

The European Competition Network 10 years after modernization

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Introduction

- ✦ Importance of networked governance and spread of networks
- ✦ Origins
- ✦ Predictions and anxieties
- ✦ Comparison
- ✦ Impact

Three main arguments:

- ✦ Singularity of ECN, linked to origins and pre-existing EU powers
- ✦ ECN defied predictions and anxieties
- ✦ Transparency/accountability issues

The emergence and spread of networks

- ✦ Networks proposed for a multiplicity of EU-related purposes since early 1990s
- ✦ Literature argues that originate as:
 - ✦ an improvised solution of second-best (Sutherland 1992, Hancher 1996) to pressures for greater coordination in a decentralized political system
 - ✦ response to a ‘functional’ (Dehousse 2001), or ‘supranational regulatory’ (Eberlein and Grande 2005) need to close gap between the need for EU-level uniformity and the location of /regulatory authorities at the national level
 - ✦ product of the second of two rounds of double delegation (Coen and Thatcher 2008a, 2008b)
- ✦ Three arguments share two premises: govts want coordinate and to preserve existing agencies; govts and Cn prefers hybrid networks to agencies

ERNs in ‘regulatory space’

- ✦ Coen and Thatcher (2008)’ s eightfold typology of coordinating mechanisms from EU supervised national implementation via ERNs to direct regulation by the European Commission (Coen and Thatcher 2008b).
- ✦ ERNs increase ‘consistency of regulation across the EU’ , ‘an important move towards formal network governance... that goes beyond pre-existing delegations and/or the reliance on soft law in informal European networks’ and ‘considerably more formalised . . . than the other networks (many of which continue to exist alongside them)’ (Coen and Thatcher 2008: 52)
- ✦ ERNs are one of five populated categories: several examples of less centralised mechanisms, but none of most federal
- ✦ Examples: CESR, ERG, ERGEG, CEOPS, CEBS, EPRA
- ✦ ERNs emerge from informal networks

Origins

- ✦ More recent literature on ECN
- ✦ 'functionalist' and 'political' (Blauberger and Rittberger 2013)
- ✦ Experimentalist perspective (Svetiev 2010)

Origins

The ECN is different - how?

- ✦ Detailed rules (compulsory cooperation, Commission oversight, Commission power of intervention), juridified

The ECN is different - why?

- ✦ Engineered, not improvised
- ✦ Part of modernization package:
 - ✦ Weight of caseload
 - ✦ Free up resources
 - ✦ Greater predictability
 - ✦ Enlargement, predicated on shared expertise and common purpose

ECN: Modernization Regulation 1/2003

- ✦ Abolition of notification and decentralization to national competition authorities responsibility for enforcement and authority to issue exemptions central to reform package
- ✦ ECN established as mechanism to preserve coherent implementation of competition rules across member states of the Union
- ✦ Partnership between DG COMP and NCAs with responsibilities to cooperate closely and share information
- ✦ Detailed rules concerning obligations and division of labour within the network set out in Network Notice, Joint Statement of the Council and the Commission, and separate Notice for cooperation between Commission and national courts
- ✦ Effective 1 May 2004

ECN: Structure and design

✦ Case allocation

- ✦ by NCA that ‘well placed to act’
- ✦ Commission monitors and prevents duplication
- ✦ NCAs are obliged to inform the Commission and other NCAs after commencing the first formal investigative procedure [Art 11 (4)]
- ✦ Commission likely to be well placed where more than three member states are affected

✦ Consistent application

- ✦ where trade between member states is affected, NCAs obliged to apply Community competition law alongside national competition law
- ✦ an NCA may not allow a practice which is prohibited by Article 81 or 82, but can apply stricter rules by Article 82
- ✦ NCAs cannot contradict an existing Commission decision [Art 16].
- ✦ Commission can make a finding that Article 81 or 82 is not applicable to a practice, which binds all national competition authorities [Art 10].
- ✦ Commission has (limited) power to relieve NCA of competence by initiating own proceedings [Art 11(6)]

Predictions . . .

ECN as an ERN?

- ✦ According to Coen and Thatcher (2008)
 - ✦ ERNs weak, lack autonomy and, subject to the controls imposed by the actors that founded them, labour under ‘the shadow of hierarchy’ (Héritier and Lehmkuhl 2008)
 - ✦ Coen/Thatcher survey shows that ERNs have limited powers and responsibilities, are weakly resourced, and loosely structured
 - ✦ ERNs do not generally exercise regulatory responsibilities. Their main function has been to improve coordination, horizontally, between national regulators, and, vertically, between regulatory bodies at national and EU levels.
 - ✦ advisory and circulate information
 - ✦ no formal role in policy-making.
 - ✦ flat with a small secretariat.

Predictions . . .

ECN-specific claims

- ✦ Modernization as an *‘imperialist move by the Commission to centralize competition enforcement and to consolidate control over increasingly assertive group of NCAs’* Wilks (2005a: 446)
- ✦ DG COMP and the new Network represent *‘the equivalent of a transnational agency that has gone beyond the power of the member states to control’* (ibid) and which the Commission will dominate (2005a: 432).
- ✦ Yet, *‘the member states have not made this grant of authority voluntarily or even consciously. The Commission has engineered a coup, which it has concealed behind a façade of administrative functionality and legal necessity*
- ✦ *‘[T]he Commission has orchestrated a political masterstroke. It has given the impression of radical reform to the member states by abolishing the notification procedure and offered decentralisation provisions ..., which in no way undermine its central role in the development of EC competition policy or enforcement of EC competition law. DG Competition has in fact managed to centralise European competition law even more than under Regulation 17 in its Rue Joseph II headquarters’* Riley (2003a: 604)

... and anxieties

- ✦ Stifle innovation
- ✦ Courts:
 - ✦ differing traditions and practices
 - ✦ (lack of) expertise of national judges
 - ✦ consistency in enforcement
- ✦ Limited capacities of small NCAs

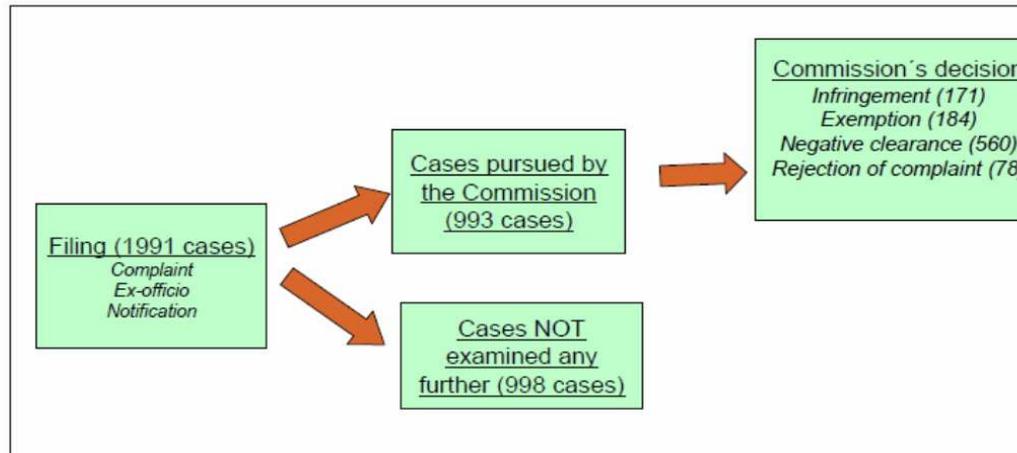
The ECN in practice

- ✦ Success and effectiveness
- ✦ Partnership rather than Commission control
 - ✦ ‘The Commission had not at all, as some had feared, used the network ... to become a “master among obedient dogs”’ (Bruno Lasserre, September 2004, cited by Norberg 2007: 541).
 - ✦ Interview testimony
 - ✦ architecture does not permit control
 - ✦ Commission has not used Article 11 (6)
- ✦ NCAs opportunity to draw on resources of expertise and experience elsewhere and develop independence vis-à-vis national authority
- ✦ ‘the opinion of small member states will not be dismissed’, ‘everyone wants everyone else on board’ (q 29)

ECN' s success I

Figure 1

The European Commission's anti-trust decision process (the data in brackets shows the number of cases available in our data from January 1999 to February 2004)



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Table 1. Classification of the Commission's Decisions

Decision Type	Number of Cases	No. Cases in Manufacturing, Telecommunications Services and Financial Intermediation	Anti-competitive Practice
<i>There are reasons to take action</i>			
<i>Formal decision</i>			
Formal decision. Prohibition with fines	44	25	YES
Formal decision. Prohibition without fines	11	6	YES
<i>Informal decision</i>			
Administrative letter. Minor community interest	32	17	YES
Discomfort letter	24	13	YES
<i>Settlement</i>			
Settlement	60	36	YES
Total	171	97	
<i>Exemptions</i>			
<i>Formal decisions</i>			
Formal decision. Exemption with obligation	14	4	YES
Formal decision. Exemption without obligation	24	6	NO
<i>Informal decision</i>			
Comfort letter. Exemption with publication	14	7	NO
Comfort letter. Exemption without publication	98	58	NO
Comfort letter. Group exemption	34	23	NO
Total	184	98	
<i>No reasons to take action</i>			
<i>Formal decision</i>			
Formal decision. Rejection of complaint	78	36	NO
Formal decision. Negative clearance	9	7	NO
<i>Informal decision</i>			
Negative Clearance without publication	270	133	NO
Negative Clearance with publication	36	17	NO
Rejection of complaint without decision	245	104	NO
Total	638	297	
Total Commission decisions with follow-up	993	492	

ECN' s success

	Total Year 2004	Total Year 2005	Total Year 2006	Total year 2007	Total year 2008	Total year 2009	Total year 2010	Total Year 2011	Total Year 2012	Jan.- April 2013
Total number of case investigations of which the Network has been informed ¹⁾	301	203	165	150	159	150	169	163	112	34
- of which COM cases	101	22	21	10	10	21	11	26	6	2
- of which NCA cases	200	181	144	140	149	129	158	137	106	32
Cases in which an envisaged decision has been submitted by NCAs during the period indicated ²⁾	32	76	64	72	60	70	94	88	91	21

¹⁾ Case investigations started whether by a National Competition Authority (NCA) or by the Commission.

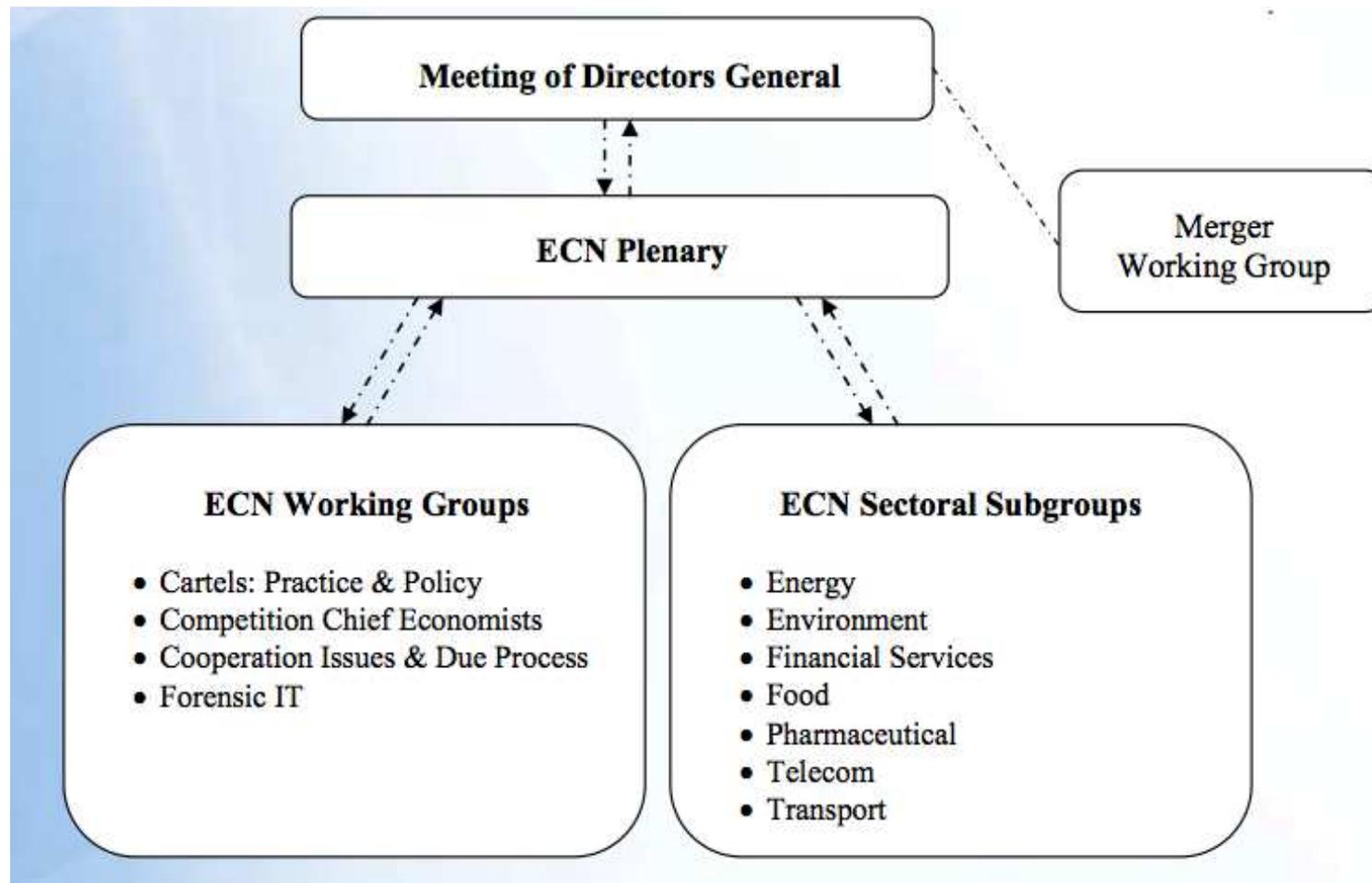
²⁾ Cases having reached the envisaged decision stage; only submissions from the NCAs under Article 11(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU.

Source: <http://ec.europa.eu/competition/ecn/statistics.html>

Commission influence

	Strongly agree	Agree	Partly agree	Disagree	Strongly Disagree	No opinion
'In allocating cases, the Commission has always acted according to the spirit and letter of the Notice'. Do you agree?	4	7				1
'In stating its opinion on how Community law should be applied, the Commission has acted according to the spirit and letter of the Notice. Do you agree?'	5	7				1
'In general, the Commission treats NCAs within the network as equal partners in a common enterprise.' Do you agree?	4	3	5			
Has the ECN shifted influence to the Commission?		1	1			

The ECN in practice: structure



ECN decision making

	Agenda	Commission influence
Directors General	Set by Commission, but Directors General can add items	Decision making by consensus. Commission influence limited
Plenary	Set by Commission, member states can add items	Decision making by consensus. Commission influence limited
Working Groups	Created by NCAs and ECN rep, co-chairs set agenda – 2 chairs, may be 2 NCAs, or 1 NCA + ECN rep	Decision making by consensus. Commission influence limited Issue can be taken to ECA in event that Commission blocks creation of WG

The ECN in practice

- ✦ Innovation? NCAs able to feed in ideas and experiences
- ✦ Courts not proved problematic, even if obligation to transmit copies of court judgments to Commission not entirely fulfilled and some divergence in how conditions of Art 101(3) applied by different courts
- ✦ Mechanisms to link in courts to ECN
 - ✦ Commission and NCAs able to intervene in judicial proceedings with observations
 - ✦ proposal in draft directive on damages actions for national courts to be bound by NCA infringement decisions
- ✦ Development of rule-making function, e.g leniency (ECN declaration); case allocation; priority setting
- ✦ Feeds into legislation, e.g. 'Food supply' and milk market

ECN's impact

Strengthening of NCAs within national settings:

- ✦ horizontal interaction between NCAs that scarcely existed previously. All fourteen NCAs reported that they had either requested or been asked for formal assistance – a possibility that did not exist in formalized form prior to modernization – and most were frequently asked informally to supply information (question 8).
- ✦ ‘now better equipped’ and ‘able to ask for resources’; NCAs ‘now expert’ and enjoyed access to other authorities and the Commission unlike the ministry’ (q 9) - Cyprus
- ✦ seven of the thirteen NCAs in the sample indicated that they had approached DG COMP for advice.

ECN's impact

- ✦ sharing of responsibilities – e.g. DK and SV
- ✦ new expertise and experience
- ✦ reform of national competition policy regimes (e.g. Austria, Bulgaria, Portugal, France? Spain?)
- ✦ convergence of models between member states?
- ✦ some difficulties, e.g. Germany, enforcement procedures
- ✦ Courts: main issue with courts at present is relationship between public and private enforcement – apparent priority to safeguard leniency programmes
- ✦ internal trust not matched by external transparency - executive transformation thesis

ECN singularity

- ✦ Clear in 2009 and in 2013: responsibilities and structure
- ✦ though perhaps less pronounced in terms of powers with new agencies BEREC and ACER

The ECN in comparative perspective

	ERNs	ECN
Origins	Regulatory gap, formalization of pre-existing informal linkages, and/or second of two rounds of double delegation	Single act of creation and product of painstaking design
Roles, functions and powers	Limited powers, highly constrained, soft law	<ul style="list-style-type: none"> • Extensive competencies • Hard law • Juridified
Operation	<ul style="list-style-type: none"> • Few defined procedures • Limited role for Commission; • Dedicated secretariat 	<ul style="list-style-type: none"> • Corpus of detailed rules and procedures • Commission as ‘network manager’
Structure and organization	Flat	Multilayered

Explaining ECN' s singularity II

- ✦ ECN not an improvised response to decentralized enforcement in areas where EU recently active, but:
 - ✦ single act of deliberate design, that part of wider, carefully crafted package
 - ✦ in area where Community competence long-established as part of Community' s economic constitution and Commission occupied privileged position
 - ✦ Commission giving away power that historically monopolized
 - ✦ centralising mechanism to accompany decentralisation of previously centralized system, where with enlargement pending, resource-starved DG COMP seized opportunity to share burden of safeguarding competition in the Union by utilising 'new' infrastructure

The executive transformation thesis

- ✦ ‘deep transformation’ of governance in Europe (Egeberg 2006; see also Curtin and Egeberg 2008)
- ✦ Historically, administrative policies ‘targeted at resolving tasks and problems within the borders of the nation state and ... steered and governed by national political and administrative leaders’ (Sverdrup 2003: 2)
- ✦ But ‘a primarily unidimensional, territorially-based conflict structure at the European level is now complemented by patterns of cooperation and conflict that cut across national borders’ (Egeberg 2006: 19).
- ✦ Produced by:
 - ✦ increased Commission autonomy, which ‘triggers centrifugal forces at the very heart of national governments’
 - ✦ creation of agencies at national level, under sway of the Commission and which ministries no longer steer
- ✦ Result: a new executive order, controlled by bureaucrats, which not subject to scrutiny

Transparency

- ✦ ‘Executive transformation’ thesis (Egeberg 2010): networks of national- and EU-level agencies/Commission, free from scrutiny at either level
- ✦ ECN:
 - ✦ links Commission with subgovernments in MSs
 - ✦ operates within a supranational framework
 - ✦ involves little participation on the part of elected politicians at EU or national level

The ECN and national differentiation

- ✦ Executive transformation thesis is partly a theory of Europeanization, but MSs have not been equally affected by the impact of the emergence of multilevel Union administration
- ✦ Important to separate sectoral and national dimensions
- ✦ Organizational differences: NCAs apply both national and EU, but extent to which NCA officials are ‘double-hatted’ varies between MSs
- ✦ The extent to which NCA officials see themselves foremost as national officials does not necessarily co-vary with these organizational differences

The ECN and national differences

- ✦ organization - no prescribed institutional structure for MS competition enforcement regimes; three models (single authority, dual authority, authority plus court)
- ✦ relative impact of the additional responsibilities for the enforcement of Articles 81 and 82
- ✦ volume of cartel cases that meet the ‘effect on trade test’
- ✦ levels of engagement in ECN forums and investigations
- ✦ horizontal interaction: propensity to contact counterparts
- ✦ position within domestic institutional setting (parent ministry, oversight, division of responsibilities/obligations vis-à-vis sectoral regulators)
- ✦ impact of jurisprudence of the national courts on handling of cases
- ✦ private enforcement of EC competition law by individual parties in national courts
- ✦ procedural rules

Conclusion

- ✦ ECN important as new actor in domain of central economic importance
- ✦ ECN different from other ERNs:
 - ✦ anomaly for existing theories of ERN creation
 - ✦ does not fit typologies of coordinating mechanisms in EU regulatory space
- ✦ Defied predictions and anxieties
- ✦ Transparency is an issue

Factors accounting for successful institutionalization

- ✦ Background of informal cooperation, e.g. at Directors General level
- ✦ Common culture underpinning ECN operation:
 - ✦ Common training and expertise
 - ✦ International expert community
 - ✦ Shared norms and methods
- ✦ Clear design and detailed rules
- ✦ Actor buy-in:
 - ✦ idea for network emerged in modernisation group within DG IV, but shape of network determined by extensive negotiations prior to 1 May 2004 in Council working group
 - ✦ obligations increased power and presence within domestic setting
- ✦ Opportunities for exchange allowed organic development of ECN
- ✦ ECA as alternative framework for discussion of broader competition issues