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The European Competition Network: what has changed?

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Introduction

The European Competition Network (ECN) is the starting point for this paper but is used as a gateway for exploring larger questions about the development and impact of EU competition policy. The ECN came into operation in 2004 and serves as an enforcement network in respect of some, but not all, of the competition rules. It is a central element in the 'Modernisation' of EU competition policy brought about through Regulation 1/2003. Modernisation constitutes the most important transition in the fifty years of EU competition evolution and it affects the operation of the agencies, the priorities of the Commission and the effectiveness of enforcement. Further, it is argued here, the ECN clears the way for the development of a supranational redefinition of the philosophy or principles of competition policy itself. In the past I have argued that DG Comp has enjoyed such a unique degree of independence that it can be analysed as a supranational agency (Wilks with McGowan, 1995; 1996; Wilks with Bartle, 2002). In like fashion it is now possible to argue that the ECN can be analysed as a uniquely independent supranational network. There is no international regime or equivalent of the WTO for competition but we do now have a regional equivalent in the form of the ECN. Here we have something that comes very close to Slaughter's (2004, p.42) vision of 'executive transgovernmental networks', especially if we can visualise the ECN as part of a trans-Atlantic, and possibly a global, network of competition regulators.

This paper therefore analyses the ECN on three dimensions. First, on the administrative dimension, as a novel network configuration for enforcing competition policy in the EU. Second, on the policy dimension, as the catalyst of an ongoing transition in the focus of European competition policy. Third, very briefly and more speculatively, on the constitutional dimension, as a means of embedding a particular economic doctrine in the 'economic constitution' of the EU.

The administrative dimension – the ECN and the enforcement of competition policy

Analysis of the ECN, rather like analysis of DG Comp, falls into a no man's land between theorising the position of non-majoritarian European agencies, and dealing with the majoritarian Commission. Thus, in a recent critique of EU agencies, Williams (2005, p.88) notes that 'agencies should form nuclei for inter-national networks, in a way the Commission's DGs (or their departments) simply cannot'. But in fact this is exactly what DG Comp *has* done. The design of the ECN should therefore be seen in the context of the pre-existing power of DG Comp. Competition policy has famously been the Commission's most powerful competence in which it applied EU law directly to European business and, in fact, also to European governments in respect of the control of state aid. There is no need for the frustrations of comitology and the Council is effectively excluded from this policy area except when pressed for new regulations in areas like mergers, state aid and utility liberalisation. This was a cherished area of supranational competence which meant that proposals for decentralisation through modernisation appeared positively revolutionary. The details of the modernisation package have been outlined thoroughly elsewhere (DG Comp, 2004; Wilks, 2005 a); b)). Essentially they involve the Commission giving up the exclusive power to apply Articles 81 and 82 (TEU) which comprise the core prohibitions on restrictive practices and abuse of dominance. These powers can now be applied by National Competition Authorities (NCAs) and adjudicated by national courts; in fact the NCAs are obliged to employ EU rather than national law for any agreements that meet the test of effect on inter-state trade. At first glance this looks like a recipe for incoherence, divergence and fragmentation, which is the nightmare prospect that the ECN is designed to dispel.

The Commission's decentralisation proposals were conceived at a time of increased interest in subsidiarity and enthusiasm for alternative modes of policy coordination, including European agencies and policy networks (Dehousse, 1997). The White Paper proposed 'that the burden of enforcement can now be shared more equitably with national courts and authorities' (CEC, 1999, p.5). It recognised, of course, the risk of incoherent and inconsistent enforcement but made only passing mention of 'a network of authorities operating on common principles and in close collaboration' (p.32). At this stage there remained substantial uncertainty as to whether Europe would see a fragmentation of policy making. The Network concept

was steadily refined in a process nicely captured in Ehlermann and Atanasiu (2004) and led eventually to the modernisation package and the key Commission Notice which formalised the Network (4/2004, see Ehlermann and Atanasiu, 2004, p.xvii). As the Network arrangements were finalised it became clear that the ECN was to become a very distinctive and disciplined network.

The ECN is primarily concerned with implementation rather than policy making. It is animated by legally defined cases working in a culture of European law and is very squarely centred on DG Comp. Unlike many other European policy networks it is not organised by Committees drawn from member states. Competition policy enforcement does provide for Member State Advisory Committees and use of these committees was canvassed in the White Paper but rejected in favour of DG Comp 'managing' the Network directly. Jordan and Schout (2005, p.39) argue that network management is important but relatively unusual in the EU. DG Comp appears to provide an important example of this model of a managed network and, if the central role of DG Comp is accepted, then it implies that the ECN is centralised as well as supranational. So what does the ECN actually do?

The ECN undertakes a number of collaborative activities which resonate with themes in the network literature. Its main functions are to share information and allocate cases under sections 81 and 82. The shared information is confidential and commercially sensitive which means that only formally designated national bodies are participants in the electronic pooling of information through the DG Comp website. This raises interesting points about the role of information in regulation (Majone, 1997) but has raised anxiety in the world of competition lawyers (Reichelt, 2005). The allocation of cases is potentially highly controversial. If any NCA opens a case against an undertaking it has to notify the Network within 30 days. Cases which involve more than three member states will be dealt with by DG Comp, otherwise handling of the case is subject to negotiation within the Network. A pattern has developed that the NCA opening the case typically continues to handle it and insiders are adamant that the anticipated disputes simply have not materialised and that the system operates far more smoothly than feared by critics such as Budzinski and Christiansen (2005). DG Comp possesses the ultimate power to step in and to take over prosecution of a case if the NCA concerned is acting slowly, incompetently or is becoming at variance with established EU legal or economic principles. There was much initial concern that this would allow DG Comp to 'cherry pick' cases but up to

the end of 2006 the Commission had never employed that final sanction. In addition the Network allows for systematic collaboration in aiding investigation by other NCAs including a national NCA using its nationally based powers to undertake investigations and 'dawn raids' on behalf of other NCAs. Less formal exchanges also take the form of advice on the specifics of the case, on law or economics and it would be very interesting to track the 'trade' in advice, the British authorities, for instance, concede that they export far more advice than they import. Overall the ECN is a rather shadowy creature, there is relatively little transparency and relatively little comment on the operation of the Network. There are plenary sessions, workshops and opportunities for the Network participants to meet (DG Comp, 2006, p.62) but so far its activities have been low key and have generated very little public comment. In short the pessimistic predictions put forward by quite a wide range of legal and academic observers have not been borne out by practice. At least up to the present the ECN appears to be quietly successful.

What we see, then, is a very distinctive network of agencies. It is exclusive, made up largely of national competition agencies with no non-governmental members; circulation of information is restricted to the network; there are tight rules of procedure; and the whole is managed by officials from DG Comp. This is a very disciplined Network but it does remain nominally voluntary and has no formal legal authority. It is constituted merely by a Notice from the Commission which has been 'adopted' by the member states. The basis for the ECN is therefore soft law. It is worth emphasising that the vast majority of the Network participants are themselves national agencies (rather than ministries) which are independent within their own administrative systems. In other words this is to a large extent a Network of non-majoritarian or delegated agencies. This has important implications to which we will return below.

Before proceeding to analyse the political implications of the ECN, and the possibility that it offers a model for other policy areas, it might be useful to locate the standing, effectiveness, and sheer variety of the agencies concerned. Table 1 sets the scene by setting out the 'global elite' of competition agencies. The ranking relates to competence in enforcement and derives from the annual survey undertaken by a specialist journal, the *Global Competition Review*. The survey shows eight globally admired competition agencies but of particular note is that the top ranking traditionally attached to the US agencies is now equalled by the EU DG Comp and by

the UK's much more specialist Competition Commission. This has implications for the US/EU cross fertilisation discussed later in this paper. Table 2 details the full range of EU agencies. It shows the rankings and also gives information about resources. It includes data on the 12 EU agencies that are not ranked by the *Global Competition Review* because they are too new, small or inactive. Table 2 illustrates the very substantial variation in resources and standing of the EU authorities and implies what many would concede, that whilst many agencies are highly effective, others are not. Table 3 supplements this picture by providing data on activity within the ECN (note that of the agencies named only the UK Commission and the Spanish Tribunal are not formally designated members of the ECN). It indicates the number of cases opened over the first 32 months of the operation of the Network and illustrates some interesting variations in activism. The French and the Germans are predictably active but the British are not, with both the Dutch and the Danes opening almost as many cases as the British. More particularly, the figures show a very marked actual decentralisation of implementation with only 20% of cases being handled by DG Comp.

On a somewhat impressionistic ranking we could identify four 'leagues' of effectiveness and activism within the ECN:

		<u>No.</u>	<u>% cases opened</u>
- Elite:	EU, Fr, Ge, UK, (It)	5	53
- Good	Den, Fin, Ire, Neth	4	19
- Problematic	Sp, Swe, Port, Aust, Pol	5	17
- Ineffectual	Gr, Belg, Lux + 11 new MS	14	11

The league table indicated that the 'elite' (in which Italy is included due to its size and improving standing) and the 'good' NCAs handle nearly three quarters of all cases. But all the authorities are active and even the 'Ineffectual' category has opened 11% of the cases with the Hungarians being particularly energetic.

The network politics of the ECN

The ECN is a variant of the European Regulatory Networks (ERNs) analysed by Coen and Thatcher (2006). They take a principal-agent approach and are rather sceptical of claims that ERNs may exploit a degree of independence and become a transgovernmental source of policy making. In particular they note the continued

domination of the Commission in controlling their goals and operation. While noting the reservations explored by Coen and Thatcher this paper takes slightly different approach. It is more constructivist in emphasising the normative understandings which appear to animate the Network and it analyses the possibility that the Commission could become more open to innovations originating with other well resourced agencies within the Network.

The politics of the ERN offer room for quite variant interpretations. An important question concerns the balance of influence within the Network between the Commission and the 27 NCAs. My argument has been that, despite an early rhetoric of decentralisation, DG Comp has created a system within which it is almost completely dominant (Wilks, 2005a). Other analysts such as Kassim (2007) are sceptical of this thesis of centralisation although it is not quite clear whether they challenge the argument that the Commission has established centralised control over the Network, or whether they accept the thesis of centralisation but believe that it happened with the active support of the member states. A diagnosis of Commission dominance would therefore suggest that the ECN is a 'steered' Network, or even a 'directed' Network or, to enter oxymoron territory, a 'hierarchical Network'. To use a looser analogy, Marc van de Woude (2003) has referred to the Commission as 'the headmaster' and its ability to remove NCAs from cases as 'the headmaster's stick'.

It is, however, possible to suggest that the dominance of DG Comp might be unstable. The Network is populated with some extremely impressive agencies, well resourced with money, staff and the intellectual firepower of very able economists and lawyers. Table 2 indicates that DG Comp commands a budget of E90 mn. and 382 staff against a combined budget of the three NCAs of France, Germany and the UK of E132 mn. and 931 staff. In economics expertise alone DG Comp has 134 economists, 13 of whom hold PhDs. In contrast the three leading NCAs have 286 economists with 46 PhDs (the US agencies have 121 economists all of whom hold PhDs) (GCR, 2005). DG Comp looks seriously outgunned. It is hardly likely that the leading European agencies will be wholly in agreement with advice and initiatives emerging from Brussels and they may be influenced by the distinctive industrial politics and industrial organisation of their respective countries. It might further be imagined that the national agencies will be resentful of the way in which the Modernisation regulation has displaced or marginalised the operation of national law. The BKA in particular has fought hard to defend the German cartel laws against the

override from Brussels (Quack and Djelic, 2005). On this basis one might have expected disagreements and tensions to have developed within and around the ECN and possibly the development of coalitions lobbying for change in the design or enforcement of policy. Indeed, many early critics of the modernisation reforms anticipated a ‘renationalisation’ of competition law. Yet such tensions have not emerged and the ECN, along with the other dimensions of EU competition enforcement appear successful and coherent. How is one to account for this striking success?

Before offering an explanation one caveat is that it is still early days and turmoil within the ECN may yet emerge. It is widely accepted that there are problems with the operation of the ECN, especially in respect of the crucially important leniency programmes, where the diverse legal arrangements across the Union make filings and negotiation highly uncertain; and in respect of criminal actions which are possible in a minority of countries and which create problems in using shared information. But these are essentially technical issues and no strong unease has as yet been expressed by Network members.

The two possible explanations for the success of the ECN advanced here are sectoral agency solidarity and the common competition culture. As regards sectoral agency solidarity, almost without exception the NCAs are depoliticised agencies with delegated powers who are fiercely jealous of their independence (Wilks, 2002). Their legal foundations, their self-esteem and their operational credibility all rely upon maintaining independence from politicians, government ministries and powerful indigenous business interests. In this setting external support from sister agencies and from DG Comp is a powerful weapon of defence. In a characteristically perceptive anticipation of this solidarity Majone suggested ‘the network as a bearer of reputation’ arguing that:

an agency that sees itself as part of a transnational network of institutions pursuing similar objectives and facing analogous problems, rather than as a marginal addition to an established bureaucracy pursuing a variety of objectives, is more motivated to defend policy commitments and/or professional standards against external influences (Majone, 1997, p.272).

This sense of solidarity can stretch almost into a social community, Dieter Wolf, when Head of the BKA, liked to refer to the European agencies as members of ‘the cartel family’ and, whilst the Germans might not need to invoke the influence of

Brussels and the ECN, it is likely that this source of support is very important in internal bureaucratic negotiations, especially in the new accession countries such as Hungary. The solidarity argument thus draws on the familiar idea that experts or professionals (who largely dominate the competition agencies) will look for esteem and peer appreciation to fellow professionals in the community as much as to their home administrations. We can thus envisage NCAs as located in a matrix which involves vertical responsibilities up to national politicians and down to national stakeholders; but also horizontally ‘across’ to DG Comp and to collaborating agencies in the Network. This can be expressed in P-A terms as a ‘double delegation’ in that the agencies have two principals (Coen and Thatcher, 2006). The interesting implication is how these competing loyalties will play out when national policy preferences collide with pan-European Network priorities, as has happened recently in merger control through the confrontation over protection of so-called ‘national champions’ in Poland and Spain (for instance, the resistance to the takeover of the Spanish energy company Endesa by the German Eon in Autumn 2006).

The second explanation for the smooth running of the ECN is more explicitly normative and lies in the idea of a ‘common competition culture’ across Europe. Time and again the Commission has advanced this proposition both as a justification for Modernisation, arguing that the member states are now mature enough to be trusted to defend competition; and as a basis for pan-European coherence and convergence of enforcement. It would be possible to argue that the smooth operation of the ECN is dependent on the shared common competition culture which DG Comp is self-consciously nurturing. Kris Dekeyser, the well-respected Commission official who has had the responsibility of managing the Network since its inception, has noted that:

we have a whole area of less formal cooperation within the ECN which is also very important because it pursues the objective of promoting a common competition culture. The ECN has proven to be a very good tool in this respect. It is really a broadly functioning framework for discussing all issues of mutual concern and for agreeing on a common approach which is, indeed, needed to foster the common competition enforcement culture and promote convergence (Dekeyser, 2005, p.3).

This concept of the ‘common competition culture’ is therefore central to an adequate interpretation of the ECN but it is also important in two other respects. It helps to

interpret the present and future impact of competition policy on the shape of the European political economy; and it is the key variable in determining whether the ECN is *sui generis* or whether this model could be generalised to other policy areas. We need therefore to devote some attention to unpacking the elements of the common competition culture.

A focus on the common competition culture stresses the ideational elements of this policy area and is far from original. There has been a consistent resort to the concept of the 'epistemic community' in analysis of competition law convergence across Europe (Wilks, 2004). The most effective deployment of this approach, drawing directly upon Haas, has been by van Waarden and Drahos (2002). They put the greatest emphasis on law as a unifying source of expertise and essentially advanced a concept of a European legal epistemic community as the mobilising force behind convergence. As Slaughter (2004, p.42) points out, Haas's early work needs to be supplemented with an organisational account of how the influence of an epistemic community is brought to bear. In response to this challenge we can deploy the ideas of Schmidt and Radaelli turning to the concept of a 'discursive institutionalism' in which discourse 'represents both the policy ideas that speak to the soundness and appropriateness of policy programmes and the interactive processes of policy formulation and communication that serve to generate and disseminate those policy ideas' (Schmidt and Radaelli, 2004, p.193). The following paragraphs hence attempt to unpack the concept of the common competition culture exploring how the legal epistemic community exerts influence through DG Comp and the ECN and going on to set the scene for a possible adaptation of the epistemic community as a legal discourse is supplemented, and possibly transformed, by economic expertise and an economic discourse.

The common competition culture can be unpacked into a legal discourse, a market discourse and a depoliticised discourse. We start with the legal discourse which articulates a legal culture. The legal constituents of the European competition regime are relatively familiar. They originate from the crucial early decisions to include competition rules in the ECSC and Rome Treaties, the direct application of the competition rules by the Commission, the remorselessly supportive and teleological judgements by the ECJ, the creation of expansive legal doctrine and its embodiment in precedent and case law. By the time that the later accession countries came to join the Union they were required to sign up to a competition *acquis* that was

elaborate, relatively comprehensive and provided a hegemonic package of public law. EU competition policy developed as essentially a legal system influenced by German thinking and the ordoliberal tradition and hence giving priority to legal principles as a framework within which the European economy should develop. German cartel enforcement is dominated by lawyers and so, until very recently, was DG Comp. They formed part of a larger legal network or epistemic community across Europe and across the Atlantic embracing legal scholars, the big law firms, the courts and the Commission itself. The whole process and language of competition law enforcement is infused with legal norms regarding due process, the rights of the parties, the standing of evidence, the weight of precedent, the role of hearings, questions of proportionality and the need to sustain those norms in the event of challenge through appeal to the ECJ or the CFI. Increasingly scholars are reflecting on the self-interest of the legal profession in sustaining and expanding the competition regime and the law firms play a part not only in developing doctrine and animating the regime but in enforcing policy through advice to business firms on compliance. They are valued and important players in the pan-European implementation of policy but they are also substantial beneficiaries (Wigger, 2007a). The ECN floats in this sea of legal discourse which is manifest in the multitude of conferences, workshops, training events, legal journals, cases and commentaries which reflect the status of competition law as a major and lucrative specialism of most international law firms. It provides a comprehensive set of typical norms – tacit but specific – which will be shared by all participants in the Network and which are a necessity for understanding and operating within the ECN.

The second component of the common competition culture is a market discourse. Competition policy takes its meaning, and its complexity, from its role in defending the operation of the market. Competition is the process of rivalry that provides the dynamic of market economies but market structures and competitive dynamics can produce wildly variant outcomes and the hundred year history of antitrust and competition policy has produced only a small number of unambiguous or *per se* rules. European competition policy is above all else about promoting and defending the free market but that is a mission fraught with ambiguity and susceptible to widely varying definitions. In a stimulating recent study (which he calls ‘strategic constructivist’) Jabko has argued that the Commission has used ‘the market’ as a ‘strategic repertoire of ideas’ leading to a ‘quiet revolution’ of dramatically deepened

European unity and a transformation in European economic governance (Jabko, 2006, pp.39,5,2). But, he argues, the Commission employed multiple meanings of the market in a discourse that was tailored to the circumstances of particular negotiations and left a deep ambiguity about what sort of market Europe should embrace. This account meshes nicely with the evolution of the ECN which is a manifestation of a political strategy pursued by the Commission but which appears to conceal any particular market biases behind a technical assessment based on precedent and formal legal tests.

Historically European competition policy had a distinctive and dominant mission in giving priority to market integration. The OECD asserts that ‘the market integration goal (is) largely accomplished’ (OECD, 2005, pp.9,12) but it remains an important context, especially for the new accession states. Defining the market mission of competition policy post-market integration poses a debate about goals, and especially about how competition policy can help or hinder the economic competitiveness of European industry and the achievement of the Lisbon objectives. It also encounters a complex assessment of economic doctrines which offer conflicting interpretations of how particular competitive conditions will influence efficiency, economic welfare, consumer welfare and productivity. These complexities have yet to have a conclusive impact on the design or enforcement of European policy and the ECN need only to agree on the virtues of competition within the market which is conventionally assessed through a pragmatic neo-classical model of competition which does not pursue perfect competition but rather ‘workable competition’. Economic approaches have become more sophisticated and stress economic efficiency assessed through the tools of welfare economics (Motta, 2004, p.30) which opens up the possibility that participants in the ECN will need to accept a greater degree of microeconomic sophistication.

The third element in the assessment of the common competition culture is a discourse of depoliticisation. The independence enjoyed by DG Comp is mirrored in the independence of the majority of NCAs. This emphasis helps to justify the closed and inter-governmental nature of the ECN but it also arguably contributes to a sense that competition policy should not be influenced or ‘tainted’ by extraneous political or policy considerations. There are some clear possibilities for conflict between competition policy outcomes and the goals of other policy areas. Policies in areas such as the environment, regional development, research and development, or energy

self-sufficiency have all in recent years fallen foul of competition enforcement. There is a tendency to see competition as enjoying a higher priority in the hierarchy of policies so that it is almost a 'meta-policy'. An equivalent perspective is to suggest that competition has a 'constitutional' status. The early community was explicitly an economic rather than a political construct and defined by reference to economic aspirations. The ordoliberal origins of German and then European policy were quite explicit in looking to an economic constitution and an objective legal framework which would control both private and public economic power. This traditional perspective on economic policy has undergone something of a renaissance in the aftermath of the single market programme. In the formulation of the OECD:

with encouragement from the judiciary, competition law framed an economic constitution. The Court's encouragement of the Commission in setting the terms of market integration gave the Treaty rules about competition a quasi-constitutional status (OECD, 2005, p.11; see also Stone-Sweet, 2004, pp.19,241).

This component of the discourse of the ECN stresses the importance, or perhaps self-importance, of the agencies concerned and the possibility that the ECN is insular and resistant to outside influence.

In rounding off this discussion of the ECN it is possible to present a stark contrast with the Coen and Thatcher analysis of other ERNs. They see the networks as relatively weak and with limited ability to initiate policy. The ECN is consistent with their analysis in that it is also dominated by the principal (the Commission) but it differs from their cases in that the Commission can 'impose' decisions and the network actors have considerable delegated power. In this area it is therefore possible to identify an effective form of 'sectoral governance'. Indeed, the contrasting concern about the ECN is that it might be too strong. In 2005 I speculated that modernization 'might lead to a European future where competition law became a dominant mode of regulating the greater European economy there may be dangers in a policy that is too successful' (Wilks, 2005a, p.447). The more recent evolution of the ECN within the wider development of European competition policy would appear to reinforce that diagnosis. Curiously a not dissimilar but more general note of warning has been offered by Williams (2005, p.96) in his discussion of agency 'monomania'. He observes that 'the problem of some independent agencies, those that serve the single market and the ECB above all, is that they are all too effective. Faithfully

filling a specified set of responsibilities, unchecked by institutions able to take a wider view'. We can come back to the dangers of hyper-competence after a brief discussion of the transition of European policy

European competition policy in transition.

The creation of the ECN as part of the Modernisation package represents one dimension of the contemporary transition of EU competition policy but there are several other dimensions. Modernisation has acted as the midwife of change by freeing up the resources and energy of DG Comp allowing it to take policy initiatives and to move on to further programmes of doctrinal reform. Before Modernisation and the ECN, DG Comp was obliged to deal with a substantial workload of notifications, complaints, case handling and appeals. One explicit justification for Modernisation was to redirect those resources towards more proactive work attacking hard core cartels. Some observers had felt this to be a disingenuous argument and maintained that the notifications workload was not excessively demanding but this argument also reemphasised one puzzling feature of the operation of DG Comp, namely its persistent understaffing, seen in the relatively small number of senior case officers. This lack of resources has been blamed for procedural inadequacies and substantive errors (Morgan and McGuire, 2002, p.44). In comparison with other regimes (with under half the number employed in the US) it is indeed remarkable that the Commission employs so few officials to deal with the complexities of competition enforcement across a multi-national market of 380 million consumers but that is an arcane aspect of Commission internal politics which remains unexplained.

DG Comp reorganised itself following Modernisation and moved into a period of transition which we can analyse under three aspects. First, there have been a series of policy initiatives; second, the philosophy and expert base of competition administration is shifting from law to economics; and third, the convergence of European and US competition law and policy appears to be increasing.

DG Comp has taken major policy initiatives in respect of cartel control, state aid control, competition in utility markets (especially in energy), and in assessing markets as well as companies through a new methodology of sectoral market studies. It has also been a major participant in the post-Lisbon debate about the stalled attempts to increase the competitiveness of European industry. All of these areas are interesting, especially the way in which the ECN has allowed more active

investigation and prosecution of cartels (McGowan, 2005). The success of the cartel programme is impressive with high profile prosecutions, the revelation of deliberate and shocking cases of market abuse, the imposition of huge fines and the sense of evangelism in the crusade against cartels which Mario Monti once described as a 'cancer' in the European economic body. Here the deployment of leniency programmes on the US model has proved astonishingly successful and seems to have given administrative teeth to the economist's more abstract assertions that cartels are inherently unstable and prone to cheating.

The Lisbon debate is important for the development of policy because it encourages a reappraisal of competition policy away from its political origins and towards substantive micro-economic policy. Competition policy has always had a tacit role in the protection of economic democracy through the guarantee of a tolerable degree of equity in the market and the elimination of gross abuse. To some extent this role has been symbolic and there are plenty of cynical commentaries on the ineffectual enforcement of the Sherman and Clayton Acts which could have been paralleled in Europe prior to the early 1990s. The reconceptualisation of competition policy as an economic policy instrument owes much to the Harvard School work of Michael Porter and his research on the national economic origins of competitive advantage. He has, of course, argued influentially that it is companies, not nations, that compete and that competitive success is related to the intensity of competition in the home market. The British Treasury has been very influenced by this argument (Wilks, 2006, OFT, 2007) and it is also having an impact on the European debate. This link has been made explicit in a range of Commission papers. To take one example, a 2004 policy statement asserts that 'effective competition between firms in the enlarged internal market must be seen as one of the key elements of a successful strategy to build up a competitive Europe and reinvigorate the Lisbon Strategy' (CEC, 2002, p.5). This refrain has been taken up at the political level with the strong support of Neelie Kroes as the Competition Commissioner. In a recent speech she articulated the economist's reconceptualisation of competition policy arguing that 'I have no qualms in saying that competition policy forms – or should form – a central plank in any industrial policy'. She also articulated the crucial transmission mechanism between competition and competitiveness arguing that 'there is considerable empirical evidence of a clear and strong link between competition and productivity growth – and hence of an important link between competition and competitiveness'

(Kroes, 2006). This suggestion that competition policy is the new industrial policy has profound implications for the industrial organisation of national capitalist systems and also for the day-to-day implementation of policy. When assessing individual cases officials sometimes (but not always) assess efficiency aspects; they sometimes (but not always) assess consumer detriment; and they sometimes (but rather rarely) assess cases within a global market. If competition rules were to be applied with an eye to the competitiveness of European industry in the global market would officials need to consider productivity as part of their case assessment? This would constitute a fundamental shift in competition assessment and opens up fascinating but remarkably complex questions about the criteria to be used to settle case decisions. This bears on the increased use of economics in making decisions and underlines the dangers of reconceptualising competition policy as industrial policy, namely that it then ceases to control large businesses corporations. In a stimulating attack on the allegedly anti-competitive implications of current European competition doctrine Vallindas, for instance, calls for a Chicago-School type efficiency defence in European cases and argues that the Union 'will have to choose between a neutral competition policy on the one hand, which acknowledges respect for legal rules as its only parameters, and a strategic competition policy on the other, the implementation of which would take the protection of EU interests into consideration' (Vallindas, 2006, pp.665,660). Some Americans, of course, would argue that EU merger enforcement is already quite partisan enough (Fox, 2003).

This discussion of competition policy as industrial policy has already introduced the question of an increased emphasis upon economics in EU competition policy and it raises the second aspect of transition which is the shift from law to economics. The OECD comments on an increased reliance on economic reasoning which it characterises as the 'economic reconstruction' of DG Comp and which it dates from 1997 (OECD, 2005, p.12). But the widely noted deficit in DG Comp economists and economic reasoning was not decisively addressed until the DG encountered major embarrassing shortcomings in respect of the hugely controversial blocking of the GE/Honeywell merger in 2001 and the loss at appeal of Airtours and two other merger cases in 2002. In each case the DG was coruscatingly criticised for the gross inadequacy of its economic analysis (Morgan and McGuire, 2004, p.53). The response was to appoint for the first time a Chief Economist (Lars-Hendrick Roller and then Damien Neven), to create an economics unit, an economic advisory

council and to recruit more economists. Mario Monti, the then Commissioner, was pivotal in this turn to economics which has been consolidated by the appointment of Neelie Kroes, also originally an economist by training.

The introduction of economists and economic analysis into organisations has been the subject of extensive organisational analysis. In the case of antitrust Marc Eisner (1991) has undertaken a fascinating study of the introduction of economists into the DoJ during the Reagan period. He analyses not only the introduction of economic doctrine, most obviously Chicago doctrine, but examines the effects of incorporating economists as direct case handlers rather than expert advisers. The effect, he establishes, was to reinforce the ‘disarmament’ of antitrust during the 1980s. It would be intriguing to draw US/EU parallels and speculate on the impact of intensified economic analysis in Europe. Unfortunately we have no equivalent in European literature of the magisterial examination by Kovacic (2004) of the norms of US antitrust enforcement. He warns against simplistic interpretations of the swings in US enforcement (what he calls the ‘pendulum narrative’) and argues for a pattern of cumulative intensification. In Europe a comprehensive study of the impact of economic doctrine on antitrust has yet to be written but one or two scholars have begun to advance hypotheses. Angela Wigger has produced an important and controversial thesis in which she argues that DG Comp has, since the early 1990s, had a strong neoliberal bias which has displaced the ‘ordoliberal’ legacy from its German origins (Wigger, 2007b)). She argues that Modernisation accentuated the ‘trend towards the use of ever more sophisticated neoclassical economic principles and econometric evidence in the assessment of anticompetitive conduct’ and she goes on to argue that:

Apart from the numerical transformation of competition officers with a background in economics, a range of indicators lay bare that the kind of competition economics that made its entry is grounded in microeconomics, analytically premised on methodological individualism, and home-based in the neoliberal free market ideology. The new creed (sic) of economists maintains strong transatlantic links indicating that the substance of economic theories that has become prevailing in EU enforcement practice is likely to be streamlined with that dominant in the US (Wigger, 2007a), pp.106,107-108).

She offers a radical theory of the coalition of forces that support this turn to microeconomics which include major corporations in ‘corporate Europe’, the

epistemic community of lawyers and professional service companies, and also, intriguingly, shareholders interested in gaining additional control over their companies through Anglo-Saxon style corporate governance (Wigger, 2007a), 116-117). She goes on to extend this analysis into two radical and intriguing implications.

These implications introduce our third theme for this section, the convergence of US and EU competition law and economics. Of course it is a commonplace that the US system provided the benchmark for the European development of antitrust and US principles were imported directly into the EEC (Amato, 1997; Gerber, 1998; Djelic, 1998). But developments from the early 1960s saw a material divergence of US and EU practice as a result partly of the massive differences between the US approach through private law and the EU approach through administrative application of public law. Competition enforcement also naturally adapted to the capitalist economic models of the two jurisdictions reflecting the neoliberal trajectory of US policy and the organised capitalism of continental Europe. An interpretation of renewed convergence between the US and the EU would therefore raise the prospect of a convergence of capitalist models between the EU and the US but, equally interesting, within Europe itself, and this is exactly what Wigger has also suggested. She emphasises the explicit approval of greater US/EU convergence expressed by Mario Monti and a variety of US commentators and symbolised especially in the borrowing of US merger principles including the adaptation of the EU merger test from a dominance test to include a test of substantial lessening of competition (the SLC test, also used in the UK). She further stresses one under-emphasised aspect of the ECN and the Modernisation reforms, namely the encouragement of private actions to enforce the competition rules and to seek damages where they are transgressed. The abolition of the notification system means that private businesses have now to decide for themselves if their agreements and competitive practices conform to EU law. Final determinations, without the involvement of competition agencies, can only be decided by court cases (Wigger, 2004, p.5) and this opens up the possibility for challenge from private parties, whether they are competitors, consumers, suppliers and so on. There is no doubt that DG Comp is encouraging private actions and this in turn implies less intervention by the public authorities. In a perceptive analysis of the effects of growing private enforcement Wigger (2007a), p.109) points out that 'whereas before a public authority could balance the decision making in antitrust matters according to broader political macroeconomic goals, individual private

claimants by definition are more likely to be driven by self-interest'. The effect, she argues, is to take 'a major step of convergence towards the Anglo-Saxon antitrust model' (Wigger, 2007a), p.104). The prospect, in other words, is the reproduction of a US regime which is dominated by private antitrust actions.

Wigger's second implication of the neoliberal, microeconomic turn in EU competition doctrine is to suggest that it poses a challenge to 'Rhenish' capitalism. This is an argument of huge importance for the development of economic governance within Europe and it is extraordinary that the interplay between varieties of capitalism and the capitalist model enshrined in European competition policy has been so little researched. There are several effective studies of the different models of capitalism prevailing within Europe which originate with Albert's distinction between Rhenish and Anglo-Saxon capitalism in a dichotomy that is more thoroughly presented by Hall and Soskice (2001) as a contrast between the German-style Coordinated Market Economy and the UK-style Liberal Market Economy. Schmidt (2002, 107) offers a more elaborate categorisation of three 'market, managed and state' capitalist variants and, although a number of other typologies exist, all of them locate capitalist models in relation to specific nation-states and none of them propose a single European capitalist model (Crouch, 2005). The proposition, therefore, that DG Comp will be enforcing competition policy by reference to an Anglo-Saxon concept of competitive behaviour within the European economy, poses the possibility that it will seek to dismantle the managed economy and the state economy models which predominate in continental Europe. Competition policy already attacks state aid, will it also militate against German cross shareholding and bank shareholding, against the dislike of hostile takeovers, against policies to support the Mittelstand, and against relational contracting? This paints a more sinister picture of the common enforcement policy exerted through the ECN and raises again the prospects of conflict and disagreement within the Network.

Conclusions

A provisional assessment of the ECN indicates that it is operating coherently and effectively to enforce competition rules across the EU. This assessment is subject to two caveats. First, that the ECN is only three years old and may be enjoying a honeymoon period which has suppressed tensions. Second, that the Network relates to a rather specific activity, the enforcement of Articles 81 and 82 (TEU), and does

not therefore link all agency activity. Control of mergers in particular is not covered although there is some spillover effect into other aspects of the competition regime.

There is an important question as to whether the ECN experience can be generalised to other policy areas. The initial assessment would be that the ECN is atypical and probably does not offer an easily generalisable model for other ERNs. Specifically, it is concerned with the enforcement of clear legal provisions contained in the Treaty. It is managed by the Commission and has been able to reproduce the exceptional supranational authority previously enjoyed by DG Comp. Indeed, this paper argues that it offers an exceptionally powerful model of policy enforcement which reflects the politics of competition policy and the normative coherence of the policy community. Thus the ECN is characterised by a level of political and normative solidarity that could be regarded as excessively strong. That strength could become problematic if, as suggested by some scholars, DG Comp has developed a particular policy stance in the form of a neoliberal interpretation of competition policy which, whilst shared by competition agencies, is resisted by 'old fashioned' industrial policy protagonists and by defenders of the managed and state models of national capitalism within Europe.

At present, it is argued, DG Comp and EU competition policy is in a period of transition marked by a series of policy initiatives and by a turn to economic analysis. Partly because its policy stance is still emerging, and partly because the application of the competition rules are still poorly understood outside the specialist competition community, there is limited resistance to the emergent neoliberal and 'Americanised' policy stance. But the shape and intensity of potential resistance is flagged by the French rejection of the European Constitution. This was widely interpreted as a rejection of the neoliberal biases felt to be embodied in the Treaty provisions and aims. The neoliberal dimension was widely debated in the run up to the referendum. Part III of the Constitution 'was constructed by the No campaign as the handmaiden of an ultraliberal Europe, which was more in line with an 'Anglo-Saxon model' (Hainsworth, 2006, p.104). The French rejection also partially inspired Jabko's study of the Commission's exploitation of market ideas in the pursuit of deeper unity and he concludes, rather soberly, with the question 'was it a mistake to pursue an integrationist strategy that relied on the market's compelling appeal? Once the promoters of Europe jumped on the bandwagon of market reforms they were caught in a process that went beyond the control of any single actor' (Jabko, 2006, p.185). He

warns of a possible backlash against the market discourse and reverses the title of his book to ponder whether we have been seeing ‘Playing Unity: A Political Strategy for the Marketisation of Europe’ (Jabko, 2006, p.186). This takes us a long way from the more mundane administrative features of the ECN but it does underline one crucial feature of depoliticised regulatory agencies which applies doubly to a transnational regulatory network, that is the problem of accountability.

The debate on accountability has accompanied the whole debate about European regulation and the position of the regulatory agencies. DG Comp has always been seen as lacking in political accountability and with a deficit in process accountability which was compensated for only by the stringency of legal control and appeal to the European courts. If the Modernisation package and the operation of the ECN has allowed the Commission to extend the influence of competition policy across Europe, and has to some extent neutered national laws and harnessed national agencies, then arguably this accountability deficit has been accentuated. The seriousness of an accountability deficit depends on the analysis of the competition model that the Commission is adopting, and the analysis of in whose interests that model operates. If Wigger is right, and that model is not only neoliberal, but is embedding an Anglo-Saxon model of capitalism across Europe, then it will become necessary to assess the competition rules as part not of a neutral European economic constitution, but as a source of structural bias which should be far more critically examined before Europe accepts a quasi-constitutional settlement that embodies a particular model of economic governance.

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Table 1: The Global Elite of Competition Agencies

		Cartel fines E mn.	Staff	GCR Enforce Rank
EU	DG Comp	683	382	4.5
US	Department of Justice	513	566	4.5
US	Federal Trade Commission	0	281	4.5
UK	Competition Commission	0	82	4.5
UK	Office of Fair Trading	1	242	4
Australia	Competition and Consumer Comm.	18	273	4
France	Competition Council	663	53	4
Germany	Cartel Office	164	154	4

Notes:

information relates to 2005

GCR ranking based on assessment of competence in enforcement and in particular on results; development; cooperation; independence and resources. Rankings are annual.

GCR user ranking on a substantial survey of agency employees and competition practitioners. It measures 'how they felt about the agencies they had regular dealings with'.

Ranks are based on a star rating of 1 to 5; 5 being outstanding.

Source: *Global Competition Review* 9(7) July 2006

Table 2 European Competition Agencies

<u>Member State</u>		<u>Enforce</u>	<u>User</u>	<u>Staff</u>	<u>budget</u>	<u>cartel</u>
		<u>rank 2005</u>	<u>rank</u>			<u>fines E</u>
			<u>2005</u>			<u>mn</u>
EU	DG Comp	4.5	3.75	382	90	683
UK	Comp Comm.	4.5	4	82	30	0
UK	Office of Fair Trading	4	3.75	242	50	1
France	Comp Council	4	3.25	53	9	663
France	DGCCRF	3.5	3.25	400	26	
Germany	BKA	4	4	154	17	164
Denmark	Danish Comp. Authority	3.75	3.25	63	6	
Finland	Finnish Comp. Authority	3.75	2.75	50	5	
Ireland	The Comp. Authority	3.75	4	46	5	
Italy	AGCM	3.75	3.25	102	27	12
Netherlands	Comp. Authority	3.75	3.25	174	10	141
Spain	Comp. Service	3.5	3	52	3	10
Spain	Comp Tribunal	2.75	3	44	5	
Sweden	Swedish Comp. Authority	3.5	2.75	85	9	12
Portugal	Portuguese Comp. Authority	3.25	3.25	59	7	29
Austria	Federal Comp. Authority	3	3	18	1	
Belgium	Comp. Council	2.75	2.5	19		0
Belgium	Comp. Service	1.25	2.5	37		
Poland	Office of Comp. & Cons Protect.	2.75	2	134	7	1
Greece	Hellenic Comp. Commission	2.5	1.75	52	12	20
Not ranked by GCR						
Cyprus	Comm. For Protection of Competition					
Czech Republic	Office for the Protection of Comp.			112		
Estonia	Estonian Competition Board			39		
Hungary	Hungarian Competition Authority			119		
Latvia	Competition Council			53		
Lithuania	Competition Council			61		
Luxembourg	Comp Council & Comp Inspection			3		
Malta	Commission for Fair Trading			1		
Romania	Romanian Competition Council			283		
Slovak Republic	Antimonopoly Office			70		
Slovenia	Competition Protection Office			20		
Bulgaria	Comm. Protection of Comp			99		

Notes:

all information relates to 2005

DG Comp includes regulation of state aid - 108 staff

several agencies also deal with consumer protection

rankings attributed by GCR and GCR user survey (see Table 1)

Sources:

'Rating Enforcement', *Global Competition Review*, 9(7), July 2006

The 2006 Handbook of Competition Enforcement Agencies, *Global Competition Review*, Special Report, December 2006

Table 3 European Competition Agencies: ECN Activity

<u>Member State</u>		<u>No. cases opened</u>	<u>No. cases % total</u>	<u>No. cases decided</u>
EU	DG Comp	133	20	
UK	Comp Comm.			
	(not an ECN member)			
UK	Office of Fair Trading	40	6	8
France	Comp Council			
France	DGCCRF	102	16	32
Germany	BKA	70	11	12
Denmark	Danish Comp. Authority	36	6	16
Finland	Finnish Comp. Authority	10	2	5
Ireland	The Comp. Authority	8	1	0
Italy	AGCM	21	3	12
Netherlands	Comp. Authority	45	7	25
Spain	Comp. Service	23	4	8
Spain	Comp Tribunal			
	(not an ECN member)			
Sweden	Swedish Comp. Authority	20	3	10
Portugal	Portuguese Comp. Authority	16	2	5
Austria	Federal Comp. Authority	14	2	2
Belgium	Comp. Council			
Belgium	Comp. Service	23	4	2
Poland	Office of Comp. & Cons Protect.	12	2	4
Greece	Hellenic Comp. Commission	8	1	7
Not ranked by GCR				
Cyprus	Comm. For Protection of Competition	0	0	
Czech Republic	Office for the Protection of Comp.	8	1	5
Estonia	Estonian Competition Board	5	1	1
Hungary	Hungarian Competition Authority	42	6	7
Latvia	Competition Council	4	1	1
Lithuania	Competition Council	2	0	2
Luxembourg	Comp Council & Comp Inspection	1	0	0
Malta	Commission for Fair Trading	1	0	0
Romania	Romanian Competition Council	n/a		
Slovak Republic	Antimonopoly Office	4	1	3
Slovenia	Competition Protection Office	2	0	1
Bulgaria	Comm. Protection of Comp.	n/a		
		650	100	

Notes:

data covers 2004, 2005 and the period Jan to Nov 2006
cases relate to possible infringements of Arts 81, 82 or both

Sources:

DG Comp website, accessed 18/4/07