

## AGENCIES, NETWORKS, DISCOURSES AND THE TRAJECTORY OF EUROPEAN COMPETITION ENFORCEMENT

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### A. INTRODUCTION

The theme of this symposium, on multi-jurisdictional antitrust enforcement, underlines the diversity of national competition regimes and directs attention to issues of leadership, coherence and coordination. This article approaches those issues through an emphasis on agencies, networks and the role of ideas expressed in discourses. The elements of the title reflect the three basic arguments explored below. The first argument is that study of the agencies that enforce competition policy is a vital ingredient in understanding policy. This is an institutionalist approach which emphasises organisational factors and the creation of interorganisational networks, including the way in which organisations and networks embody repertoires of shared ideas regarded as appropriate. Secondly, a discourse approach allows an analysis of policy change through examination of competing technical (legal and economic) and national (for example, German and American) competition discourses. However, these discourses are mediated and deployed in organisational settings, hence resort to an analytical approach which has become known as “discursive institutionalism”.<sup>1</sup> The third argument deals with the trajectory of European competition policy. It is more speculative and relates the discussion to policy enforcement after Modernisation and the extent to which European antitrust embodies and enforces a particular Anglo-Saxon norm of how capitalist economies should be organised and coordinated. This perspective recognises the US influence on the conceptual base, the priorities and the processes of enforcement. Competition policy is not a neutral factor in shaping the evolution of European capitalism but can act as a vehicle for political interests and as a sometimes unwitting agent of system

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<sup>1</sup> V Schmidt and C Radaelli, “Policy Change and Discourse in Europe: Conceptual and Methodological Issues” (2004) 27 *West European Politics* 183.

change. The article addresses each of these three areas in the following sections before drawing the threads together in the conclusion.

## B. THE AGENCIES AND THE NETWORK

The way in which implementation of competition policy is organised and resourced is a key factor in determining the effectiveness of policy and its distributional consequences. This requires analysis of the politics of competition policy to sit alongside the more mainstream legal and economic analysis. As regards enforcement, the focus is on the multiple competition agencies which have proliferated at a remarkable rate along with the global spread of market economies. These agencies are typically accorded a more or less complete level of political independence and stand apart from mainline ministries.<sup>2</sup> The *Global Competition Review*<sup>3</sup> reviews 64 agencies and ranks 38 of them. It is not hard to argue that these agencies make a difference,<sup>4</sup> but determining quite what impact they have requires an analysis of their powers, competence, resources and modes of cooperation with other agencies.

In a European setting the background to this discussion is, of course, the reforms in the enforcement of Articles 81 and 82 known as “modernisation”, including the European Competition Network (ECN). The ECN began operation in 2004 as an enforcement network in respect of some, but not all, of the competition rules. It is a central element in the modernisation package brought about through Regulation 1/2003. Modernisation constitutes the most important transition in the 50 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 a supranational redefinition of the philosophy or principles of competition policy itself. In the past I have argued that the European Commission’s Directorate General for Competition (DG Comp) has enjoyed such a unique degree of independence that it can be analysed as a supranational agency.<sup>5</sup> In like fashion it is now possible to argue that the ECN can be analysed as a uniquely independent supranational network. Here we have something that

<sup>2</sup> S Wilks and I Bartle, “The Unanticipated Consequences of Creating Independent Competition Agencies” (2002) 25 *West European Politics* 148.

<sup>3</sup> “Rating Enforcement” (July 2006) 9 *Global Competition Review*; “Rating Enforcement” (June 2007) 10 *Global Competition Review*.

<sup>4</sup> See S Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester University Press, 1999).

<sup>5</sup> S Wilks and L McGowan, “The First Supra-national Policy in the EU: Competition Policy” (1995) 28 *European Journal of Political Research* 141; S Wilks and L McGowan, “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* (Oxford, Clarendon Press, 1996).

comes very close to Slaughter's vision of "executive transgovernmental networks",<sup>6</sup> especially if we can visualise the ECN as part of a transatlantic network of competition regulators.

If this argument could be substantiated it would establish the competition network as quite exceptional. There has been an active debate about the delegation in Europe of governance to independent agencies and the transnational operation of regulatory networks which constitute a form of sectoral governance.<sup>7</sup> However, research on these European Regulatory Networks indicates that they are relatively weak, under-resourced and overridden by national governments.<sup>8</sup> The ECN appears to be an exception to this diagnosis, and the following pages argue that the ECN has developed into an effective enforcement mechanism which has been corralled by DG Comp along lines defined by the DG's policy trajectory. A recurrent theme in this discussion is the extent of the real independence of the agencies, the Network and DG Comp. The tendency has been to analyse both the agencies and DG Comp as "non-majoritarian" bodies;<sup>9</sup> in other words, bodies not under the direct control of elected politicians. But whether we can strictly regard DG Comp as "non-majoritarian" is uncertain and conclusions on this question would have an important effect on the assessment of the policy priorities of DG Comp analysed later in the article.

The analysis of agency impact is thus highly dependent on the relationships with European law and with DG Comp, and in this respect we should first focus on the operation and success of the ECN. In a recent critique of EU agencies, Williams noted that "agencies should form nuclei for inter-national networks, in a way the Commission's DGs (or their departments) simply cannot".<sup>10</sup> 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

<sup>6</sup> A-M Slaughter, *A New World Order* (Princeton University Press, 2004), 42.

<sup>7</sup> B Eberlein and E Grande, "Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State" (2005) 12 *Journal of European Public Policy* 89.

<sup>8</sup> D Coen and M Thatcher, "Network Governance and Multi-level Delegation. European Networks of Regulatory Agencies" (2008) *Journal of Public Policy* forthcoming.

<sup>9</sup> G Majone, *Regulating Europe* (London, Routledge, 1996), 285; M Thatcher and A Stone Sweet, "Theory and Practice of Delegation to Non-majoritarian Institutions" (2002) 25 *West European Politics* 1.

<sup>10</sup> G Williams, "Monomaniacs or Schizophrenics?: Responsible Governance and the EU Independent Agencies" (2005) 53 *Political Studies* 88.

supranational competence which meant that proposals for decentralisation through modernisation appeared positively revolutionary. The details of the modernisation package have been outlined thoroughly elsewhere.<sup>11</sup> Essentially, they involve the Commission giving up the exclusive power to apply Articles 81 and 82, which comprise the core prohibitions on restrictive practices and abuse of dominance. These powers can now be applied by the national agencies, known as the 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 interstate trade. At first glance this looks like a recipe for incoherence, divergence and fragmentation, which is the nightmare prospect that the ECN was 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.<sup>12</sup> The White Paper proposed "that the burden of enforcement can now be shared more equitably with national courts and authorities".<sup>13</sup> 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".<sup>14</sup> 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<sup>15</sup> and led eventually to the modernisation package and the key Commission Notice (4/2004) which formalised the Network. 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 enforcement 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

<sup>11</sup> DG Comp, "Regulation 1/2003 and the Modernisation Package Fully Applicable since 1 May 2004" [Summer 2004] *Competition Policy Newsletter*, S Wilks, "Agency Escape: Decentralisation or Dominance of the European Commission in the Modernization of Competition Policy?" (2005) 18 *Governance* 431; S Wilks, "Competition Policy", in H Wallace, W Wallace and M Pollack (eds), *Policy Making in the European Union* (Oxford University Press, 5th edn, 2005).

<sup>12</sup> R Dehousse, "Regulation by Networks in the European Community: The Role of European Agencies" (1997) 13 *Journal of European Public Policy* 867.

<sup>13</sup> CEC, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* (Brussels, European Commission, 1999), 5.

<sup>14</sup> *Ibid.*, 32.

<sup>15</sup> C-D Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Oxford, Hart Publishing, 2004).

rejected in favour of DG Comp “managing” the Network directly. Jordan and Schout argue that network management is important but relatively unusual in the EU.<sup>16</sup> DG Comp appears to have created a model of a centralised managed network, 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<sup>17</sup> but has raised anxiety in the world of competition lawyers.<sup>18</sup> 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.<sup>19</sup> DG Comp possesses the ultimate power to step in and take over prosecution of a case if the NCA concerned is acting slowly or 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 mid-2007 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. There are plenary sessions, working groups, workshops and opportunities for the Network participants to meet,<sup>20</sup> but so far its activities have been low key with limited transparency and have generated very little public comment.

<sup>16</sup> A Jordan and A Schout, *The Coordination of the European Union: Exploring the Capacities of Networked Governance* (Oxford University Press, 2006), 39.

<sup>17</sup> See G Majone, “The New European Agencies: Regulation by Information” (1997) 4 *Journal of European Public Policy* 262.

<sup>18</sup> D Reichelt, “To What Extent does the Co-operation within the European Competition Network Protect the Rights of Undertakings?” (2005) 42 *Common Market Law Review* 745.

<sup>19</sup> O Budzinski and A Christiansen, “Competence Allocation in the EU Competition Policy System as an Interest Driven Process” (2005) 25 *Journal of Public Policy* 313.

<sup>20</sup> DG Comp, *Report on Competition Policy, 2005* (Brussels, European Commission, 2006), 62.

What we see, then, is a very distinctive network of agencies. It is exclusive, made up largely of NCAs 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 enjoy extensive independence within their own administrative systems. In other words, this is to a large extent a network of non-majoritarian agencies. It is, of course, still relatively early days. 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 first three years of operation appear to have endorsed the judgements of those who designed the ECN.

### C. THE PUZZLE OF NETWORK STABILITY

The ECN is operating much more smoothly than early critics anticipated and more effectively than regulatory networks in other policy areas. This does pose a puzzle, since there are substantial centrifugal forces with the potential to introduce conflict into the Network. These forces include wide disparities in agency competence, pressures of agency self-interest, divergence in national competition laws, and disparities in national economic expectations and industrial (and consumer) priorities. Moreover, whilst the design of the Network offers a simple and elegant model of centrally made uniform substantive rules (Articles 81 and 82) and decentralised enforcement, the reality is far less simple. These rules coexist with national competition laws and rely upon effects on interstate trade to become applicable; the rules are separate from the merger regime and the state aid regime, which rest on alternative relations of decentralisation; and further, a hundred years of administrative theory have attested to the difficulty of divorcing “policy making” from “policy implementation”, means become ends and the pragmatics of enforcing policy can transform its effects. There is a vast literature dealing with the pros and cons of decentralisation, or of subsidiarity in the European context, and also a substantial literature on the pros and cons of international coordination of

competition policies.<sup>21</sup> But as a first step in assessing the success of competition coordination we should take stock of the range and operation of the agencies involved.

Table I sets the scene by setting out the “global elite” of competition agencies. The ranking relates to competence in enforcement and derives from the well regarded annual surveys undertaken by the *Global Competition Review* (GCR). The 2006 survey identifies eight globally admired competition agencies, but of particular note is that the top ranking traditionally attached to the US agencies is now equalled, and for the Department of Justice (DoJ) surpassed, 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 the article. The survey is based on opinions and reviews of publications, and should be used

**Table I: The Global Elite of Competition Agencies**

		GCR ranking		Staff, 2007
		2006	2005	
EU	DG Comp	5	4.5	593
US	Federal Trade Commission	5	4.5	367
UK	Competition Commission	5	4.5	118
US	Department of Justice	4.5	4.5	769
US	Office of Fair Trading	4	4	301
Australia	Competition and Consumer Comm	4	4	325
France	Competition Council	4	4	96
Germany	Cartel Office	4	4	230

Notes: GCR ranking is based on assessment of competence in enforcement and in particular on results, development, cooperation, independence and resources. Rankings are annual. Thirty other authorities are ranked, all at 3.5 or below. The staff numbers relate to staff concerned with competition enforcement. Ranks are based on a star rating of 1 to 5, 5 being outstanding.

Source: “Rating Enforcement” (July 2006) 9 *Global Competition Review*; “Rating Enforcement” (June 2006) 10 *Global Competition Review*.

<sup>21</sup> R van den Bergh, “The Subsidiarity Principle and the EC Competition Rules: The Costs and Benefits of Decentralisation”, in D Schmidtchen and R Cooter (eds), *Constitutional Law and Economics of the European Union* (Cheltenham, Edward Elgar, 1997), 142; E Fox, “Antitrust Law on a Global Scale: Races Up, Down, and Sideways”, in D Esty and D Geradin (eds), *Regulatory Competition and Economic Integration: Comparative Perspectives* (Oxford University Press, 2001), 348; C Damro, “Transatlantic Competition Policy: Domestic and International Sources of EU-US Cooperation” (2006) 12 *European Journal of International Relations* 171; M Utton, *International Competition Policy* (Cheltenham, Edward Elgar, 2006).

with care. It reflects the views of the international competition policy community, but in itself that reputational bias is interesting and the annual rankings are undoubtedly taken very seriously by the agencies themselves. The survey indicates levels of prestige, both administrative and doctrinal. It therefore reflects ideas in good currency and it is significant that the German Bundeskartellamt (BKA) has fallen in prestige. The GCR remarks that the “Federal Cartel Office was once perhaps the world’s most influential antitrust authority, [but] now finds itself adrift from the mainstream, clinging stubbornly to the per se rule of anti-competitive behaviour”.<sup>22</sup> In contrast, the rise in ranking of DG Comp reflects mainly its cartel and merger work, although the success of the ECN should have helped. In the UK the record of the Office of Fair Trading (OFT) is disappointing, with criticism of a lack of focus, whilst the UK Competition Commission has risen to become the highest rated national agency in Europe, largely reflecting the quality of its investigations although, in a weird and indefensible anomaly, it has not been accredited by the British Government as part of the ECN. The rankings provide a measure of status and prestige and, by implication, an indicator of leadership potential within the Network and influence within national administrative systems. These leading agencies will be a focus for emulation within Europe and transnationally in respect of their organisation, their legal ingenuity and their economic expertise.

Tables II and III detail the full range of EU agencies. They show the rankings and also give information about financial and staffing resources. They include data on the nine EU agencies that are not ranked by the *Global Competition Review* because they are too new, too small or inactive. Table II 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 III supplements this picture by providing data on activity within the ECN. It indicates the number of cases opened over the first 40 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 the Dutch, the Danes and even the Hungarians opening more cases than the British. More particularly, the figures show a very marked actual decentralisation of enforcement, with only 20% of cases being handled by DG Comp.

Based on the GCR ranking, we could attempt an impressionistic identification of four “leagues” of effectiveness and activism within the ECN (Table IV). The table indicates that the “elite” and the “good” NCAs handle nearly three-quarters of all cases. But all the authorities are active, with the Hungarians being particularly energetic. Even the sketchy profile of agencies presented in Tables II and III illustrates the potential for active and well-resourced agencies to provide

<sup>22</sup> *Global Competition Review* (2007), *supra* n 3, 2.

**Table II: European Competition Agencies**

Member State		CGR rank, 2005	Staff, 2007	2006 budget (€m)	2006 cartel fines (€m)
EU	DG Comp	5	593	97	1800
UK	Comp Comm	5	118	29	0
UK	Office of Fair Trading	4	301	51	5
France	Comp Council	4	96	11	128
France	DGCCRF	3.5	415	29	0
Germany	BKA	4	230	17	5
Denmark	Danish Comp Authority	3.5	92	8	0
Finland	Finnish Comp Authority	3.5	53	5	0
Ireland	The Comp Authority	3.5	28	6	0
Italy	AGCM	3.5	118	37	362
Netherlands	Comp Authority	3.5	295	22	114
Portugal	Portuguese Comp Authority	3.5	71	8	1
Sweden	Swedish Comp Authority	3	93	10	0
Spain	Comp Service	3	84	3	0
Spain	Comp Tribunal		39	6	25
Austria	Federal Comp Authority	3	28	1	0
Poland	Office of Comp & Cons Protection	3	155	7	9
Czech Rep	Office for the Protection of Comp	3	30	3	10
Hungary	Hungarian Competition Authority	3	100	7	35
Belgium	Comp Council	2.5	22	1	0
Belgium	DG Comp		37	5	0
Slovak Rep	Antimonopoly Office	2.5	41	2	40
Greece	Hellenic Comp Commission	2	46	11	0
<b>Not ranked by GCR</b>					
Cyprua	Comm for Protection of Comp				
Estinia	Estonian Competition Board		39		
Latvia	Competition Council		53		
Lithuania	Competition Council		61		
Luxembourg, Comp Council & Inspection	Commission for Fair Trading		3		
Malta	Commission for Fair Trading		1		

**Table II (cont)**

Member State		CGR rank, 2005	Staff, 2007	2006 budget (€m)	2006 cartel fines (€m)
Romania	Romanian Competition Council		283		
Slovenia	Competition Protection Office		20		
Bulgaria	CommProtection of Comp		99		

Notes: DG Comp includes regulation of state aid—108 staff. Several agencies also deal with consumer protection. Rankings were attributed by the GCR and GCR user survey (see Table I). Sources: The 2006 Handbook of Competition Enforcement Agencies, Global Competition Review, Special Report, December 2006; “Rating Enforcement” (July 2006) 9 *Global Competition Review*; “Rating Enforcement” (June 2006) 10 *Global Competition Review*.

**Table III: European Competition Agencies: ECN Activity**

Member State		No of cases opened	No of cases as % of total	No of cases decided
EU	DG Comp	151	20	
UK	Comp Comm (not an ECN member)			
UK	Office of Fair Trading	40	5	8
France	Comp Council			
France	DGCCRF	121	16	39
Germany	BKA	81	11	24
Denmark	Danish Comp Authority	44	6	19
Finland	Finnish Comp Authority	12	2	7
Ireland	The Comp Authority	8	1	1
Italy	AGCM	26	3	20
Netherlands	Comp Authority	55	7	25
Portugal	Portuguese Comp Authority	18	2	5
Sweden	Swedish Comp Authority	22	3	11
Spain	Comp Service	24	3	10
Spain	Comp Tribunal(not an ECN member)			
Austria	Federal Comp Authority	15	2	3
Poland	Office of Comp&Cons Protection	17	2	5
Czech Rep	Office for the Protection of Comp	8	1	5

Hungary	Hungarian Competition Authority	52	7	10
Belgium	Comp Council			
Belgium	DG Comp	28	4	4
Slovak Rep	Antimonopoly Office	6	1	3
Greece	Hellenic Comp Commission	15	2	10
<b>Not ranked by GCR</b>				
Cyprus	Comm for Protection of Comp	0		
Estonia	Estonian Competition Board	6	1	1
Latvia	Competition Council	4	1	2
Lithuania	Competition Council	2	0	2
Luxembourg, Comp Council & Inspection	Commission for Fair Trading	1	0	
Malta	Commission for Fair Trading	1	0	
Romania	Romanian Competition Council	n/a		
Slovenia	Competition Protection Office	2	0	2
Bulgaria	CommProtection of Comp	4	0	
<b>Total</b>		763	100	216

Notes: Data cover the 40 months from May 2004 to August 2007. Cases relate to possible infringements of Arts 81, 82 or both.

Source: [ec.europa.eu/comm/competition/ecn/statistics.html](http://ec.europa.eu/comm/competition/ecn/statistics.html) (accessed 3 October 2007).

**Table IV: “Leagues” of effectiveness and activism within the ECN**

League	Country	No	% cases opened
Elite	EU, Fr, Ge, UK	4	52
Good	Den, Fin, Ire, It, Neth	5	19
Problematic	Sp, Swe, Port, Aust, Czech, Pol, Hung	7	20
Less effective	Gr, Belg, Lux + 8 new MS	11	9

alternatives to a standard DG Comp approach to enforcement. The highly diverse level of fines indicates variation in commitment and possibly in doctrine.

Turning to 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 and

European law are almost completely dominant.<sup>23</sup> Other analysts, such as Kassim and Wright,<sup>24</sup> are sceptical of this thesis of centralisation and put more emphasis on negotiated outcomes mediated through an epistemic community of policy specialists. A diagnosis of Commission dominance would suggest that the ECN is a “steered” Network, or even a “directed” Network. To use a looser analogy, Marc van de Woude visualised the Commission as “the headmaster” and its ability to remove NCAs from cases as “the headmaster’s stick”.<sup>25</sup>

It is, however, possible to suggest that the dominance of DG Comp might be unstable. This would be consistent with the Kassim and Wright view of the Commission as operating “within a complex institutional setting that imposes requirements and constraints”.<sup>26</sup> In other areas of European regulation it has proved difficult to create effective sectoral coordination. In areas such as the environment and energy there remains wide divergence in regulatory practice,<sup>27</sup> and even in well-coordinated areas such as telecommunications and financial services the mechanisms of coordination have difficulty in reconciling diverse sectoral and stakeholder interests.<sup>28</sup> One argument is, of course, that such diversity is no bad thing. There is an “Austrian” argument that competition between regulatory regimes is productive and creative in that it operates as a learning process.<sup>29</sup> In the context of competition policies, regulating structurally diverse economic systems, there is considerable value in this argument, and there are some very well understood centrifugal forces which would lead us to suppose that diversity would be the norm and that such pressures could threaten the coherence of the Network and the central position of DG Comp. The obvious centrifugal forces are:

- the striking disparity in size and competence of the NCAs as demonstrated by Tables II and III;
- disagreements over the allocation of enforcement work with resentment at the tendency for substantial prestigious cases being handled by DG Comp and the routine cases being handled at the national level;
- disagreements over economic analysis and the basis for infringement decisions, disagreements which would emerge from different national

<sup>23</sup> Wilks, *supra* n 11.

<sup>24</sup> H Kassim and K Wright, “Revisiting Modernization: The European Commission, Policy Change and the Reform of EC Competition Policy”, paper presented at the EUSA Conference, Montreal, May 2007.

<sup>25</sup> M Van der Woude, “The Modernization Paradox: Controlling Decentralisation”, paper presented at a seminar on Europeanisation of National Systems, Brussels, International Bar Association, 2003.

<sup>26</sup> Kassim and Wright, *supra* n 24, 12.

<sup>27</sup> Jordan and Schout, *supra*, n 16.

<sup>28</sup> Coen and Thatcher, *supra* n 8.

<sup>29</sup> Van den Bergh, *supra* n 21, 154.

economic traditions and the differing economic conditions of the Member States;

- disagreements over independent decision making and the possibility that DG Comp might be seen as too politicised, as less independent than many NCAs (a regular criticism from many German commentators) and with the risk either of national political intervention or of an unwelcome link to other policy areas such as employment protection or media plurality;
- disagreements over the treatment at the European level of important and influential national companies, whether they be IKEA, Philips or Endasa;
- resentment at the displacement or marginalisation of national law.

Such disagreements could give rise to a variety of strategies pursued by the larger NCAs, such as the OFT and the BKA. Some NCAs might feel impelled directly to oppose the Commission (for instance Germany); some may be more assertive negotiators within the framework of the ECN (perhaps Italy and France); while others might pursue a strategy of seeking to mould the Network by “uploading” their own preferred priorities and methods into the European system (the UK?). Such expectations are reinforced by the existence within the Network of some extremely impressive agencies, well resourced with money, staff and the intellectual firepower of very able economists and lawyers. Table II indicates that DG Comp commands a budget of €90m and 593 staff against a combined budget of the three elite NCAs of France, Germany and the UK of €132m and 1160 staff. In economics expertise alone DG Comp has 207 economists, 21 of whom hold PhDs. In contrast, the three leading NCAs have 358 economists with 49 PhDs (the US agencies have 159 economists, 105 of whom hold PhDs).<sup>30</sup> DG Comp therefore has no monopoly of expertise. It is hardly likely that the leading European agencies will be wholly in agreement with advice and initiatives emerging from Brussels; they may well be influenced by the distinctive industrial politics and industrial organisation of their respective countries. The BKA in particular has fought hard to defend the German cartel laws against the override from Brussels.<sup>31</sup> On this basis, one might have expected oppositional strategies not only from individual NCAs but also from 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, appears successful and coherent. How is one to account for this striking success?

<sup>30</sup> *Global Competition Review* (2007), *supra* n 3, various national country profiles.

<sup>31</sup> S Quack and M-L Djelic, “Adaptation, Recombination, and Reinforcement: The Story of Antitrust and Competition Law in Germany and Europe”, in W Streeck and K Thelan (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press, 2005), 255.

### 1. Explaining Network Stability: Transnational Solidarity and Unifying Discourses

There are a number of potential explanations for the ability to contain conflict within European networks.<sup>32</sup> In the case of the ECN, the two distinctive elements rest on organisational self-interest through agency solidarity and on managed normative convergence through unifying discourses. As regards sectoral agency solidarity, almost without exception the NCAs are depoliticised agencies with delegated powers who are fiercely jealous of their independence.<sup>33</sup> 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.”<sup>34</sup>

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 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 principle-agent terms as a “double delegation” in that the agencies have two principals.<sup>35</sup> The interesting question is how these competing loyalties will play out when national policy preferences collide with pan-European Network priorities, as happened over 2006–2007 in merger control through the confrontation over protection of so-called “national champions” in Poland and Spain

<sup>32</sup> See C Radaelli and B Eberlein, “Conflict Resolution within Networks”, [forthcoming](#).

<sup>33</sup> See Wilks and Bartle, *supra* n 2.

<sup>34</sup> Majone, “The New European Agencies”, *supra* n 17, 272.

<sup>35</sup> Coen and Thatcher, *supra* n 8.

(for instance, the ultimately successful resistance to the takeover of the Spanish energy company Endesa by the German Eon in the months up to April 2007).

The second explanation for the smooth running of the ECN is more explicitly normative and lies in a unifying discourse based on 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 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 can be argued that the smooth operation of the ECN is dependent on a shared common competition culture disseminated through a discourse 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.”<sup>36</sup>

This discourse 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 analyse 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.<sup>37</sup> The most effective deployment of this approach, drawing directly upon Haas,<sup>38</sup> has been by van Waarden and Drahos.<sup>39</sup> They put the 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 points out, Haas’s early work needs to be supple-

<sup>36</sup> K Dekeyser, cited in “The European Commission Network: What It Is and Where It Is Going” [July 2005] *The Antitrust Source* 3.

<sup>37</sup> See S Wilks, “Understanding Competition Policy Networks in Europe: A Political Science Perspective”, in Ehlermann and Atanasiu (eds), *supra* n 15, 65–79; and Kassim and Wright, *supra* n 24.

<sup>38</sup> See P Haas, “Introduction: Epistemic Communities and International Policy Coordination” (1992) 46 *International Organization* 1.

<sup>39</sup> F Van Waarden and M Drahos, “Courts and (Epistemic) Communities in the Convergence of Competition Policies” (2002) 9 *Journal of European Public Policy* 913.

mented with an organisational account of how the influence of an epistemic community is brought to bear.<sup>40</sup> 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”.<sup>41</sup> In many ways the ECN provides a textbook example of an EU-led “coordinative discourse” promoted by the Commission and aimed explicitly at coordinating a pan-European network. Such discourses can be exceptionally powerful, mobilising the power of ideas and legitimising a particular policy stance. Hence, say Schmidt and Radaelli, “the discourse does better if it contains cognitive arguments that demonstrate the policy programme’s relevance, applicability and coherence: and normative arguments that resonate with long-standing or newly emerging values”.<sup>42</sup> Thus the whole programme of activities “intended to foster the creation of a common competition culture”<sup>43</sup> matches the discourse concept rather neatly. It is primarily coordinative, it embraces a cognitive framework drawing on competition law and economics, and it has a strong normative thrust in pursuit of the perceived benefits of competition. The following paragraphs hence 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 European Court of Justice (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

<sup>40</sup> Slaughter, *supra* n 6, 42.

<sup>41</sup> Schmidt and Radaelli, *supra* n 1, 193; see also V Schmidt, “Bringing the State Back into Varieties of Capitalism and Discourse Back into the Explanation of Change”, paper presented at the Annual Meeting of the American Political Science Association, Philadelphia, 2006.

<sup>42</sup> Schmidt and Radaelli, *ibid*, 201.

<sup>43</sup> CEC, *Report on Competition Policy: Commission Staff Working Document Annex to the Report* (Brussels, European Commission, 2007), 86.

thinking and the ordoliberal tradition, and hence giving priority to legal principles as a framework within which the European economy should develop.<sup>44</sup> 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 Court of First Instance. 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.<sup>45</sup> They are valued and important players in the pan-European implementation of policy but are also substantial beneficiaries.<sup>46</sup> 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 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 Jabko argued that the Commission 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.<sup>47</sup> But,

<sup>44</sup> See D Gerber, *Law and Competition in Twentieth Century Europe* (Oxford, Clarendon Press, 1998), chs 7–9; and M-J Djelic, *Exporting the American Model* (Oxford University Press, 1998), ch 6.

<sup>45</sup> G Morgan, “Transnational Actors; Transnational Institutions; Transnational Spaces: the Role of Law Firms in the Internationalization of Competition Regulation”, CSGR Working Paper 167/05 (2005).

<sup>46</sup> A Wigger, “Towards a Market-based Approach: The Privatization and Micro-economization of EU Antitrust Enforcement”, in H Overbeek, B van Apeldoorn and A Nölke (eds), *The Transnational Politics of Corporate Governance Regulation* (London, Routledge, 2007), 98, 114.

<sup>47</sup> N Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985–2005* (Princeton University Press, 2006), 9, 12.

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 conceals any particular market biases behind a technical assessment based on precedent, formal legal tests and competition economics.

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”<sup>48</sup> but it remains an important context, especially for the new accession states. Defining the market mission of competition policy, after the achievement of 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. Hence, it is argued, the common competition culture is characterised by a “market discourse” but might be evolving towards a neo-liberal, consumer-welfare-dominated “economic discourse”, a proposition to which we return below.

The third element in the assessment of the common competition culture is a discourse of depoliticisation. Even when agencies are under the nominal control of politicians (as is the case with DG Comp and the BKA) they are outspoken in emphasising their operational independence. Many agencies, such as the OFT, have been granted formal legislative independence (comparable to the Bank of England) which insulates them from the pressures and rhythms of electoral politics.<sup>49</sup> This emphasis helps to justify the closed, agency-specific nature of the ECN, but it also arguably contributes to the belief 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 has been 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

<sup>48</sup> OECD, *Competition Law and Policy in the European Union* (Paris, OECD, 2005), 9, 12 (report prepared by Michael Wise).

<sup>49</sup> See M Flinders and J Buller, “Depoliticization: Principles, Tactics and Tools” (2006) 1 *British Politics* 293; and Wilks and Bartle, *supra* n 2.

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”.<sup>50</sup> This assumption of constitutional pre-eminence for competition provoked, and may be threatened by, the Sarkozy-inspired changes to the Reform Treaty discussed below. Nonetheless, the discourse of depoliticisation stresses the importance, or perhaps self-importance, of the agencies concerned and the possibility that the ECN is insular and resistant to outside influence.

To summarise the puzzling operation of the ECN, it could have been expected that there would be a degree of overt conflict, a risk of incoherence or the emergence of one or more NCAs to threaten the leadership role of the Commission. The fact that none of these features appears to have developed is explained by the value that NCAs place upon their domestic independence which is enhanced by the ECN, and by the success of competition specialists in the epistemic community in working with and through DG Comp to create a persuasive set of coordinative discourses. These discourses are not, however, purely European in origin. Indeed, it can be argued that they embody a substantial American influence, so I now go on to consider transatlantic convergence.

#### D. FROM EUROPEAN TO TRANSATLANTIC CONVERGENCE

The importance attached above to the leadership of DG Comp invites discussion of the policy trajectory of the DG now that modernisation has been accomplished. Some priorities, and in particular the targeting of cartels and state aid, are fairly clear. There is also, however, an interesting transatlantic dimension to DG Comp’s policy priorities. This is tangential to the venerable and recently intensifying debate about the prospects for a global competition regime comparable to, or even combined with, the World Trade Organization. That debate embraces theoretical arguments and a literature dealing with the modes of cooperation and especially the growth and influence of the International Competition Network.<sup>51</sup> This section does not deal directly with that debate

<sup>50</sup> OECD, *supra* n 48; see also A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004), 19, 241.

<sup>51</sup> See, for instance, Utton, *supra* n 21; Damro, *supra* n 21.

within international political economy but instead concentrates on a more limited discussion of the cross-fertilisation between European reforms and US antitrust. Having argued that modernisation has reinforced convergence of European competition policy through effective centralisation, this article goes on to argue that US antitrust has served as a model and inspiration for recent European developments, and that European competition policy makers are pursuing further “Americanisation”. In fact, the stage of the debate is such that we can almost take some degree of Americanisation as given. A recent issue of the *Antitrust Bulletin* was devoted entirely to the question “Converging or diverging paths?”, on which the editors simply noted “that overall EC competition law has been moving much closer towards U.S. antitrust”.<sup>52</sup>

This article addresses two complex and highly significant aspects of transatlantic convergence, the “turn to economics” and the promotion of private actions. Dealing first with the turn to economics, European competition law has long been criticised for the inadequacy of its economic analysis and the way in which enforcement has traditionally been dominated by lawyers and relatively formalistic legal tests. This follows very much in the German ordoliberal tradition, in which competition policy was visualised as a structure of economic laws rather than as a way of pursuing economic efficiency. The increased emphasis on economic analysis is particularly apparent in the UK, where there has been a shift to an explicit focus on an economic assessment of competition in the Competition Act 1998<sup>53</sup> and the Enterprise Act 2002,<sup>54</sup> but there has been an equivalent, if more gradual, shift in Europe. 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.<sup>55</sup> 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 (*Tetra Laval* and *Schneider*) in 2002. In each case the DG was coruscatingly criticised for the gross inadequacy of its economic analysis.<sup>56</sup> The response was to appoint for the first time a Chief Economist (Lars-Hendrick Röller and then Damien Neven), to create an economics unit and an economic

<sup>52</sup> G Niels and A ten Kate, “Introduction: Antitrust in the US and the EU—Converging or Diverging Paths?” (2004) XLIX *Antitrust Bulletin* 17.

<sup>53</sup> M Cini, “Competition Policy”, in I Bache and A Jordan (eds), *The Europeanization of British Politics* (Houndsmills, Palgrave Macmillan, 2006), 216.

<sup>54</sup> S Wilks, “The Reinvention of UK Competition Policy”, paper presented at an ECPR Conference, Bath, September 2006.

<sup>55</sup> OECD *supra* n 48, 12.

<sup>56</sup> E Morgan and S McGuire, “Transatlantic Divergence: GE-Honeywell and the EU’s Merger Policy” (2004) 11 *Journal of European Public Policy* 53.

advisory council, and to recruit more economists.<sup>57</sup> Mario Monti, an economist and the then Commissioner, was pivotal in this turn to economics. Symbolically, he announced the Chief Economist appointment in October 2002 in the great shop window of transatlantic antitrust celebration, the annual Fordham Antitrust Conference. The symbolism was reinforced in the person of the English Director-General, Philip Lowe, also an economist, and it was consolidated by the appointment as Commissioner of Neelie Kroes, also originally an economist by training.

The introduction of economists and economic analysis into organisations has been the subject of intriguing organisational analysis. In the case of antitrust, Marc Eisner undertook a fascinating study of the introduction of economists into the DoJ during the Reagan administration. He not only analysed the introduction of economic doctrine, most obviously Chicago doctrine, but examined the effects of incorporating economists as direct case handlers rather than expert advisers. The effect, he established, was to reinforce the “disarmament” of antitrust during the 1980s.<sup>58</sup> It would be intriguing to draw US/EU parallels and speculate on the impact of intensified economic analysis in Europe. In a magisterial examination of the norms of US antitrust enforcement, Kovacic warned against simplistic interpretations of the swings in US enforcement from hyperactive enforcement in the 1960s inspired by industrial organisation models to inactivity in the 1980s reflecting the shift to Chicago-School models (what he calls the “pendulum narrative”). Instead he argued for a pattern of cumulative intensification.<sup>59</sup> In Europe a comprehensive study of the impact of economic doctrine on European competition enforcement has yet to be written.

Identifying an enhanced role for economics in the enforcement of European competition policy is therefore easy enough, but it is far more demanding to analyse its effect on the goals of policy, the effectiveness of enforcement, the predictability of enforcement, the bias in administration and the substantive impact on national and the European economies. We do know, however, that economic analysis has become far more extensively employed in both national and European regimes. At the European level the Chief Competition Economist and his staff have become involved with case work and the new Chief Economist, Damien Neven, has given an account of the increased resort to economic advice seen, for instance, in the rapid growth of the economic consulting industry.<sup>60</sup> His account of the impact of economics in DG Comp

<sup>57</sup> L-H Röller and P Buiges, “The Office of the Chief Competition Economist at the European Commission”, available at <http://ec.europa/dgs/competition/economist/publications/html> (accessed on 26 September 2007).

<sup>58</sup> M Eisner, *Antitrust and the Triumph of Economics* (University of North Carolina Press, Chapel Hill, NC, 1991).

<sup>59</sup> W Kovacic, “The Modern Evolution of US Competition Policy Enforcement Norms” [2003] *Antitrust Law Journal* 377, 378, 457.

<sup>60</sup> D Neven, “Competition Economics and Antitrust in Europe” (2006) 21 *Economic Policy* 743.

draws frequent parallels with the US and the economic approaches have a distinct Anglo-American pedigree, converging on what has been called the “post-Chicago synthesis”.<sup>61</sup> Analysis of the systemic impact of this turn to economics is difficult, but this article picks up one or two starting points before turning to an interpretation offered by Angela Wigger.

The enhancement of economics implies that economic analysis and reasoning, and therefore economic efficiency, will be increasingly privileged in the mix of objectives to be pursued by European policy. Among the alternative objectives has been the overwhelming imperative of market integration, a sympathetic attitude to the position of small- and medium-sized enterprises,<sup>62</sup> and a quasi-regulatory attitude to positions of dominance which places a legal obligation on dominant firms to compete responsibly and to restrain the deployment of their economic power.<sup>63</sup> This legacy of emphasis on the competitive process and keeping markets open has caused US critics to assert that “we protect competition, you protect competitors”,<sup>64</sup> but the turn to economics suggests that European doctrine will move closer to the American stress on competition as a process. Once the emphasis has shifted to economics, the question arises what sort of economics? Again, this is a complex area and it is hard to pick out an emergent European economic doctrine. Niels and Kate speculate that Europe has leapfrogged Chicago thinking to adopt the post-Chicago synthesis.<sup>65</sup> What is probably common ground, however, is the focus among economic practitioners on welfare economics and on consumer welfare as the proper goal of economic analysis. In Motta’s definition, competition policy “is the set of policies and laws which ensure that competition in the market is not restricted in such a way as to reduce economic welfare”.<sup>66</sup>

The next stage, having proceeded from economics, to economic welfare, is to ask how these welfare standards will be operationalised. In the US it is widely felt that

“the 1980s victory of the Chicago School was more a victory of economic libertarianism and political conservatism than of maximisation of a microeconomic welfare function. “Consumer welfare” was the label given for the *raison d’être* of the new regime, but it obscured the fact that the first real principle was non-intervention.”<sup>67</sup>

<sup>61</sup> This has become the orthodox characterisation; see J Vickers, “Discussion” *ibid.* 784.

<sup>62</sup> M Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004), 17.

<sup>63</sup> E Fox, “We Protect Competition, You Protect Competitors” [2003] *World Competition*, 149, 157; Neils and Kate, *supra* n 52, 12; see also “A Bundeskartellamt/ Competition Law Forum Debate on Reform of Article 82: a ‘Dialectic’ on Competing Approaches” (2006) 2 *European Competition Journal* 211.

<sup>64</sup> Fox, *ibid.*

<sup>65</sup> Neils and Kate, *supra* n 52, 16.

<sup>66</sup> Motta, *supra* n 60, 30.

<sup>67</sup> Fox, *supra* n 63, 152–53.

This would appear to counsel caution for European analysts reading across from American experience, but it also provokes the question of whether there are submerged political preferences underlying the application of European competition policy. Does an emphasis on consumer welfare lead to a model of policy application that favours a neo-liberal or Anglo-Saxon economic model? Can consumer welfare analyses put undue emphasis on short-term price improvements, on efficiency gains from the scale operations of large companies and on allowing any activity that does not restrict output? Does the economic principle of regarding every individual case assessment as unique, through the “effects-based” approach, lead to a tolerant assessment of competitive strategies? In other words, can consumer welfare allow too permissive an operation of competition policy?

In response to such questions, Wigger and Nölke have produced an important and controversial thesis which argues that DG Comp has, since the early 1990s, had a strong neo-liberal bias which has displaced the German ordoliberal legacy.<sup>68</sup> Wigger 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 neo-liberal free market ideology. The new creed 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.”<sup>69</sup>

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.<sup>70</sup> Wigger is advancing a bold argument about microeconomics and neo-liberalism, but is also arguing, even more controversially, that this is an Americanised neo-liberalism that draws on US antitrust doctrine to effect a more permissive stance towards large companies based on a rationale of efficiency. In contrast, Vallindos, for instance, argues that the Commission is, if anything, dominated by a Harvard

<sup>68</sup> A Wigger and A Nölke, “Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: The Case of Antitrust Enforcement” (2007) 45 *Journal of Common Market Studies* 487.

<sup>69</sup> Wigger, *supra* n 46, 106, 107–8.

<sup>70</sup> *Ibid.*, 116–17.

structuralist approach which he sees as inimical to the development of globally competitive European companies and the Lisbon agenda.<sup>71</sup>

This raises one of the many paradoxes in this complex debate since 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 greatly influenced by this argument<sup>72</sup> 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”.<sup>73</sup> 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”.<sup>74</sup>

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. 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 enforcement and opens up fascinating questions about the mix of 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. For example, in his attack on the allegedly anti-competitive implications of current European competition doctrine, Vallindos calls for a Chicago-School-type efficiency defence in European cases and argues that the Union

<sup>71</sup> G Vallindos, “New Directions in EC Competition Policy: The Case of Merger Control” (2006) 12 *European Law Journal* 642–43.

<sup>72</sup> Wilks, *supra*, n 54.

<sup>73</sup> CEC, *A Pro-active Competition Policy for a Competitive Europe* (Brussels, European Commission, 2004), COM(2004)293 final, 5.

<sup>74</sup> N Kroes, “Industrial Policy and Competition Law and Policy”, speech to the Fordham University Law School, September 2006, europa.eu press release.

“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.”<sup>75</sup>

He is thus arguing for a more strategic or permissive operation of policy, which Wigger maintains is already taking place.

The second area of transatlantic convergence lies in the efforts by the Commission to encourage private actions to recover damages for breach of competition law, either as a follow-up to an infringement decision or as a stand-alone action. This innovation goes to the heart of the differences between US and European antitrust. US antitrust is centred on private actions, so that over 90% of US antitrust cases are pursued by private parties and the enforcement actions of the competition regulators take the form of prosecutions in the courts. The familiar incentives for private litigation include, of course, triple damages, class actions and “no win, no fee” legal representation. There may be a danger in overplaying the contrasts—American practitioners point to the vast majority of cases that are settled out of court—but the contrast between European administrative enforcement and US private enforcement provides a fundamental and revealing contrast. In Europe, competition law has always had a “direct effect” on national courts, in fact “Articles 81 and 82 provide a perfect example of Treaty provisions that are horizontally directly effective”,<sup>76</sup> but there have historically been very few cases opened in national courts. Following modernisation, the Commission identified private action as the next frontier of competition law enforcement and moved to encourage 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. Barry Hawk likened this fundamental shift to “The Protestant Reformation”. Whereas in the past the catholic church of the Commission had identified sinners or granted absolution through the notification process, after modernisation undertakings have to look to their consciences and to their personal relationship with the legal gospels to decide whether they were sinning. Final determinations, without the involvement of competition agencies, can only be decided by court cases, and this opens up the possibility for challenge from private parties, whether they are competitors, consumers, suppliers and so on.

In order to encourage private actions DG Comp issued a Green Paper (on the “EC antitrust rules” [*sic*]) in December 2005.<sup>77</sup> The ensuing consultation exercise

<sup>75</sup> Vallindos, *supra* n 71, 665, 660.

<sup>76</sup> J Shaw, *Law of the European Union* (Basingstoke, Palgrave, 3rd edn, 2000), 436.

<sup>77</sup> CEC, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (Brussels, European Commission, 2005), COM(2005) 672.

is said to have been favourable<sup>78</sup> and a White Paper is expected in December 2007. Neelie Kroes has made this reform one of the key elements of her platform and it has featured large in many of her speeches.<sup>79</sup> It is too early to assess how effective this encouragement is likely to be. Early indications of cases being opened in national courts point to a growth in private actions in some national jurisdictions, but many lawyers remain sceptical. Eilmansberger, for instance, notes that there has been little increase in private action. He reviews the obstacles and concludes that stand-alone private actions, whilst necessary, face formidable barriers.<sup>80</sup> This attempt at radical Americanisation has generated considerable angst and lends itself to melodramatic fears of a US antitrust invasion which will reproduce the excesses of the US litigation culture in Europe.<sup>81</sup> Others, such as Walsh, argue that “the Commission by actively encouraging and facilitating private party actions is obviating its responsibilities as primary enforcer of E.C. competition law and policy”.<sup>82</sup> This argument is extended by Wigger to explore the possibility is that the resort to private action is further reinforcing the bias towards an Anglo-Saxon model of competition policy. In a perceptive analysis of the effects of growing private enforcement, Wigger 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”.<sup>83</sup> The prospect, in other words, is the reproduction of a US regime which is not only dominated by private antitrust actions but disseminates assumptions of corporate individualism.

## E. CONCLUSIONS

The institutional approach adopted in this article has concentrated attention on the agencies which enforce competition policy. It notes the diversity of agencies

<sup>78</sup> CEC (2007), *supra* n 43, 10.

<sup>79</sup> N Kroes, “Reinforcing the Fight against Cartels and Developing Private Antitrust Damage Actions: Two Tools for a More Competitive Europe”, speech to a Commission/ IBS joint conference, March 2007, europa.eu press release.

<sup>80</sup> T Eilmansberger, “The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement Through Legislative Action” (2007) 44 *Common Market Law Review* 434, 477–78.

<sup>81</sup> J Martin, “Private Antitrust Litigation in Europe: What Fence is High Enough to Keep Out the US Litigation Cowboy?” (2007) 28 *European Competition Law Review* 2.

<sup>82</sup> D Walsh, “We Say Competition, You Say Antitrust: Can Diverging Policy Objectives be met by Uniform Enforcement Policies?”, paper presented at the EUSA Conference, Montreal, May 2007, 2.

<sup>83</sup> Wigger, *supra* n 46, 109, 104.

but also outlines the consolidation of a transnational community with a high level of mutual awareness and a tendency to benchmark against leading NCAs. The community cooperates through the ECN, which is operating coherently and effectively to enforce competition rules across the EU, although it is only one component in the pattern of pan-European competition enforcement. The Network relates to a rather specific activity, the enforcement of Articles 81 and 82, and does not therefore link all agency activity. Control of mergers in particular is not covered, although there are some spillover effects from the Network into other aspects of enforcement.

There is an interesting 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 regulatory networks. Specifically, it is concerned with the enforcement of clear legal provisions contained in the Treaty of Rome. It is managed by the Commission and has been able to reproduce the exceptional supranational authority previously enjoyed by DG Comp. Indeed, this article 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 neo-liberal interpretation of competition policy. The coherence of the ECN is thus explained by the self-interest of national agencies in sustaining their independence through engagement with a supranational network, and by the normative cement of a series of discourses around the common competition culture. But these discourses may themselves create a wider tension as they promote change in the European economy.

At present, it is argued, there is limited resistance to the emergent neo-liberal and “Americanised” policy stance embodied in the competition discourses. 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 neo-liberal biases felt to be embodied in the Treaty provisions and aims. The neo-liberal 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’”.<sup>84</sup> The French rejection also partially inspired Jabko’s study of the Commission’s exploitation of market ideas in the pursuit of deeper unity. Jabko concludes, rather soberly, with the question

<sup>84</sup> P Hainsworth, “France Says No: The 29 May 2005 Referendum on the European Constitution” (2006) 59 *Parliamentary Affairs* 104.

“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.”<sup>85</sup>

He warns of a possible backlash against the market discourse which appears to have materialised in the dramatic last-minute amendment of the new European Reform Treaty in June 2007 as a result of intervention by President Nicolas Sarkozy. The deletion from the opening Treaty objectives of Article 3(1)(g), which requires “a system ensuring that competition in the internal market is not distorted”, and its replacement by a Protocol does appear to represent a distinct downgrading of competition and was certainly portrayed as such by Sarkozy. As Alan Riley has noted, “no mere protocol can achieve the same interpretive status as the preamble and the first few articles”,<sup>86</sup> and DG Comp’s negotiating strength on state aid, national champions and sector liberalisation has been weakened. 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: 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 having 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 in whose interests that model operates. Wigger offers a persuasive argument that the model is not only neo-liberal, but has a trajectory that is embedding an Anglo-Saxon model of capitalism across Europe. If that is the case, 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.

<sup>85</sup> Jabko, *supra* n 47, 185.

<sup>86</sup> A Riley, “Restoring the Competition Principle to the EU Reform Treaty: Problems and Solutions” unpublished note, August 2007, 3.