

**The Modernisation of EU competition policy:  
Making the network operate**

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## Abstract

This paper does not seek to evaluate whether decentralisation of the implementation of Art. 81 ECT is desirable but simply analyses how the network of enforcers envisaged in the White Paper would operate. We identify two issues. We observe that in the proposed framework, simultaneous enforcement by several authorities is likely to occur and that each member states will have little incentive to take into account in its decision the interests of other member states. We show that such system of enforcement can have a “*disintegrating effect*”, to the extent that it does not allow for a balancing between positive and negative net benefits across member states. We suggest that in order to avoid these effects, some co-ordination between the members of the network should be organised. In particular, we advocate the re-emergence in the intra-EC context of a 'positive comity' obligation and we suggest that a formal procedure for co-ordination between different institutions should be laid down (as in the US). We further observe that the accountability of antitrust authorities could deteriorate in the White Paper era. In order to address this concern, we suggest that institutional constraints like accountability and independence standards should be imposed on member states. Finally, drawing on the US experience with multiple enforcement, we argue that the role of the Commission should be as much to manage regulatory innovation (arising from the enforcement activity of member states) as to resolve conflict.

## Section 1: Introduction and overview

This paper focuses on the de-centralization of enforcement of European Community (EC) competition law as spelled out in the EC White Paper of April 1999 on Modernization of EC competition law (hereinafter 'the White Paper').<sup>1</sup>

At the outset, it may be worth emphasising what the White Paper does not do. In particular, the White Paper does not put into question the allocation of competence as laid down in Art. 81 of the EC Treaty (ECT), which is an exclusive competence. The Commission through the White Paper simply proposes that competence with respect to competition policy which has been transferred to the Community could from now on be exercised by both Community and national authorities (national competition authorities and national courts). Consequently, it is inappropriate to subject the White Paper to Art. 5 ECT (subsidiarity) and to its legal consequences.

The White Paper is thus not concerned with the allocation of competence. It reorganises enforcement; what is envisaged in the White paper is a limited work sharing where the Commission retains the monopoly over individual exemptions (see § 92, p 32 – see also Elhermann (2000)). *Some* of the implementation<sup>2</sup> of Art. 81 is entrusted to at least<sup>3</sup> 16 players, rather than one.

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<sup>1</sup>See, European Commission, The White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No 99/027, 28 April 1999. We recognise that there is some complementarity between de-centralization of enforcement and other aspects of the modernisation contained in the White Paper in particular the treatment of vertical restraints. In a sense both endeavours aim to take off some of the burden from DG Comp's shoulders. More fundamentally, the issue of who will be applying EC competition law is not independent from the design of the laws themselves. In what follows, we abstract from this issue.

<sup>2</sup> Arguably, rather limited responsibilities are delegated to member states under the current proposal.

<sup>3</sup> In each member state, both the antitrust agency and courts could implement Art 81 ECT.

This paper does not seek to evaluate whether decentralisation of the implementation of Art. 81 ECT is desirable. Rather, we analyse how the decentralisation envisaged in the White Paper would operate. In particular, we identify two potential sources of inefficiency associated with the sharing of enforcement among several authorities. First, and most fundamentally, different authorities might not have the same incentives in exercising their power; national authorities will indeed not have an incentive to take into account effects taking place outside their own territory. Second, different authorities will respond to different institutional constraints and accountability might operate differently at the national level relative to the EU.<sup>4</sup>

We argue that the first concern is potentially quite serious and show that divergent incentives can have a “*disintegrating effect*”, in particular given the scope for simultaneous rulings on single cases offered by the framework currently envisaged and *despite* the fact that rulings from individual member states only apply within the confines of their territory. In the proposed framework, it is unlikely that member states will routinely opt for a balancing test whereby they will internalise in their decisions the interests of other member states (be it foreign consumers or producers as the case may be). By contrast, such balancing is guaranteed when the Commission is in charge.

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<sup>4</sup> In addition, there may be a concern about different levels of competence. However, incompetence is hardly a structural issue. Its effects are likely to be transitory and they do not have a “disintegrating effect” (incompetence is, in its crude form, origin-blind). There may be yet another concern, namely that regulatory diversity among member states with respect to a number of ancillary but influential tools for antitrust enforcement might again introduce some inconsistencies across countries. For a discussion of this issue and whether as a consequence, some minimum harmonisation is warranted in this area, the reader is referred to Kon (1999), Mohr Mersing (1999) and Forrester (1999).

In our view, existing legal tools are inadequate to ensure that incentives will be aligned. In particular, the duty to co-operate, as laid down in ECT, and Art. 9.3 of Reg. 17/62 do not sufficiently curtail national discretion.

We suggest that in order to align incentives two additional measures should be considered. First, we advocate the re-emergence in the intra-EC context of the 'positive comity' obligation as we know it from the field of co-operation at the international realm. Second, we suggest that a procedure for arbitration between different institutions should be laid down. This role could be played directly by the European Court of Justice (ECJ) or by the Commission (which itself would be subject to judicial review). We discuss the alternatives but emphasise that in any event, the circumstances where the institution assuming an arbitration role will have the right or the obligation to intervene should also be negotiated *ex ante*.

The second concern, namely that institutions will differ across countries is also one that in our view should be taken seriously. The design of institutions matters a great deal in the implementation of competition law. Unlike other areas where the law is codified in details, competition law is formulated in general terms and accordingly leaves a lot of discretion to the implementing authorities<sup>5</sup>. Discretion is however associated with reduced accountability that in turn enlarges the scope for various forms of capture. In our view, the case law of the ECJ does not, as the Commission suggests in the White Paper, provide enough discipline in this respect<sup>6</sup>. As a result of different institutional frameworks, different member states may thus strike different balance between the interests of their various constituencies. In general, whether

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<sup>5</sup> From this perspective, the area of competition is probably not the prime candidate for delegation to member states.

accountability at the level of the member states is more effective than accountability at the Commission level is at best unclear and there are some good reasons to think that accountability will be reduced in the White Paper era. In order to address this concern, it would be useful in our view to impose institutional constraints on the member states. These may take the form, for instance, of accountability standards (like common publication requirements) and standards of independence (for instance with respect to the status of civil servants or the nomination of competition commissioners).

To sum up, if the Commission has recognised some of these concerns just discussed, the White Paper falls short from providing a comprehensive framework to analyse the underlying issues. In our view, the sharing of responsibilities that it envisages is unlikely to work well without important accompanying measures. The operation of a network requires a minimum of standardisation and co-ordination. Standardisation should focus on institutional constraints and co-ordination should focus on positive comity obligations and the establishment of procedures for arbitration.

The rest of the paper is divided as follows: Section 2 considers the issue of multiple enforcement and concludes that the occurrence of simultaneous enforcement by several members of the network should not be dismissed. In Section 3, we examine the consequences of such simultaneous enforcement acknowledging that the members of the network have different incentives and we show that under the current proposal, it has disintegrating effects. In Section 4, we examine whether the existing legal framework can address this matter. In Section 5, we discuss the institutional

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<sup>6</sup> It is not clear in any event that the case law should act as strong discipline.

constraints under which the national competition authorities (NCAs) and the Commission operate. In Section 6, we provide a positive account of the US experience with respect to multiple enforcement from which useful lessons can be drawn. Finally, Section 7 concludes and collects our suggestions to improve the operation of the network.

## **Section 2: Multiple enforcement (the 15+1 scenario)**

This Section focuses on the legal parameters that the White Paper envisages for competition enforcement in the EC. We first observe that the White Paper is not subjected to the constraints imposed by subsidiarity. Second, we show that the White Paper leads to multiple enforcement.

### **2.1. The White Paper and Subsidiarity**

As we mentioned earlier, the White Paper should not be viewed as a proposal within the context of subsidiarity. The Commission nowhere submits that the question of competence is prejudged through the White Paper. The Commission simply adds new partners to exercise an exclusive Community competence. This is confirmed by the fact that it is still the Commission alone that will define the EC competition policy (and not in some form of cooperation with the member states).<sup>7</sup>

Hence, competition policy post-White Paper is a Community competence to be co-exercised by DG Comp and by the NCAs as well. This is a substantive innovation in

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<sup>7</sup> See the White Paper at p. 31.

the sense that institutions (the NCAs) are called to apply a legal instrument which involves a fair amount of discretion without having formal competence. Effectively, under the White Paper, the NCAs operate as administrative units of an EC-wide executive. This is the first instance, to the best of our knowledge, in which national authorities are meant to exercise judgement on behalf of the Community. The importance of this reform thus cannot be overstated.

The White Paper, by being insulated from subsidiarity-type considerations (as laid down in Art. 5 ECT), still ensures that Community action will not be subjected to the constraints laid down in Art. 5 ECT. Hence, the Community is unrestrained and can intervene when it deems it necessary.<sup>8</sup>

Finally, the White Paper does not deal at all with issues regarding application of national competition law. Indeed, this remains national competence and the White Paper does not alter the pre-existing paradigm of allocation of competence.

## 2.2. EC competition law: here, there and everywhere

As well known, Art. 81 ECT applies to the extent that an agreement 'may affect trade between member states'. The ECJ has traditionally interpreted this term *lato sensu*.<sup>9</sup> Voices arguing in favour of a restrictive construction of the mentioned clause have

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<sup>8</sup> On whether this conclusion is in itself a problem, see *infra* Section 4.

<sup>9</sup> It should be noted that in US law, the interstate commerce clause has also been interpreted in a wide sense, the leading Supreme Court decisions being *Summit Health v. Pinhas*, 500 US 322 and *McLain v. Real Estate Board*, 444 US 232.

remained largely minoritarian<sup>10</sup>, whereas the majority of doctrine seems to endorse the ECJ's conclusions in this respect.<sup>11</sup>

As long as the Community is the sole enforcer, the evaluation of whether trade among member states is affected is purely a Community-wide issue. For the purpose of exercising jurisdiction, the question of which EC countries are involved in the intra-community trade is simply irrelevant.

However, when national enforcers are involved, the issue is more intricate. Indeed, some countries may be unaffected (in terms of trade) and the question arises of whether they should still be allowed to exercise jurisdiction. For example, could the Portuguese NCA assert competence over an agreement between an Italian and a Danish undertaking which only affects trade between those countries? In our view, the answer to this question must be positive.

The Portuguese NCA should not be asked to establish some 'minimum contacts' other than having satisfied the 'may affect trade between member states'-requirement. The reason is simply that the White Paper only enlarges the set of potential enforcers without altering the mechanism that triggers jurisdiction.

Hence, we can, in principle, expect frequent multiple enforcement as several NCAs can simultaneously assert their rights even with respect to events occurring outside

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<sup>10</sup> See, for example, Wessering (1997).

<sup>11</sup> Ehlermann (2000) concurring.

their territory.<sup>12</sup> In turn, one could expect interested parties to select enforcers strategically in order to advance their own interests.

This is sometimes referred to as 'forum shopping', an issue which has been raised but not fully explored in the literature so far<sup>13</sup>.

Instances of multiple enforcement are easy to illustrate. Imagine a case where country A and country B assert jurisdiction over the same practice or decide jointly not to intervene. This could be for example a case of an alleged horizontal agreement between Greek and Italian carriers operating in the sea transport sector between Greece and Italy.<sup>14</sup> Independently of whether the Greek and Italian authorities intervene or not, Portugal could assert jurisdiction, either because our preferred interpretation is correct – that is, that any NCA can intervene to the extent that trade among member states is affected, or because Portuguese tourists were charged monopoly prices by the Greek and Italian undertakings at hand.

Of course, multiple enforcement could lead to conflicting decisions<sup>15</sup>. But even in the absence of conflicts, it is not clear that multiple enforcement will be appropriate, as the several agencies may lead to an outcome that is undesirable. These issues are further analysed in Section 3.

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<sup>12</sup> Even if our conclusion is contested, it is legally impossible to doubt the validity of the statement that in our example, Italy and Denmark can, in principle, assert jurisdiction based on the 'nationality' clause and eventually any other member state whose consumers' interests are affected based on the 'effects' doctrine.

<sup>13</sup> Compare Ehlermann (2000) and Siragusa (1999).

<sup>14</sup> Every resemblance to actual cases is completely unintentional.

<sup>15</sup> It is irrelevant for the purposes of this exercise whether NCAs and the Commission are at equal footing with respect to the kind of decisions they can take post-White Paper. As Ehlermann (2000, p.30) observes, it is most likely the case that NCAs can adopt positive decisions. What we care about here is *quid* in case where two NCAs reach divergent decisions independently of how much they can decide.

The extent of conflict and the consequences of multiple enforcement are also affected by the scope of the decisions that NCAs can take. According to the White Paper (§60), decisions by NCAs will have a limited territorial effect in the sense that they are deprived of any legal effects beyond national boundaries. This approach can lead to the following paradox: a transaction which by definition affects trade among member states (since otherwise, EC law does not come into play at all) must be submitted to one NCA knowing *ex ante*, that no matter what the decision is, it is binding only within a part of the common market.

As Nehl (1999) points out, in the name of de-centralization, the Commission effectively puts into question the network concept that it wants to create. Territorial limitation can lead to a series of perverse incentives: not to submit to NCAs if EC-wide protection is sought; outlaw an otherwise valid transaction only within the four corners of a particular sovereignty; raise transaction costs to the maximum possible, since, conceivably, fifteen different outcomes are possible in a particular case.<sup>16</sup>

### **Section 3: The consequences of multiple enforcement**

In the previous section, we have argued that (i) member states will not be seriously constrained in asserting their enforcement rights<sup>17</sup> so that multiple simultaneous enforcement can be (widely) expected but (ii) that the scope of their decisions will be limited to their own territories (at least according to what appears to be the working

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<sup>16</sup> Ehlermann (2000), Nehl (1999) and Siragusa (1999) have identified some of the consequences mentioned here.

<sup>17</sup> Assuming *arguendo* that notifications will be rare in the White Paper era, one can still expect NCAs to respond to complaints.

hypothesis of the White Paper). In this Section, we analyse the consequences of such a framework for enforcement.

To the extent that national authorities are accountable to national constituencies, it is natural to assume that they will only consider the interest of those constituencies. In other words, national authorities cannot be expected to take into account, in the evaluation of the cases that they handle, the effects that are taking place outside their territory. Each country will thus consider both the competitive effects and the potential efficiency benefits that accrue within their own territory.

Since, as discussed above, a number of countries can be expected to assert their enforcement rights, a likely outcome is one where a number of countries will simultaneously assess the competitive effects and the efficiency benefits that accrue within their own territory and adopt a ruling which has effects in their territory. One can then wonder whether such an outcome would significantly differ from that obtained if there was a single enforcer at the EU level.

For the sake of the argument, assume that each country can impose remedies which meet its own concern *without* affecting the agreement under review in other countries (in terms of competition or efficiency benefits). In such a hypothetical world, the deal under review is effectively “separable” across countries and it is not clear that a single enforcer would achieve an outcome which is fundamentally different from that arising from simultaneous enforcement across countries<sup>18</sup>. Such an authority would

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<sup>18</sup> In the absence of efficiency benefits, the scope for conflicts would also be reduced. Indeed, when the relevant antitrust market extends to a few countries, multiple enforcement by any subset of the countries concerned will yield the same outcome as single enforcement by a central authority (see Neven and Röller, 2000).

indeed recognise that each country can be assessed separately and would impose appropriate remedies in each country.

When remedies in one country affect other countries, the matter is altogether different. For instance, assume that a particular agreement only makes business sense if it can be implemented in all countries. In such a case, there is indeed a potential external effect across countries because a negative decision in one country will effectively prevent the deal from being implemented in other countries where the deal might possibly bring positive net benefits (i.e. where efficiency benefits dominate potential anti-competitive effects). The outcome of simultaneous multiple enforcement might then differ significantly from that arising from a single EC wide enforcer. Consider for instance a deal which brings positive net benefits at the EC level but such that the balance between anti-competitive effects and efficiency is unfavourable in one country. An EC-wide enforcer would, in all likelihood (that is, observing the Community Interest Clause), allow (or fail to sanction) the deal. By contrast, under multiple enforcement, the deal will be banned (or sanctioned) by the country which suffers. Hence, whereas an EC-wide single enforcement allows for balancing between positive and negative net benefits across countries, multiple enforcement does not. In general, simultaneous multiple enforcement also imposes more numerous constraints than single EC-wide enforcement (net benefits have to be positive in 15 subsets of the EC and not only at the level of the EC as a whole). As a consequence, simultaneous multiple enforcement should be expected to lead to more prohibition (or sanctions) than EC-wide single enforcement. It will also be biased against deals which have an EC-wide scope but have uneven consequences across the

EC. From that perspective, simultaneous multiple enforcement will thus have a “*disintegrating effect*” relative to the current situation.

So far, we have considered, following the White paper, that rulings by NCAs only have effects within their own territories. It is worth noting that our main conclusion, namely that simultaneous multiple enforcement can have a disintegrating effect, remains valid even if this assumption is relaxed. Indeed, if it assumed that rulings by NCAs have effects throughout the EC (in a modified White Paper scenario), external effects across countries will be even reinforced. In those circumstances, a negative decision by one authority will always prevent other countries from realising the net benefits that would potentially accrue to them.

#### **Section 4: Co-operation in the network**

So far we have established that multiple enforcement is a real possibility in the White Paper era and that it could have substantial adverse consequences. In what follows, we first consider whether the existing legal framework and proposals in the White Paper suffice by themselves to address the problem. We conclude that this is not the case.

The existing framework is in full mutation. The duty to cooperate imposed on member states, and Art. 9.3 of Reg. 17/62, which provides the Commission with the possibility to intervene when warranted, constitute the existing framework. In the White Paper, the Commission proposes an information-sharing system between NCAs and national courts on the one hand and the Community institutions on the other.

We take each component in turn.

#### 4.1. The duty to co-operate (Art. 10 ECT)

One way to avoid non-co-operative outcomes associated with multiple enforcement is provided by Art. 10 (ex Art. 5) ECT which imposes on member states a duty to co-operate. This instrument however appears to be rather ineffective.

Art. 10 ECT imposes a double obligation on member states: a positive obligation, that is to ensure fulfilment of the obligations arising out of the Treaty and a negative one, that is to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. Lenaerts and van Nuffel (1999, at p. 419) have appropriately dubbed the duty to co-operate as the ‘federal good faith’.

It is well established that the duty to co-operate contains both a vertical (member state to Community) as well as a horizontal (member state to member state) angle. Absent cases where a member state fails to comply with specific EC obligations, the duty to co-operate has been interpreted as an obligation imposed on member states ‘to take all appropriate measures to guarantee the full scope of Community law’ (Lenaerts and van Nuffel, 1999 at p. 421).

This means that member states (NCAs for the purposes of the present paper) must not only cooperate with EC institutions responsible for implementing EC law<sup>19</sup> (NCA to

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<sup>19</sup> See ECJ 217/88 *Commission v. Germany* [1990] ECR I-2879 at §33 p. I-2907.

DG IV), but also with institutions of other member states <sup>20</sup>(NCA to NCA). How far can we construe this obligation to extend to?

We should keep in mind that normally Art. 10 ECT is invoked as an auxiliary basis to any given claim. By itself, it is thus a rather weak basis to carry a claim. That is, Art. 10 ECT offers a good argument when the violation of another specific obligation is alleged. But there is no such other alleged violation in the context of our discussion. More specifically, there is no obligation at all that calls for a member state to desist when another member state has decided to exercise jurisdiction. Moreover, the White Paper itself acknowledges the possibility for “forum shopping” which means that the Commission does not construe Art. 10 ECT so as to impose a duty to desist when another NCA has been requested to intervene. It seems fair to conclude that with respect to the horizontal angle of the duty to co-operate we should not expect too much when applied in the context of de-centralised antitrust enforcement.

Art. 10 ECT could be helpful when the Commission decides to intervene in a particular case (vertical angle). It is by now settled case law that once the Commission has initiated procedures, and *a fortiori* when it has adopted a final decision, national courts are bound to avoid conflicting decisions if necessary by suspending proceedings before them.<sup>21</sup> As the White Paper notes (p. 35) the same principle could *mutatis mutandis* apply to NCAs as well. The duty to co-operate could serve as an argument for such an endeavour.

#### 4.2. When the Commission intervenes (Art. 9.3 Reg 17/62)

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<sup>20</sup> See for example, ECJ 165/91 *Van Munster* [1994] ECR I-4661 at §32 p. I-4697.

<sup>21</sup> See C-234/89 *Sergios Delimitis v. Henninger Bräu AG* [1991] ECR I-935.

According to Art. 9.3 of Reg. 17/62

« As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member states shall remain competent to apply Article 85(1) and Article 86 in accordance with Article 88 of the Treaty ».

The White Paper suggests that, based on this provision, the Commission can, in case of a final decision by a national institution and subject to *res judicata*, prohibit an agreement allowed by national courts (or NCAs); moreover, in case of a non-final decision by a national authority, the Commission can intervene and propose its own preferred solution (the White Paper pp. 35-6).

The Commission has however not bound its discretion in this respect. No one post-White Paper knows if, when and under what circumstances the Commission will make use of its discretion.

This stands in stark contrast with the US approach where the Supreme Court has indicated under what circumstances it is likely to intervene. The main drawback of unlimited discretion, is that private parties are likely to prefer the security of a Commission decision. Ultimately, this would defeat the whole purpose of the White Paper in terms of decentralisation. For decentralisation to succeed, guidance on the role of the umpire seems necessary. In other words, the institutional credibility of the NCAs largely depends on the extent to which they follow the Commission's

legacy and firms' anticipation of this will be greatly enhanced by guidelines on the circumstances where the Commission would intervene.

Rule 10 of the US Supreme Court addresses the subject of 'considerations governing review of certiorari' and provides a source of inspiration for future EC guidelines in this respect. It reads as follows:

« ... Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should not be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law ».

The US institutional framework still differs from that found in the EC to the extent that the Commission is not the ultimate umpire as Commission's decisions can be appealed before the ECJ.

What stems from the analysis above is that the existing framework is too weak and too imprecise. The ECT was based on the assumption that competition law is enforced in a centralised manner. Hence, it did not pay much attention to the vertical relationship (NCAs to DG Comp).

#### 4.3. Information sharing

In addition to existing instruments, the White Paper envisages the adoption of a wide information sharing scheme. This would certainly help to reduce unintended inconsistencies in NCAs' decisions but it certainly does not address the underlying issue of divergent incentives.

The argument of course could be advanced that it is anyway (that is, even absent legal compulsion) in the interest of NCAs, since they are in some sort of repeated interaction with each other, to ‘internalise’ foreign interests in their decisions. Practice does offer however examples where co-operation breaks down. *Boeing/McDonnell Douglas* may be a case in point, where the EC moved in to assert jurisdiction without paying much attention to the stated wish of its partner to exclusively decide the case. When stakes are high, the incentive to deviate may be hard to resist.

Hence, it appears that the current legal framework even in conjunction with information sharing will not suffice to address the undesirable features of multiple enforcement.

## **Section 5: Accountability in the network**

As discussed above, allowing several institutions to implement the same rule might give rise to inefficiencies, even if we abstract from the issue of incentives and simultaneous enforcement just discussed. The constraints that institutions will face in the White Paper era might differ from those prevailing before and accountability might deteriorate.

Indeed, it has long been recognised that institutions should not be seen as benevolent and omniscient agents following the mandate that has been assigned to them. Civil servants will take decisions in terms of their own objectives (which may include the objective assigned by the law but also others like career motives) and third parties will

naturally seek to exert influence on the decision. The extent to which civil servants will actually deviate from pursuing the objectives that have been assigned to them, which is usually referred to as capture, will also depend on the institutional framework. For instance, greater accountability should in general reduce the extent of capture. Other features like independence will involve more delicate trade-offs (see for instance Neven et al., 1992 for a discussion).

In turn, greater accountability will be easier to achieve if the mandate given to the civil servants is precisely codified. The implementation of rules can indeed be verified *ex post* relatively easily. By contrast, the implementation of general principles which allow for wide discretion is harder to monitor.

Competition statutes in general, and Art. 81 ECT in particular, are formulated in very general terms and leave a lot discretion to the agency in charge of implementing it. As a result, accountability is difficult to achieve in the area of competition and it will be difficult to monitor effectively the operation of several agencies<sup>22</sup>.

The issue then arises as to whether accountability will be enhanced as a result of decentralisation. The classic theory of federalism suggests that accountability is greater at local levels of governments. Yet, there are some reasons to think that this wisdom may not apply in the case at hand. First, in the current situation, the Commission's decisions have EC wide effect and hence are more likely to attract attention of the antitrust community throughout the EC. From this perspective,

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<sup>22</sup> From that perspective, it is rather odd that competition is the first area where multiple implementation of Community policy is envisaged. Other areas like agricultural policy or research and development policy are substantially more codified than competition and should a priori be better suited to multiple implementation.

accountability would be weakened in the White Paper era if NCAs' decisions have territorial limitations, since national civil servants will then be more sheltered from EC-wide scrutiny.

Second, the accountability in front of the judicial system might be weakened. In the current system, Commission decisions can be appealed at the ECJ, a court with experience in antitrust issues, the decisions of which have an EC wide effect. By contrast, in the White Paper era, decisions by NCAs might or might not have an EC-wide effect (as noted above). In the latter case, they will be, if at all, scrutinised by national courts, which do not necessarily have much experience in antitrust.

Third, accountability might be subject to substantial increasing returns. For instance, the control which is undertaken by the press or by the academic community involves substantial fixed costs. Some countries may be too small to ensure the emergence of such mechanisms of accountability.

For all these reasons, it may be wise to enhance to accountability of NCAs in the White Paper era.

## **Section 6: Inside the US; the 50+1 laboratory<sup>23</sup>**

Parallels with US experience are sometimes striking and sometimes less so. In what follows, we do not recommend an institutional transplant but still suggest that some US experience is quite relevant for the present discussion and should not be lightly

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<sup>23</sup> This term was first used by Justice Brandeis in *New State Ice Co vs Liebermann*, 285 US 262,311 (1932).

overlooked. In the United States, multiple enforcement occurs notably across different circuits of the Federal Courts<sup>24</sup>.

To illustrate the US approach, we will focus on a simulation whereby two federal courts are called to judge first on the same issue and then on a comparable issue.<sup>25</sup>

Imagine that an undertaking sues another undertaking before two Federal Courts. Both suits can proceed simultaneously. One of the parties though can ask to transfer the case [using 28 USC 1404(a) or 1406(a)]. In such a case the two suits will be consolidated. If no such request is tabled, the possibility still exists for a party to request from the Court to stay proceedings until the other suit was resolved. In such case, it is up to the Court to decide whether it will act accordingly or not. If nothing from the above occurs, when judgement occurs in one of the two suits it will have force of *res judicata* and the winning party on proper motion can dismiss the second suit. This is so essentially because judgements govern the actions of the parties in general not where they are acting. At least for Federal Courts there is nothing that limits the force of say a 7th Circuit judgement to the 7th Circuit. As mentioned above, the working hypothesis of the White Paper stands in contrast with this approach.

A similar result can stem from a case where multiple plaintiffs sue the same defendant before various circuits. The Judicial Panel of Multi-district Litigation (composed of

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<sup>24</sup> Our discussion here does not focus on state law in the same way that the White Paper is not concerned about national competition law. As in the EC architecture, there are State Agencies and a Federal Agency. No formal links are established between the two and co-operation is on a voluntary basis. Notwithstanding this though, some rather spectacular outcomes are the result of such co-operation, the *Microsoft* litigation being probably the best illustration of the sort.

<sup>25</sup> This part of the paper is largely based on discussions with Eleanor Fox and Diane P. Wood.

federal judges, see 28 USC 1407) can order that the cases be all considered in one district for pre-trial proceedings. When litigation reaches the trial stage, it can be transferred back to various districts. There is a complicated doctrine, called *non-mutual offensive issue preclusion*, under which it is possible that particular facts found in one case against one party can be taken as established in a later case against the same party.

Now if comparable cases reach various districts, there is absolutely no guarantee that they will all end up with the same result. In fact, Federal Circuits often disagree on issues of law. Perhaps the most famous and long-standing conflict was between the 9th Circuit (alone) and everyone else on the question whether market power had to be shown in a Sherman Act Section 2 attempt to monopolise case. The Supreme Court finally granted certiorari and resolved it in *Spectrum Sports v. McQuillan*, 506 US 447 (answer - yes). As is explained *infra*, conflicting jurisprudence is top of the list for the Supreme Court to grant certiorari.

What are the lessons to be drawn from this parallel? First, multiple enforcement occurs in the US. Arguably, it encourages innovation in interpretation of US antitrust law and this feature is much valued in US practice<sup>26</sup>. Second, there is a number of procedural devices designed to encourage co-ordination between parallel enforcers. And third, there is a final umpire who plays the important role of providing future guidance on the basis of diverse and arguably enriched experience.

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<sup>26</sup> As Burns (2000) notes, gains from innovation are particularly beneficial in an area like antitrust where economic analysis is not always beyond doubt.

One should however be careful in drawing lessons for the European context. The main difference between the US and the EC lies with incentives. Whereas different circuits in the US do not have obvious incentives to concentrate on effects taking place within the territory of their jurisdiction, the same is not true for European NCAs which respond to domestic constituencies.

## **Section 7: Improving the network**

In the previous sections, we have argued that some co-ordination is required and that some minimum standards of accountability should be imposed to make the network operate.

With respect to co-ordination, two dimensions should be emphasised. Measures should be taken first to align incentives of the NCAs and second, to capitalise the gains from innovations (in light of the US experience).

Positive comity obligations on NCAs is a natural instrument to align incentives and we would certainly advocate their consideration. Positive comity obligations are however unlikely to prove sufficient to avoid the negative consequences of multiple enforcement. Ultimately, either a central co-ordination or a formal rule to allocate jurisdiction will be necessary.

Unfortunately, the second option does not completely address the fundamental incentive issue. It does provide some legal security especially if national decisions

are given an EC-wide effect and parties to the dispute will avoid forum shopping. But it does not guarantee that the forum designed will provide a proper balancing between (eventually) conflicting interests.

Hence, it seems that the role of co-ordination currently envisaged for the Commission should be formalised. In particular, the circumstances where the Commission will intervene should be clarified *ex ante*.

In our view, the US experience also certainly suggests that the role of central authority is as much to distil diversity as to co-ordinate enforcement. Hence, the focus of the White Paper must shift: instead of focusing solely on co-ordination of enforcement and *ex ante* instruments like information sharing, the Commission should pay more attention to *ex post* instruments designed to ensure that gains from innovation are properly realised.

The role of co-ordination could be entrusted to the Commission, which would thus assume a role of *primus inter pares* in the network. The Commission's decisions are of course subject to judicial review by the ECJ. Hence, one could wonder whether the co-ordination should not be left directly to the ECJ. Rapid action however will most likely be needed for the umpire to assume the entrusted responsibility. For this reason (along with the undisputed competence that the Commission now commands on antitrust issues) we should rather see the Commission in this position. And this solution does not at all set aside the ECJ since eventually some of the Commission's decisions will be submitted to its review by dissatisfied parties.

The Commission could thus provide a procedural vehicle which will function as the counterpart to Art. 177 ECT: based on *ex ante* agreed criteria (inspired by the experience of the US Supreme Court), the Commission will move in to consider cases where incentives of NCAs are grossly inadequate or will provide ‘corrective’ action when deemed necessary.

Finally, as discussed above, an adequate operation of the network will require that its members meet some minimum standards. Hence, we would advocate the introduction of institutional constraints on NCAs<sup>27</sup>. These may take the form, for instance, of accountability standards (like common publication requirements). But harmonised accountability standards may not suffice because, as discussed above, only limited accountability (*ex post*) can be achieved in an area like competition. Hence, it would seem necessary to impose standards *ex ante* on particular features of the national institutions (for instance with respect to the status of civil servants or the nomination of competition commissioners).

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<sup>27</sup> Institutional constraints on member states are not unheard of. For instance, standards of independence are already considered in the new framework for the regulation of telecoms (see Com

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