Von der Groeben, H. (1985). *The European Community: The Formative Years. The struggle to establish the Common Market and the Political Union (1958-66)*. Luxembourg: Office for the Official Publications of the European Communities.

- Wigger, A. (2008). *Competition for Competitiveness: The Politics of the Transformation of the EU Competition Regime*, PhD thesis, Free University of Amsterdam.
- Wilks, S. (2005a). 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?', *Governance*, 18:3, 431-452.
- Wilks, S. (2005b). 'Competition Policy' in H. Wallace, W. Wallace and M.A. Pollack (eds) *Policy Making in the European Union*. Oxford: Oxford University Press.
- Wilks, S. (2007) 'The European Competition Network: what has changed?' paper presented at EUSA biennial conference, Montreal, 17-19 May
- Wilks, S. and McGowan, L. (1996), "Competition policy in the European Union: creating a Federal Agency", in B. Doern and S. Wilks (eds), *Comparative Competition Policy: National Institutions in a Global Market*, Clarendon Press, Oxford, pp.225-67
- Wright, K. (2008). *European Commission Opinions to National Courts in Antitrust Cases: Consistent Application and the Judicial-Administrative Relationship*. UEA, Norwich: ESRC Centre for Competition Policy Working Paper 08-24.
- Wright, K. (2009). 'European Commission Interventions as *Amicus Curiae* in National Competition Cases: the Preliminary Reference in *X BV*', *European Competition Law Review*, 30:7, 309-313 (forthcoming July 2009)

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ⁱ Dehousse (2001) suggests that limited resources and expertise, efficiency costs, and its collegiate character, may undermine the credibility of Commission as an implementing agency.

ⁱⁱ Coen and Thatcher give the examples of the Independent Regulators Group (telecommunications), The Forum of European Securities Commissions, and the Council of European Energy Regulators.

ⁱⁱⁱ These are: the Committee of European Securities Regulators (CESR), the European Regulators Group (for Telecommunications) (ERG), the European Regulators Group for Electricity and Gas (ERGEG), the Committee of European Insurance and Occupational Pensions’ Supervisors (CEOPS), the Committee of European Banking Supervisors (CEBS), and the European Platform of Regulatory Authorities (broadcasting) (EPRA).

^{iv} This section draws on Kassim and Wright (2009).

^v On the decision to entrust final decision-making authority to a heterogeneous political body, see Karagiannis (2007).

^{vi} OJ 13, 21 02 1962, 204/64

^{vii} After the Lisbon Treaty Articles 81 and 82 EC are renumbered 101 and 102 respectively. We use the pre-Lisbon numbering as that prevailed at the time of the 2004 reform.

^{viii} From 1967 when the number of open cases surpassed 37,000, the combination of ex ante control, limited resources and the complexity of decision making led the introduction of measures designed to make its workload more manageable without any sacrifice of legal certainty (Norberg 2007: 524-5). These included a softening of the criterion according to which cases were notified, the introduction of *de minimis* notices, as well as the use of block exemptions, from the 1970s comfort letters and in the mid-1990s backlog exercises, designed to clear obsolete cases (Norberg 2007: 524-5; see also Goyder 2003: 41, 43).

^{ix} Whilst in 1997-98 153 officials were responsible in the Commission for investigating cases, the figure in the member states was 1200 (Lang 1998, cited by Norberg 2007: 528).

^x Note that, although there were regular criticisms of how it handled its caseload, the Commission’s central role was never in question (Norberg 2007: 528).

^{xi} Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O J L 1, 04.01.2003, p.1-25.

^{xii} For narrative and background to the reform see e.g., Ehlermann (2000), Venit (2003), Gerber (2001)

^{xiii} Commission Notice on cooperation within the Network of Competition Authorities OJ C 101, 27.4.2004, 43-53

^{xiv} Council document No. 15435/02 ADD 1

^{xv} Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.04.2004, p. 54-64. Though these are not linked through a comparable network as this would offend against the principles of judicial independence and procedural autonomy. A full examination of the relationship between the Commission and the courts is beyond the scope of this paper (but see Wright (2008), Gerber and Cassinis (2006a, 2006b), Norberg (2003))

^{xvi} Network Notice, para 8. Paragraphs 8-15 of the Network Notice give illustrative examples

^{xvii} Communication on cases takes place through a secure encrypted on-line database where all NCA investigations applying EC rules are logged. There are two levels of the database, the first level ‘ECN Circa’, to which each case handler has his or her own account with access, and a higher confidentiality level, ‘ECN Interactive’, where notifications of opened proceedings are lodged. There is a pro forma for the input of information on each case.^{xviii} English is the working language of the ECN, although interpretation is provided in the plenary and working group meetings at the request of one Member State. As well as drastically minimising translation costs, this serves to facilitate communication and trust in the network, which as we shall see is a vital factor in its success.

^{xviii} Indeed, in the words of one Commission interviewee, the ECN was “improvised from existing networks”.

^{xix} It is also worth noting that the genesis of the existing network rules can be found in the working groups predating the modernisation package.

^{xx} DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses - Public consultation, Brussels, December 2005. Available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>

^{xxi} However, the operation of the ECN depends upon trust and, as one interviewee observed: “there is no institutional guarantee that the ECN will remain a success”. It has not as yet experienced any major crises or weathered any serious storms. It may, therefore, be too early to tell.

^{xxii} A similar view was expressed in the political science literature, where the creation of the ECN was interpreted as part of ‘an extraordinary coup’ (Wilks 2005a: 437) by the Commission, and DG COMP and the new Network, it was argued, represented ‘the equivalent of a transnational agency that has gone beyond the power of the member states to control’ (ibid). For an alternative view, which suggests that to interpret the network as an arena for power play is fundamentally mistaken and to premise interpretations of Commission action on the assumption that it is a self-interested, power maximizer is likely to lead to misleading conclusions, see Kassim and Wright (2007, 2009).

^{xxiii} As an official in the NCA of a large member state commented when we approached him for an interview, ‘the reality is not as thrilling as you may think’. A

similar point was made by an official of the Council Secretariat, interviewed on 14 September 2005.

^{xxiv} Two accounts were offered to use with respect to this provision. The first is that it was envisaged as a dispute settlement mechanism. An early draft of the Modernisation Regulation referred to the Commission taking responsibility for proceedings under Article 11(6) only where it was ‘best’ (not ‘well’) placed to deal with the case. This would be where the case impacted on competition in several Member States, or where NCAs could not reach agreement between themselves on which of them should handle the case. However, this formulation did not make it the final version of the regulation. The second, according to a Commission official, was that the opportunity to take over a case under Article 11(6) was included because of concerns that some NCAs were not sufficiently independent in their national systems, or not sufficiently well resourced. In the event, they have been “pleasantly surprised” by the capabilities of NCAs. In addition, the Member States appear to have accepted that more resources would need to be allocated to their competition agencies, indicating that they believe the ECN serves their national interests.

^{xxv} If an appeal is in progress in the national court the Commission cannot take over the case until it is finished. This is particularly pertinent in countries such as Ireland and Finland, where the first decision is adopted by a court rather than their competition authority

^{xxvi} One case relating to the car sector was referred from the Commission to the Hellenic Competition Commission for lack of Community interest (although it is unclear by and to whom it was notified in the first place). In Hungary, another was formally referred to the Commission, while three more were referred informally before proceedings had been launched. Ireland has attempted to transfer two cases to the Commission, but in both cases the Commission rejected the request. In the first the Commission was already investigating the same undertaking and in the other case the Commission deemed that the market in question was too small to warrant its involvement (FIDE 2008). In the UK, the Office of Fair Trading transferred the iTunes case on suspected excessive pricing for music downloads to the Commission. No investigation had officially been opened but discussion with other Member States revealed that there was a pan-European issue. Several member states, of which UK was one, also requested the Commission to take over a case with a Community dimension in the flat glass sector.

^{xxvii} An alternative explanation (see Kassim and Wright 2007, 2009) acknowledges that the Commission is operating, and is constrained, within an international epistemic community, and wants to uphold a good reputation. The Commission attaches a good deal of importance to “intellectual leadership” rather than legal leadership. In order to retain its credibility, it must be able to hold its own in international competition enforcement.

^{xxviii} Our research suggests that it is necessary to distinguish between policy and working group input; and actual experience of allocation and cooperation in the network at case level. According to our interviews, all NCAs’ views are given equal weight and taken seriously in the ECN fora. However, in terms of practical day-to-day case experience, some NCAs have not been involved in re-allocation of cases or information sharing. This is partly down to chance, as the particular circumstances of a case arising may not warrant cross-border cooperation, or the economic markets involved may be more localised in nature.

^{xxix} In terms of cooperation in investigations, the OFT has had one formal request for assistance from another NCA, and three informal. In the informal cases matters were dealt with by writing letters to the firms concerned or meeting with them, without compelling them to comply, and it was sufficient [*more instances of cooperation between NCAs to follow*]. This demonstrates the contacts and cooperation between NCAs, without the Commission's involvement.