Draft Paper for the CCP Annual Summer Conference 2007, "Management of networks between the Competition Authorities in the EC and the US: Different Polities, Different Designs"

Firat Cengiz, University of East Anglia ESRC Centre for Competition Policy and Norwich Law School

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I. Introduction

Multi-jurisdictional polities¹ consist of multiple sovereign units with potentially distinct cultures, political interests and administrative traditions. This diversity stands both as an advantage and a disadvantage for policy enforcement. On the one hand realisation of this diversity contributes to the innovation in policy enforcement, but on the other hand it causes complexities in terms of consistency and uniformity. The puzzle becomes even more complicated when it comes to antitrust policy, as due to the ever expanding integration between economies most violations affect multiple markets and therefore engender action by multiple authorities. As a result, management of complex relations between multiple authorities establishes itself as the ultimate challenge for multi-jurisdictional antitrust enforcement in modern societies. In order to reach the ideal, such management should entertain to some extent conflicting goals of diversity and consistency at the same time.

From this perspective, the choices of design of the EC and the US distinguish themselves as highly appealing examples for a detailed analysis. First of all, these polities developed mature and strong antitrust policies, which set models for the newly emerging antitrust regimes all around the globe. Second, they both stand on strong multi-jurisdictional foundations, in which their antitrust policies are strongly embedded.² Last but not the least, both polities initiated substantial revisions of their

¹ For the purposes of this Paper the concept of ``multi-jurisdictional polity" refers to a political system where more than one level of jurisdiction exists and where the legal acts of the upper level has direct applicability within the legal system of the lower level. Therefore, the United States as a federal system and the European Union as a supranational system both fall within the scope of this concept.

² Since its debut, American antitrust philosophy strongly aligned the aversion against concentration of economic power with the federal rationale against the concentration of political power; see Hans B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition*, The John Hopkins Press, Baltimore, 1955, at p.53 *et seq*; James May, "Antitrust in the Normative Era: Political Theory in

enforcement regimes recently. The Modernization movement in the EC decentralised the enforcement regime by delegation of enforcement authority from the Commission to the national competition authorities (NCAs).³ And the Antirust Modernisation Commission (AMC) in the US expressed the desire for a more systemised regime, although it did not propose any legislative change, and left the matter entirely to the mutual will of the state and federal authorities.⁴ Due to these tempting characteristics of the two polities in terms of multi-jurisdictional antitrust enforcement, this Paper aims to analyse the EC and the US enforcement regimes in a comparative perspective. In one of his innumerable seminal works, Daniel J. Elazar, without any doubt one of the most illuminating comparative social scientists ever to live, identified the potential benefits of a comparative study as better-self knowledge through looking at one's significant other; better knowledge on other's experiences who confronted with the similar issues and consequently inter-polity policy learning; the value and pleasure of sharing information for increased understanding; and lastly, common theory-building of the kind helpful to all scholars.⁵ This paper takes into consideration and aims to realise these benefits.

The first part of this Paper aims to accomplish the last benefit and proposes the model of "network management" as a common model for multi-jurisdictional policy enforcement. It argues that the model distinguishes itself as a suitable candidate for this task, as it reflects the complexity of policy enforcement in contemporary societies successfully and proposes a logical framework for effective multi-jurisdictional policy enforcement. The second part of the Paper analyses the antitrust enforcement regimes of the EC and the US under the model in order to raise the degree of self-knowledge and knowledge on the experiences of other. Afterwards, turning to perhaps a more

Constitutional and Antitrust Analysis", 50 Ohio State Law Journal 257 1989; Herbert Hovenkamp, "Antitrust Policy, Federalism and the Theory of the Firm: An Historical Perspective", 59 Antitrust Law Journal 75 1990, at 78. In the EC experience on the other hand, particularly during the foundational period of the European Economic Community, competition policy significantly contributed to the integration process through prevention of anticompetitive activities which re-establish the trade barriers; David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, Oxford, 2001, p. 334.

³ Council Regulation on the Implementation of the Rules on Competition ("Modernisation Regulation"), 1/2003, OJ 2003 L1/1; Commission White Paper on the Modernization of the Rules Implementing Articles 85 (now 81) and 86 (now 82) of the EC Treaty ("White paper"), OJ 1999 C 132/1.

⁴ Antitrust Modernization Commission, Report and Recommendations ("AMC Final Report"), Chapter II.C: State Enforcement of Antitrust Laws, p. 185 *et seq.* available at http://www.amc.gov/report recommendation/toc.htm, April 2007.

⁵ Daniel J. Elazar, "International and Comparative Federalism", Political Science and Politics, 1993, 26(2):190-95, at 191.

fundamental question, the Paper attempts to explain the differences in the EC and the US enforcement regimes by their distinct traditions of regulatory federalism. Finally, towards the end, the Paper raises the question of transatlantic policy learning and leaves it largely as an open one with very early observations and an emphasis on the desirability of more extensive future work at this front. As to the benefit of comparative study as a source of pleasure, it surely is a pleasure for the Author to communicate her perspective through this Paper, but it ultimately is for the reader to decide whether the Paper satisfies the condition or not.

II. The Model: Network Management

Political science models are of significant assistance in the analysis of complex legal problems, as those models discern and shed light on otherwise imperceptible individual elements of complex problems and offer a much more straightforward vision of the real world. Accordingly, legal science literature has always been keen on borrowing political science models and incorporating those models at the core of the legal analysis. In terms of the multi-jurisdictional antitrust enforcement, legal studies devoted significant attention to the model of "regulatory competition" due to the close connection between the basic premises of antitrust policy and the model. More recent studies revealed substantial weaknesses of this model, such as the irrational assumptions on which it stands and its failure to predict policy outcomes. Perhaps more essentially however, this model does not reflect the complexity of modern societies and oversimplifies the problem of multi-jurisdictional policy enforcement. In very brief terms, it perceives the problem as one of jurisdiction; and based on the

⁶ See e.g. Frank H. Easterbrook, "Antitrust and the Economics of Federalism", Journal of Law & Economics 1983, 26(1):23; Roger Van Der Bergh, "Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy", International Review of Law and Economics 1996, 16(3):363; Damien Geradin, "Competition between the Rules and Rules of Competition: A Legal and Economic Analysis of the Proposed Modernization of the Enforcement of EC Competition Law", Columbia Journal of European Law 2002, (9)1:1.

⁷ William W. Bratton, Joseph A. McCahery, "The New Institutional Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World", Georgetown Law Journal, 1997, 86(2) 201; William J. Karney, "Federalism and Corporate Law: A Non-Delaware View of the Results of Competition", in William W. Bratton et. al. (Eds), *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States*, Clarendon Press, Oxford, 1997; Dale D. Murphy, *The Structure of Regulatory Competition: Corporations and Public Policies in a Global Economy*, Oxford University Press, Oxford, 2004; J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge University Press, Cambridge, 2000. However, some studies still continue to rest their arguments on the hypotheses of regulatory competition model. See e.g. Michael S. Greeve, "Cartel Federalism? Antitrust Enforcement by the State Attorneys General", 72 University of Chicago of Law Review 99 2005.

relative advantages and disadvantages of centralisation as opposed to decentralisation, it attempts to predict which would be a better choice in any given polity.⁸

Nevertheless, the enforcement problem facing the modern multi-jurisdictional polities goes beyond the matter of jurisdiction and consequently the simplistic dichotomy of centralisation as opposed to decentralisation does not offer the solution. Due to the ever expanding integration between local, national and global economies, rigid jurisdictional tests designed in abstract fail to designate the best placed authority to handle a policy issue. Even when enforcement of a policy is fully centralised or decentralised, multiple authorities get involved into the process through alternative channels when their economies or citizens are affected. To give just one example from the EC, although enforcement of the European merger policy is fully centralised as to the mergers of Community dimension, and the Commission enjoys exclusive jurisdiction in the scrutiny of such mergers, 9 when high stakes are involved, national authorities utilise the national regulatory processes to block the mergers which appear detrimental from their perspectives. 10 As in such situations different authorities utilise different policy channels, and consequently "talk" in different languages, resolution of conflicts become even more complicated; compliance costs rise; and ultimately the future becomes unpredictable for the subjects of regulation.¹¹

Hence, the ultimate challenge facing the modern multi-jurisdictional polities is the management of complex relations between multiple authorities which get involved into the enforcement process. In order to accomplish the ideal, such management

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^{8 8} For the basics of the model see Charles M. Tiebout, "A Pure Theory of Local Expenditures", Journal of Political Economy 1956, 64(5): 416; Daniel C. Esty, Damien Geradin, "Regulatory Co-opetition", (2000) Journal of International Economic Law 2000, 3(2):235, at 238, republished in Daniel C. Esty and Damien Geradin (Eds), *Regulatory Competition and Economic Integration: Comparative Perspectives*, Oxford University Press, Oxford, 2001; Firat Cengiz, "US Federal Regime from the Network Management Perspective. World Competition", 2007, 30(2):307, p.309 *et seq*

⁹ Council Regulation on the Control of Concentrations Between Undertakings (ECMR) 139/2004, OJ 2004 L 24/1, Art.1.

¹⁰ The conflict between Poland and the Commission in the analysis of a bank merger case constitutes the most recent example. In this case, Poland first attempted to block the merger through utilisation of the national privatisation regulations and imposed divestitures at the national level despite the Commission's exclusive jurisdiction and its decision to clear the merger. See the Commission decision, 179/2005, OJ 2005 C179/2; the Warsaw Voice News, 12 April 2006, "The Big Bank Job", available at http://www.warsawvoice.pl/view/11093/.

To instance, the conflict referred in the above footnote, resulted with two cases before the Community Courts whereby the Commission and the Republic of Poland sued each other on the grounds of violation of the Community rules of freedom of investment and the ECMR respectively. At the time of the writing of this Paper neither of these cases has reached to the final decision phase yet. See Case T-41/06 *Republic of Poland v Commission of the European Communities*; European Commission press release, "Mergers: Commission launches procedure against Poland for preventing Unicredit/HVB merger", IP/06/277; 08/03/2006.

should on the hand provide channels through which the authorities can "voice" their perspectives, and on the other sustain consistent and coherent enforcement with the lowest possible cost for the subjects of regulation. In other words it should accomplish diversity without harming consistency.

From this perspective, the model of network management developed by the Dutch tradition of policy networks approach appears as a suitable model for multijurisdictional policy enforcement, because it reflects the complexity of modern multijurisdictional polities and offers a solution to the enforcement dilemma. Different authors offer plenty of different definitions of the concept of networks. ¹² Incorporating the common elements of all of these definitions in to one simple sentence, networks can be defined as *complex dialectical relations between multiple* and mutually dependent actors which take part in the formulation and enforcement of the policies. Actors form networks when they are interdependent on each other's resources in order to accomplish a goal which they all desire. ¹³ Such resources can be financial resources or human resources as well as experience and expertise. The network management model perceives the modern societies as consisting of complex networks between multiple actors. ¹⁴ Such vision strikingly overlaps with the with the structure of modern multi-jurisdictional polities which incorporate not only "maze of institutions", but "matrix[es] of reciprocal power relations". ¹⁵

Network relations are complex; and they have to be managed effectively in order to reach the ideal in the design and enforcement of the policies in the modern societies. Effective network management requires on the one hand incorporation of all actors with the necessary resources or vested interests to the enforcement process, and on the other hand coherent and consistent enforcement through communication and dispute resolution in the short run and through mutual trust and comity building in the long

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¹² See e.g. David Marsh, R.A.W. Rhodes (Eds.), *Policy Networks in British Government*, 1992, Clarendon Press, Oxford, 1-25, at 1; see Bernd Marin, Renate Maytz, "Introduction: Studying Policy Networks", in Bernd Marin, Renate Maytz (Eds.), *Policy Networks: Empirical Evidence and Theoretical Considerations*, Westview Press, Colorado, 1991, 11-23, at 14; Walter Kickert, "Complexity, Governance and Dynamics: Conceptual Explorations of Public Network Management", in Jan Kooiiman (Ed.), *Modern Governance*, 1993, Sage, London, 191-204, at 191-192

¹³ Tanja A. Boerzel, "Organizing Babylon- On the Different Conceptions of Policy Networks", Public Administration, 1998, 76(2), 253, p. 254

¹⁴ Patrick Kenis, Volker Schneider, "Policy Networks and Policy Analysis: Scrutinizing a New Analytical Toolbox", in Marin and Maytz, supra note 12, 25-59, at 31; Frans Van Waarden, "Dimesions and Types of Policy Networks", European Journal of Political Research, 1992, 21:29-52, at 31.

¹⁵ Dale Krane, "American Federalism, State Governments, and Public Policy: Weaving Together Loose Theoretical Threads", Political Science and Politics, 1993, 26(2): 186-190, at 187.

run.¹⁶ In other words, network management aims to accomplish to some extent conflicting goals of diversity and consistency at the same time.

In brief terms, effective network management requires vigorous utilisation of three main instruments:¹⁷

- 1) Actor signalling mechanisms: Through the signalling mechanisms all actors with the necessary resources are called to participate to the enforcement process. Just to give an example from antitrust policy, all authorities whose markets are affected by the particular violation in question, who are in a position to collect and bring substantial evidence or who have significant past experience in dealing with the kind of violation in question should be called to take part in the enforcement process.
- 2) Information exchange and communication mechanisms: Through the communication mechanisms all actors exchange the information in their possession as well as their individual perceptions and concerns regarding the particular issue in question. Communication mechanisms are of enormous importance for network management, as effective utilisation of these mechanisms prevents emergence of conflicts between the actors in the short run and contribute to the generation of mutual trust and comity in the long run.
- 3) Dispute resolution mechanisms: Dispute resolution mechanisms are utilised in cases where the communication channels fail to generate a consensus among the actors regarding the best enforcement strategy. In such cases conflicts should be resolved immediately and swiftly before they give way to more complicated political disagreements or deadlock situations.

As a general rule, the model also emphasizes the essential connection between the policy formulation and enforcement stages. If assistance of certain actors at the policy enforcement stage is desirable, those actors should also be given pass to the policy

¹⁶ Erik-Hans Klijn, Joop Koppenjan and Katrien Termeer, "Managing Networks in the Public Sector: A Theoretical Study of Management Strategies in Policy Networks", Public Administration, 1995, 73(3), 437, at 454; Walter Kickert, "Complexity, Governance and Dynamics: Conceptual Explorations of Public Network Management", in Kooiiman supra note 12, at 192; W.J.M. Kickert, J.F.M. Koppenjan, "Public Management and Network Management: An Overview", in W.J.M. Kickert, E-H. Klijn, J.F.M. Koppenjan (Eds.), *Managing Complex Networks: Strategies for the Public Sector*, 1999, Sage Publications, London, 35-61, at 36.

¹⁷ Klijn, et al., id; Kickert, id., Kickert et al., id.

formulation stage, because if the policy in question does not reflect their perspectives, they would not have the incentives to take part in the enforcement process.¹⁸

In addition, the time dimension plays an essential role in network management. The model suggests that as the game is repeated in time, actors would realise the benefits of cooperative as opposed to individual enforcement efforts, commit to cooperation, and build up a certain level of mutual trust, loyalty and comity. Therefore, through vigorous utilisation of the management instruments, network management will become progressively more effective in time.¹⁹

II. Network Management in the EC and the US Antitrust Regimes: How Are They Different?

A. Network Management in the EC Antitrust Regime

From the network management perspective, the first characteristic of the EC network is its imposed nature. The European Competition Network (ECN) came into existence as a result of the modernisation movement, which transformed the Article 81(3) EC to a legal exception rule and decentralised the enforcement of Community competition policy by giving the national competition authorities (NCAs) and the courts the authority to enforce the Community competition rules in their entirety. Modernisation took place largely to the desire of the Commission. Although national authorities also significantly contributed to the discussion process and enthusiastically agreed to take part in the enforcement of the policy, 1 it was the Commission who initiated the modernization. Its docket was already overflowing with individual exemption applications and cases of standard nature; and the then forthcoming enlargement would most certainly exacerbate the enforcement deadlock. Under those circumstances, decentralised enforcement appeared as the most practical solution. In other words, in terms of the resource dependencies, it was the

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¹⁸ J.J. Richardson, A.G. Jordan, *Governing under Pressure: the Policy Process in a Post-Parliamentary Democracy*, 1985, Blackwell, Oxford, at 137; Marin and Maytz, supra note 12 at 16; Kenis and Schneider, supra note 14, at 38.

¹⁹ Andrew Hindmoor, "The Importance of Being Trusted: Transaction Costs and Policy Network Theory", Public Administration, 1998, 76:25-43.

²⁰ Modernisation Regulation, supra note 3.

²¹ See European Commission, White Paper on Reform of Regulation 17, Summary of the Observations, 29.02.2000.

²² White Paper, supra note 3, at 6-7, 10, 32.

Commission who was in pressing need to the utilisation of national authorities' resources.

Decentralised enforcement particularly in the aftermath of the enlargement was not only a promising, but also an equally risky choice. It may have very well resulted with the destruction of consistency and uniformity of the policy. Especially, possible parochial actions of the NCAs of the new Member States were a matter of concern, as at the time those authorities had little experience in the enforcement of the policy and shared a strong bound of loyalty with their national economies and political processes.²³ The Commission aimed to address the risks of decentralisation through formation of a network among the competition authorities of Europe. In other words, the ECN came into existence largely as an imposed organisation through action at the Community level.

ECN was expected to overcome the risks of decentralised policy enforcement in two ways. First, under the general dynamics of network management, the network would lead to effective and consistent policy enforcement through coordination and cooperation among its members in the short run, and through mutual trust and loyalty building in the long run.²⁴ Second, the ECN as a network design incorporates a strong principal-agent dimension as a safeguard against the "shirking" of the NCAs- i.e. taking conflicting actions with the perception of the Commission or the general philosophy of competition law developed by the Community institutions. Therefore, as its another striking characteristic, the ECN stands on a hierarchical structure.

First of all, the Commission enjoys a distinguished position within the network and in a sense it still retains its enforcement monopoly. According to the rules of network, initiation of proceedings by the Commission relieves the NCAs from their competence to investigate the same case.²⁵ It is certain that this power will be used only under extraordinary circumstances as such a drastic action would bruise the

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²³ White Paper, id., at 25; Wouter P.J. Wils, "The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation

Replacing Regulation No.17", 2001 Fordham Corp. L. Inst. 000 (B. Hawk ed.2000), 313-363, at 322-23. ²⁴ Commission Notice on Cooperation within the Network of Competition Authorities ("Network Notice"), 2004/C 101/03, OJ C 101, 27/04/2004, pp. 0043-0053, para.1: "Together the NCAs and the

Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition. The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It provides a framework for the cooperation of European competition authorities in cases where Articles 81 and 82 of the Treaty are applied and is the basis for the creation and maintenance of a common competition culture in Europe." (emphasis added)

²⁵ Modernisation Regulation, supra note 3, Art. 11(6).

mutual trust between the NCAs and the Commission and could destroy the enthusiasm of the NCAs to participate to the enforcement process.²⁶ Nevertheless it stands as the ultimate safeguard against shirking, as in such a case the NCAs in question will have to face a significant deterioration of their authority and prestige in the eyes of other members of the network, their citizens and their principals within the national political system.

Second, the Commission enjoys strong monitoring and oversight powers within the context of the network. The network structure provides complex signalling and information exchange mechanisms both amongst the NCAs and between the Commission and the NCAs. For instance, both at the outset of their investigations and before they reach a final decision imposing remedies, the NCAs are required to inform the Commission.²⁷ Besides being ordinary tools of network management, these mechanisms are foreseen also as oversight and control mechanisms, through which the Commission comes into full information regarding the facts before the NCAs, the enforcement strategy they follow, and the decision they intend to take; and consequently, it gains the ability to intervene before the NCAs take any action against its perception.

The Commission's position within the network is further distinguished by its near monopoly over the design of the policy. The essential connection between the policy planning and enforcement stages suggested by the network management model is largely broken within the context of the Community competition policy. The Commission designs the policy largely free from outside interference apart from the boundaries imposed by the jurisprudence of the European Court of Justice and the Court of First Instance. It enacts block exemption regulations and takes individual decisions, which are binding on the NCAs and the national courts in the decisions they take, and soft-law measures such as guidelines and notices, which although do not have any legal binding power are nevertheless of considerable influence for the

²⁶ Through the Network Notice, the Commission committed to use this power only under certain circumstances and particularly where there is a danger that the NCAs might "shirk"; see Network Notice, id., para.54.

²⁷ Modernisation Regulation, supra note 3, Arts. 11, 16; Network Notice, id., paras. 16, 26.

²⁸ See C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, [2000] ECR I-11369 declaring the Commission's distinguished position as the designer of the EC antitrust policy.

²⁹ C-63/75, Fonderies Roubaix v Fonderies Roux, [1976] ECR 111, 9-11; C-234/89 Delimitis v. Henninger Brau [1991] E.C.R. 1-935, 946; Modernisation Regulation, supra note 3, Art.16(2); Network Notice, supra note 24, para.43; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004/C OJ 101/04, para.8.

NCAs and the courts as they state the Commission's position on a specific matter. In general, NCAs enjoy only limited channels in terms of participation to these processes.³⁰ On the other hand, potential contribution of the NCAs to the design of the Community competition policy through innovative use of the national competition laws is equally restricted under the strong supremacy standard. Under the general rule of the supremacy of the Community law and the special supremacy standard foreseen by the Modernisation Regulation, national laws can neither allow what the Community law prohibits³¹ and nor prohibit what the Community law allows with the exception of national laws on unilateral conduct, mergers or laws pursuing a different goal such as unfair competition laws.³²

As its another characteristic from the network management perspective, the ECN incorporates largely compulsory mechanisms of cooperation. Cooperation between the NCAs and the Commission does not take place on a voluntary basis. First of all, when the NCAs investigate a violation under the national laws which fulfils the criterion of "trade between Member States", they have no discretion but are required to open parallel proceedings under the Community law.³³ Second, NCAs have to respond positively to the Commission's requests for cooperation when the Commission asks them to communicate information in their possession regarding the violation in question or utilise their powers under national law to gather such information.³⁴ In terms of the relations amongst the NCAs, the network seems to incorporate discretion-based style of cooperation mechanisms. In contrast to the cases where the request comes from Commission, NCAs may refuse each other's requests for cooperation.³⁵ In other words, at the first glance, the mechanisms of network show differentiated deference to national procedural autonomy and agency discretion depending on whether the relations take place between the principal and the agents or

³⁰ In terms of the block exemption regulations and soft-law measures, NCAs may voice their perspectives through responding to Commission's white and green papers. In terms of the individual decisions, they enjoy a stronger position and may contribute to the design of the policy through participation to the Advisory Committee on Restrictive Practices and Dominant Positions to the opinion of which the Commission is required to give "utmost account", see Modernisation Regulation, id., Art.14(5).

³¹C-14/68, Walt Wilhelm v Bundeskartellamt, [1969] ECR 1.

³² Modernisation Regulation, supra note 3, Art.3(2). Such rigid rule of supremacy is expected to further marginalise the role of national antitrust regimes, see A.O. Salord., "Concurrent Application the April 1999 White Paper and the Future of National Laws", European Competition Law Review, 2000, 21(2): 128-141.

³³Modernisation Regulation, id., Art.3(1).

³⁴ Id., Arts. 22(2), 11(3)-(4), 12(1).

³⁵ Id., Arts. 22(1), 11(3)-(4), 12(1).

amongst the agents which occupy equal positions within the network. But under ordinary circumstances, NCAs are not expected to refuse each other's requests for cooperation either. First of all, under the general dynamics of networks an NCA which refuses the request for cooperation without a reasonable cause may face same type of retaliatory behaviour in the future games. Second, if lack of communication between the NCAs leads to conflicting analyses, the Commission may take the case and thereby punish all of the NCAs involved.³⁶ In other words, under the shadow of Commission's differentiated position the mechanisms of cooperation largely work on an imposed basis.

As its another characteristic, the ECN stands on a juridified framework. Rather than letting the network to find its equlibria in the relations between its members through consecutive games, its mechanisms of cooperation were predetermined by the detailed rules set forth in the Modernisation Regulation and the Network Notice. Again, such characteristic of the network stands as a safeguard against the risks of decentralisation, and particularly the potential commitment problems which may emerge between the NCAs due to the lack of a former common tradition of interagency cooperation.

In terms of the practical aspects of network management, the ECN incorporates a case allocation regime which aims to minimise the number of the authorities involved in each investigation.³⁷ At the outset of their proceedings, the NCAs signal each other and the Commission to spot cases which are of interest to multiple authorities and as far as possible allocate such cases to a single best place authority which stands at the centre of gravity of the violation and therefore has the ability to collect strategic information and bring the violation effectively to an end.³⁸ If other NCAs do not give up their interest in the investigation, they may form an enforcement group and take coordinated action under the lead of a single authority.³⁹ Although the case allocation regime formally works on a voluntary basis and the authorities enjoy discretion as to

³⁶ In fact, in the Network Notice, the Commission explicitly mentioned that it would consider opening its own proceedings in cases where the NCAs seem to pursue conflicting decisions, see Network Notice, supra note 24, para. 54(a).

³⁷ Network Notice, id., para.8.

³⁸ Modernisation Regulation, supra note 3, Art.11, Network Notice, id., para.16 *et seq*. In connection with the motivation to allocate the cases to a single authority, the NCAs are given the authority to close their proceedings or reject complaints on the ground that another NCA has already initiated action against the same infringement; Modernisation Regulation, Art.13

³⁹ Modernisation Regulation, id., Art.12; Network Notice, id. 26.

whether follow these rules, again the network dynamics and the differentiated position of the Commission put certain pressure on the authorities to do so. Even when the investigation is carried out by a single NCA, other members may be asked to cooperate through communication of strategic information and utilisation of fact-finding powers in order to gather such information.⁴⁰

The ECN does not incorporate any strong dispute resolution mechanism. The only possible forum of dispute resolution appears to be the loose Advisory Committee mechanism. Commission decisions are discussed within the Advisory Committee and lead to a formal opinion to which the Commission must give "utmost account". Decisions of the NCAs may also be brought to the Committee, however in such cases discussions do not lead to a formal and binding opinion. Nevertheless, lack of a strong dispute resolution mechanism does not appear as a significant discrepancy within the context of the ECN, as the network design as a whole aims to minimise the conflicts between its members through its strong principal-agent dimension, juridified characteristic and compulsory cooperation mechanisms.

In summary, rather than being voluntarily formed by its members as suggested by the network management model, the ECN came into existence through action at the Community level as an imposed organisation. As a network design, it incorporates a strong principal-agent dimension where the Commission occupies a differentiated position over other members of the network. The ECN rests on a pre-determined juridified foundation; and its mechanisms of cooperation and coordination are largely of compulsory nature minimising the role of agency discretion. There are strong connections between such characteristics of the ECN, and its imposed nature largely explains its hierarchical and juridified structure. Both the asymmetrical positions and predetermined mechanisms of cooperation stand as safeguards against the risks of decentralised policy enforcement, and particularly against inconsistency, in the lack of a common tradition of cooperation among the members of the network. In other words, from the diversity-consistency perspective, the network seems to strategically value consistency over diversity. Such choice, at least partly, stems from the imposed nature of the network; and the balance may change to the favour of diversity in the

⁴⁰ Modernisation Regulation, id., Arts. 22(1),(2)

⁴¹ Modernisation Regulation, id., Art.14(1).

⁴² Modernisation Regulation, id., Art.14(7).

future, if the authorities manage the network successfully and develop mutual trust, loyalty and comity.

B. Network Management in the US Antitrust Regime

Federal antitrust policy in the US is enforced by the Antitrust Division of the Department of Justice and the Federal Trade Commission concurrently. On the other hand, State Attorneys General (State AGs) also get involved into the process through the actions for damages and injunctive remedies they bring on behalf of their citizens in their *parens patriae* capacity,⁴³ and similar actions they bring on behalf of their states, when the proprietary interests of the state as a purchaser of a product is harmed as a result of a violation.⁴⁴ State AGs in very brief terms are the chief legal officers of the states and in most of the states they are elected by the popular vote of citizens. In other words, they have a political identity.⁴⁵

As opposed to the imposed and centrally planned nature of the networks in the EC antitrust regime, networks between the federal authorities and the State AGs emerged through voluntary collective action due to the resource interdependencies and developed as a result of a natural historical experiential learning process.

State enforcement of federal antitrust laws was largely non-existent before the 1980s. In the 1980s, states began to assume an activist role in antitrust enforcement as a result of multiple developments. First of all, towards the end of the 1970s, influenced by the massive class actions of the time, State AGs began to bring actions for damages on behalf of their states. Through these actions, they got acquainted with the basics of the federal antitrust policy and gained some enforcement experience. Second, in 1976 Congress enacted the Hart-Scot-Rodino Antitrust Improvements Act, which *inter alia* recognised the authority of the State AGs to bring actions for

⁴³ 15 U.S.C. §18a; *Parens patriae* is a common law doctrine which honours a sovereign's prerogative to protect those living under his rule. See Michael Malina, Michael D. Blechman, "Parens Patriae Suits for Treble Damages under the Antitrust Laws", Northwestern University Law Review, 1970, 65(2):193-231; George B. Curtis, "The Checkered Career of Parens Patriae: The State as a Parent or Tyrant?", DePaul Law Review, 1975, 25(3):895-915.

⁴⁴Georgia v. Pennsylvania Railroad Co., 324 U.S. 430 (1945); State of Georgia v. Evans, 316 U.S. 159 (1942).

⁴⁵ State AG's office is a hybrid organisation which stands at the mainstream of state politics with political, administrative, and legislative-related powers. They pursue a general law enforcement agenda. See Firat Cengiz, "The Role of State AGs in the U.S. Antitrust Policy: Public Enforcement Through Private Enforcement Methods", ESRC Centre for Competition Policy, Working Paper No.06-19, available at http://www.ccp.uea.ac.uk/publicfiles/workingpapers/CCP06-19.pdf, at 3 et seq.

⁴⁶ John J. Flynn, "Trends in Federal Antitrust Doctrine Suggesting Future Directions for State Antitrust Enforcement", 4 Journal of Corporation Law 479, at 481.

damages on behalf of their citizens in cases of Sherman Act violations.⁴⁷ Third, and perhaps most importantly, activism in state enforcement took place largely as a response to the enforcement strategy of the federal authorities under the Reagan administration.⁴⁸ Under the economics and efficiency based Chicago School approach, the federal authorities at the time focused more on horizontal violations and left mergers and vertical restraints largely uncovered.⁴⁹ Since particularly vertical restraints generally have significant local effects, states attempted to fill what they perceived as an enforcement gap.

1980s were also the foundational period of the horizontal dimension of networks –in other words, networks amongst the State AGs. At the time, State AGs were on the one hand enthusiastic about assuming an activist role in antitrust enforcement, but on the other hand significantly constrained by their scarce resources. Networks came into existence as a natural and practical solution to this dilemma. At first, they began to coordinate their actions in the individual cases, and then the network became institutionalised with the formation of the Multistate Antitrust Task Force under the framework of the National Association of Attorneys General (NAAG).⁵⁰ In other words, in accordance with the general propositions of the network management model, State AGs voluntarily formed networks due to the resource interdependencies they experience in search of a common goal.

As opposed to the emerging cooperation amongst the State AGs, relations between the federal and state authorities were largely confrontational during the 1980s due the conflicting antitrust philosophies they pursue. In contrast to the economics and efficiency based approach of the federal authorities at the time, states were pursuing a more conventional agenda with an aim to address not only economic but also the

⁴⁷ The political rationale behind this recognition was twofold. Parens partriae actions were expected to enhance the effectiveness of the federal antitrust regime by causing extra deterrence, and also to provide a source of relief for the consumers who themselves have little incentives to bring individual actions due to the high litigation costs. See Report of the House Committee on the Judiciary, H.R. Rep. No.499, 94th Cong., 1st Sess., September 22, 1975

⁴⁸ Robert Abrams, "Developments in State Antitrust Enforcement", 62 New York University Law Review 989, at 990; ABA Antitrust Section, Monograph No.21, State Merger Enforcement (1995), at 29; David A. Zimmerman, "Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers?", 48 Emory L. J. 337, at 346; Lloyd Constantine, "Antitrust Federalism", 29 Washburn Law Journal 163 at 173-74.

⁴⁹ Robert Pitofsky, "Antitrust in the Next 100 years", 75 California Law Review 817, at 818; William E. Kovacic, "The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy", 36 Wayne Law Review 1413, at 1415-1416; Robert A. Skitol, "The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be In Its Third Century", 9 Cornell Journal of Law and Public Policy 239 at 248.

⁵⁰ ABA Section of Antitrust Law, State Antitrust Enforcement Handbook (2003), at 38.

social implications of economic behaviour.⁵¹ When the federal authorities enacted rather permissive guidelines on horizontal mergers⁵² and vertical restraints,⁵³ states enacted rival guidelines reflecting their point of view under the framework of the NAAG.⁵⁴ Likewise, when the federal administration proposed bills to the Congress and filed amicus briefs to the Courts for the restriction of the scope of per se analysis and treble damages. 55 states proposed counter bills and filed counter amicus briefs. 56 The issue of information exchange was another matter of controversy. Information before the federal authorities is of significant importance for the success of cases brought by the State AGs. In terms of the horizontal violations, states generally bring follow-on cases after the Department of Justice presses criminal charges. In terms of the mergers, State AGs are not a part of the federal premerger control program, in other words, the merging parties are not required to submit information regarding the merger to the State AGs. Therefore both the grand jury materials and premerger filings under the possession of the federal authorities constitute important sources of evidence for the cases brought by the State AGs. In order to gain access to these sources of evidence, State AGs fought long and unsuccessful battles before the federal courts.⁵⁷ With their access to the evidence in possession of the federal authorities blocked, they became more interdependent and relied on alternative channels in order to gather strategic information. For instance, under the framework of the NAAG, they enacted a voluntary premerger disclosure compact, where they waived their authority to gather information under state laws in return of the voluntary submission of the premerger information by the merging parties.⁵⁸ If the parties do not voluntarily

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⁵¹Id., at 80; David W. Barnes, "Federal and State Philosophies in the Antitrust Law of Mergers", 56 George Washington Law Review 263.

⁵²Department of Justice Guidelines on Horizontal Mergers, Trade & Antitrust Reg. Rep. (BNA) 42 (1069), June 17, 1982, at 1251.

⁵³ Department of Justice Guidelines on Vertical Restraints, Antitrust and Trade Reg. Rep. (BNA), 48 (1199), January 24, 1985, at 193.

⁵⁴ NAAG Guidelines on Horizontal Mergers, Trade & Antitrust Reg. Rep. (BNA) 49(1243), December 5, 1985, at 978; NAAG Guidelines on Vertical Restraints, Trade & Antitrust Reg. Rep. (BNA), 52(1311), April 16, 1987, at 746.

⁵⁵ "Reagan Administration has developed a four-part legislative proposal that would eliminate recovery of damages in rule of reason cases and would expand protections for owners of intellectual property."; Antitrust & Trade Reg. Rep. (BNA), 44(1108), March 31, 1983; at 681.

⁵⁶ "The NAAG proposes model legislation of nine titles as a rival to the proposed legislation by the administration", Antitrust & Trade Reg. Rep. (BNA), 51(1294), December 11, 1986, at 893.

⁵⁷ The federal courts ruled that the states have to show a "particularised need" in order to gain access to the grand jury materials in *Illinois v. Abbott & Associates, Inc.*,460 U.S. 557 (1983). They ruled that under the confidentiality provisions of the Clayton Act, federal authorities are not under an obligation to share the premerger filings with the states in *Mattox v. FTC*, 752 F.2d 116 (1985) and in *Lieberman et al. v. FTC*, 771 F.2d 32 (1985).

⁵⁸ NAAG Voluntary Premerger Disclosure Compact, available at http://www.naag.org/protocols.php.

submit the information, State Attorneys utilise their powers under the state law to gather information and share such information to the extent permitted by the state freedom of information acts.

During the 1980s States were very active both at the high policy front and the practical enforcement front. At the high policy front, they enacted guidelines, filed amicus briefs to the courts, and proposed bills to the Congress. At the practical enforcement front, they pursued many cases of national dimension in a collective way.⁵⁹ Although such activism came as a bottom-up development, not all actors within the network assumed equally influential roles. States with larger resources and stronger antitrust traditions such as New York, Texas and California took the lead both in the formulation of the NAAG's position in high policy matters and in practical enforcement efforts.⁶⁰

With the beginning of the 1990s, the nature of the federal-state relations began to change and vertical -federal-to-state- dimension of the networks came into existence. Multiple factors contributed to this process. First of all with an antitrust agenda loaded with issues of international dimension, federal authorities found the clearance of conflicts at home essential in order to be able to speak with one voice at the international arena. Second, influential outside actors such as the Congress and the American Bar Association voiced concerns about the compliance costs raised by the divergent actions at the state and federal levels and urged the authorities to harmonise their efforts. Auring the 1990s antitrust gradually became a more technical and politically neutral policy, and as a result consensus between the authorities became more achievable. Perhaps more fundamentally however, federal-state cooperation developed as a result of a strategic learning process, as the authorities came to realise that in a confrontational style of relationship, where they impede each others' actions, eventually none of them would be able to realise their goals.

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⁵⁹ For a list and discussion of those cases see ABA Handbook, supra note 50, at 29 et seq.

⁶⁰ Particularly State AGs of small states with lower budgets such as New Mexico and Louisiana were sceptical of about the potential value of state antitrust enforcement. See e.g. Antitrust ad Trade Reg. Rep. (BNA) 52 (1314), May 7, 1987, at 969; For the statistics of state enforcement see NAAG's Multistate Litigation Database at http://www.naag.org/antitrust/search/.

⁶¹ Hearing Before the Committee on the Judiciary, House of Representatives, "Antitrust Enforcement Agencies: The Bureau of Competition of the FTC and the Antitrust Division of the DOJ", 106th Congress, 2nd Session, April 12, 2000, Serial No.104.

⁶² "Assistant Attorney General James F. Rill announced that, with the approval of the Department of Justice, the Antitrust Division is ready to join NAAG in establishing an Executive Working Group to formulate common enforcement objectives.", Antitrust & Trade Reg. Rep. 57 (1425), July 20, 1989, at 84

⁶³ Skitol, supra note 49, at 253.

Cooperation first began at the high policy level with the harmonisation of the federal and NAAG guidelines which then constitute a common foundation for joint enforcement efforts.⁶⁴ In terms of the practical aspects of network management, horizontal network experience of the 1980s significantly contributed to the process. As the States had already developed a tradition of inter-agency cooperation and best practices regarding the practical aspects of such cooperation, federal-state relations became less complicated to manage. The network as it stands today involves signalling mechanisms through which the state and federal authorities inform each other when they encounter a case which might be of interest to other authorities. In terms of information exchange amongst the State AGs, mechanisms developed by the multistate task force in the 1980s are still utilised. Federal authorities on the other hand, developed mechanisms to share information with the State AGs without breaking the federal law. Upon the waiver of confidentiality by the parties under investigation, they share information in their possession and their economic analysis with the state AGs. 65 They also developed cross-deputization mechanisms where state officials take part in the federal investigations which are of interest to the state. 66 In the past they also sent their economists to work with the State AGs in the cases of local dimension. When multiple states get involved into the same investigation, State AGs form an enforcement group and coordinate their actions under the lead of one or two states.⁶⁷

Although at times states also get involved into the cases of national dimension, in general there is a certain understanding of work division between the federal and state authorities. Joint federal-state efforts generally take place in the cases which are geographically of multistate dimension with a strong local segmentation, such as

⁶⁴ "Achieving federal harmonization, the department of justice and the federal trade commission adopt the 1992 horizontal merger guidelines", Antitrust & Trade Reg. Rep. (BNA), 62 (1559), April 2, 1992, at 404; "In a step forward in the convergence of process in governmental reviews of acquisitions in the U.S., the NAAG proposes revisions to its Horizontal Merger Guidelines", Antitrust & Trade Reg. Rep. (BNA), 63(1581), September 3, 1992, at 291.

⁶⁵ "...the Federal Trade Commission implements a program to assist State AGs who are investigating the competitive implications of certain mergers by exchanging data and analyses developed in the agency's investigations under the premerger notification program, provided that the parties submitting such information consent to a limited waiver of Clayton Act Section 7's confidentiality provisions."; Antitrust & Trade Reg. Rep. (BNA), 63(1581), September 3, 1992, at 291.

⁶⁶ "30 Assistant State AGs were cross-deputized to work with the DOJ and FTC.", Antitrust & Trade Reg. Rep. (BNA), 60(1500), 24.1.91, at 103.

⁶⁷ ABA Handbook, supra note 50, at 9.

healthcare, supermarket chains, or oil and gas chains.⁶⁸ In terms of the remedies, in most of the cases State AGs seek damages on behalf of the consumers or injunctive remedies of local nature, such as local divestitures. Most cases end with consent decrees, in other words settlements with the defendants which are approved by the courts.⁶⁹ If everything goes smoothly, federal and state authorities enter into universal consent decrees with the parties which address both the state and federal claims.⁷⁰

In contrast to the juridified nature of the ECN, these mechanisms are best practices developed through a case-by-case experiential learning process and work in very informal and flexible ways in practice. Again, in contrast to the compulsory cooperation mechanisms of the ECN, agency discretion prevails at each phase of network management in the US. Decisions as to whether take action against a violation and whether to do so individually or in coordination with the others are taken by each member of the network on a case-by-case cost-benefit analysis. Members take action only if the violation in question raises concerns from their perspective, and cooperate with others only when they expect to be better-off from cooperation. As its most striking dissimilarity to the ECN, all actors within the US network enjoy equal positions. Even if some are more influential than the others, it is because they entertain larger financial resources and stronger antitrust traditions, not because they enjoy differentiated authority.

As its only similarity to the ECN, the US network does not incorporate any strong dispute resolution mechanism. The only factors minimising the possibility of conflicts are mutual trust and comity between the authorities and the only mechanisms of dispute resolution are informal contacts and discussions. In cases where these mechanisms fail and members cannot reach to a consensus, all retain the authority to walk away and bring their individual actions. In general, the adversarial nature of the US antitrust regime gives incentives to the authorities to stay in cooperation. In order to be successful, authorities have to submit strong evidence and press convincing arguments before the courts or against the legal team of the defendants in the settlements negotiations. Therefore, federal authorities benefit from the cooperation of

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⁶⁸ See e.g. Connecticut v. Mylan Laboratories, Inc., D.D.C., No. 1:98CV03115, 12/22/98; FTC v. Mylan Laboratories, Inc., D.D.C., No. 1:98CV03114 (THF), 11/29/00; FTC v. Tenet Healthcare Corp., E.D. Mo., 7/30/98; California v. Shell Oil Co., DC CCal, 12/19/97; In re Shell Oil Co., FTC, File No. 971 0026, 12/19/97; California v. Quality Food Centers, DC CCal, 2/13/98.

⁶⁹ 15 U.S.C.A. § 15c(c); 15 U.S.C.A. § 16(e).

⁷⁰ See e.g. In re Nintendo of America, Inc., FTC, File 901-0028, 4/10/91; New York v. Nintendo of America, Inc., DC SDNY, 4/10/91.

the State AGs particularly in terms of collecting local evidence, and the State AGs benefit from the superior expertise of the federal authorities particularly in terms of the economic analysis of the case. On the other hand, when time is pressing and the case in question involves technical and political complications which render the resolution of conflicts in due course highly unlikely, some members may get excluded from the process and bring duplicative actions.⁷¹ Although on rare occasions, in some cases the political identity of the State AGs complicates the coordination process when they act with political motives to protect their local economy.⁷² When the authorities cannot manage to solve the conflicts among themselves, courts function as the last clearing houses of conflicts through their authority to review consent agreements and decide on the individual cases.⁷³

In contrast to the ECN, in terms of contribution to the design of the federal policy, federal and state authorities enjoy equally extensive channels, and may bring their perspectives into play through individual cases, soft-law measures such as guidelines, amicus briefs and legislative proposals. In addition, the States enjoy a choice of law, and under the flexible preemption doctrine of the Supreme Court -the functional equivalent of the principle of supremacy of the Community law- when they are dissatisfied with the stance of the federal policy on a particular issue they may strategically design and utilise the state antitrust laws instead of the federal law.⁷⁴

In comparison to the ECN, the US network appears as a strikingly different design in its every aspect. First of all, in contrast to the imposed nature of the ECN, the US

⁷¹ The most notorious example of such conflicts is the Microsoft case, where nine states and the District of Columbia continued to the litigation of monopolisation in demand of stricter remedies despite the fact that ten other states and Antitrust Division had reached a settlement with the defendant. See *U.S. v. Microsoft*, 231 F.Supp.2d 144 (D.D.C. 2002); *New York v. Microsoft Corp.*, 209 F.Supp.2d 132 (D.D.C. 2002); *New York v. Microsoft Corp.*, 224 F.Supp.2d 76 (D.D.C. 2002). As a result of this case, some commentators started a campaign against the state enforcement of federal antitrust laws, see e.g. Richard Posner, "Antitrust in the New Economy", 68 Antitrust Law Journal 925.

⁷² For instance, the State of Los Angeles, the place of incorporation of most of the Microsoft's rivals, was the lead in the Litigating States' action. The State of Washington on the other hand, the state of incorporation of Microsoft, unsurprisingly did not participate to the action.

⁷³ For instance, in the Microsoft case, the District Court paid particular attention to design parallel remedies in the cases brought by the Antitrust Division and the Litigating States, see *U.S. v. Microsoft*, supra note 71; *New York v. Microsoft Corp.*, supra note 71.

⁷⁴ For instance when the Supreme Court decided that the indirect purchasers were not entitled to treble damages under federal antitrust law in *Illinois Brick Company et al. v. State of Illinois*, 431 U.S. 720(1977), the states, who themselves are in the position of indirect purchasers in most of the actions they bring, reacted collectively by adopting indirect purchaser statutes in their state laws. Those laws passed the preemption scrutiny of the Supreme Court in *California v. ARC America Corp.*, 490 U.S. 93 (1989). Now, as the indirect purchasers are entitled to treble damages almost all around the Country, the Illinois Brick doctrine became practically redundant and the AMC has proposed abolishment of this doctrine by legislative action. See AMC Final Report, supra note 4, at 267.

network came into existence as a result of a collective action by its members due to their resource interdependencies in search of a common goal. In terms of network management, compared to the juridified nature of the ECN, the US network stands on mechanisms which are developed through a case-by-case experiential learning process. Such mechanisms work in a flexible manner and agency discretion prevails at every phase of the network management. In contrast to the compulsory cooperation mechanisms of the ECN, cooperation within the US network takes place on a voluntary basis. Perhaps more fundamentally however, in contrast to the hierarchical structure of the ECN, all actors enjoy equal footing within the network. As its only similarity to the ECN, the US network does not incorporate any strong conflict resolution mechanism. Lack of a strong conflict resolution mechanism seems to be more detrimental to consistency of the policy in the context of the US, as in contrast to the ECN, which as a general design aspires at minimising the possibility of conflicts, under the loose structure of the US network, mutual trust and comity appear as the only factors capable of performing this function, and although on rare occasions, sometimes they fail, particularly when the members act with political motivations. Under these characteristics, the US network seems to tolerate diversity more enthusiastically than the ECN, and as it will be seen in the following part, such design is a natural reflection of the partnership model US federalism in the field of antitrust policy.

III. Nature of Federalism in the EC and the US: Why Are They Different?

Each multi-jurisdictional polity stands on a unique federalist "equilibrium"; and such equilibrium is reflected on every aspect of inter-institutional relations which take place within its policy-making and enforcement processes.⁷⁵ With the distinct designs and management styles of the networks in the EC and the US antitrust regimes identified, this Paper now turns to the connection between these distinct designs and the general federalist equilibria these polities incorporate in the enforcement of their policies.

Regulatory federalism both in the EC and the US stands on essentially cooperative traditions. The patterns of such cooperation, however, differ significantly from one to the other. The EC tradition incorporates mainly a "top-down" and one directional

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⁷⁵ Elazar, supra note 5, at 191.

style of cooperation. Such cooperation takes places from the Member State to the Community level under the command of the principles developed by the Community institutions. The EU pursues the goal of an "ever evolving Union" between its constituent units,⁷⁶ but its *sui generis* structure is significantly undersized for the accomplishment of this goal. Uniform and effective enforcement of the Community policies plays the key role in the integration between the constituent units⁷⁷, and with a centralised general enforcement mechanism lacking, the Community heavily relies on the national political, administrative and judicial mechanisms. Its directives are implemented through the national political processes, and its policies are enforced through the national administrative and judicial processes. Contribution of the national authorities to the enforcement of the Community policies does not take place on a voluntary basis, but failure to do so is deemed an infringement of the "duty of loyalty" of the Member States. In other words, cooperation within the federalist tradition of the EC is mainly of imposed nature.

Due to the key role of the uniform and effective enforcement of the Community policies in the integration process, Community institutions utilise strong monitoring and command mechanisms in order to prevent the possibility of shirking at the national level. The Commission gets involved to the process through actions of infringement⁸⁰ and occasional informal directions it gives to the national authorities. European Court of Justice on the other hand, closely monitor the actions of the national courts through the preliminary rulings mechanism.⁸¹ The national courts act almost as a decentralised general court system under the command of the Community Courts and the systematically expanded doctrines of supremacy and uniformity, which affect the procedural as well as substantive aspects of the national laws.⁸² Even the citizens take part in the process of monitoring through their right to bring actions

⁷⁶ Article 1(2) EU.

⁷⁷See in general, George A. Bermann, "The role of law in the Functioning of Federal Systems", in Kalypso Nicolaidis, Robert Howse (Eds.), The federal vision: *Legitimacy and Levels of governance in the United States and the European Union*, Oxford University Press, Oxford, 2003, 191-122.

⁷⁸ Article 10 EC.

⁷⁹ See, Deidre Curtin, Ige Dekker, "The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity", in Paul Beaumont, Carole Lyons, Neil Walker (Eds.), *Convergence and Divergence in European Public Law*, Oxford Portland, Oregon, 2002, 59-78, at 69-71.

⁸⁰ Article 226 EC.

⁸¹ Article 234 EC.

⁸² Imelda Maher, "National Courts as European Community Courts", Legal Studies, 1994, 14:226-43.

for damages against the infringements of the Community law by the national institutions.⁸³

The horizontal dimension of the cooperation, i.e. cooperation between the Member States without the involvement of the Community institutions, on the other hand is only of embryonic nature. National institutions do not share any substantial interagency cooperation tradition without the involvement of the centre. Although network type of organisations currently began to emerge particularly in the regulated markets, Commission takes the lead in the formation and the design of such initiatives.⁸⁴

In summary, the European tradition of federalism rests on a top-down, one-directional style of cooperation, where the national authorities contribute to the integration through the enforcement of Community policies under the command of the Community institutions. On the other hand, horizontal dimension of the cooperation is largely missing. The hierarchical dimension of the ECN and its imposed nature are reflections of the general principal-agent style of relations between the national and Community institutions in the field of the competition policy. Its compulsory and juridified mechanisms on the other hand seem to have arisen as safeguards against the potential commitment problems which may emerge amongst the national authorities in the lack of a spontaneous horizontal cooperation tradition.

The course of affairs is strikingly different on the other side of the Atlantic. In contrast to the relatively static nature of federalism in the EC, the US tradition experienced a significant transformation over time from a "dual federalism" to a cooperative one. The early US philosophy had strongly been affected by the unpleasant experience of the British rule of the colonial times. As a precaution against excessive concentration of political powers, it attempted to strictly distinguish between the federal and state regulatory powers and strongly disallowed intrusion by one level to the sphere of authority of the other. 85 After the "New Deal", 86 a new and

⁸³ECJ C-6 & 9/90, Frankovich and Bonifaci v Italy, [1991] ECR I-5357

⁸⁴ See e.g. Pierre Larouche, "Coordination of European and Member State Regulatory Policy: Horizontal, Vertical and Transversal Aspects", in Damien Geradin, Rodolphe Muñoz, Nicolas Petit (Eds.), *Regulation Through Agencies in the EU: A New Paradigm of European Governance*, Cheltenham, UK, 2005, 164-180; Burkard Eberlein, Edgar Grande, "Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State", Journal of European Public Policy, 2005, 12(1): 89-112.

⁸⁵ David Fellman, "Federalism and the Commerce Clause, 1937-47", The Journal of Politics, 1948, 10(1):155,167; Philip J. Weiser, "Towards a Constitutional Architecture for Cooperative Federalism", 2000, 79 North Carolina Law Review 663, at 665; Michael J. Laslovich, "The American Tradition: Federalism in the United States", in Michael Burgess, Alain-G. Gagnon (Eds.), *Comparative Federalism and Federation: A Reappraisal*, 1993, Harvester Wheatsheaf, London, 187-20, at 188.

cooperative style of federalism emerged, as coordinated action at all levels of governance became vital for the effective and swift solution of the grave problems facing the nation.⁸⁷ Consequently, the new US federal philosophy evolved along flexible mechanisms which value the ends more than the means, does not foresee any strict mechanism of jurisdictional delineation of regulatory responsibilities and allows a substantial overlapping of federal and state powers. Naturally, under such an overlap, coordinated action at the state and federal levels is very desirable for the sake of consistency and effectiveness. However, neither the federal nor the state authorities can be forced to take such action, but they retain full discretion in their decisions of cooperation. In particular, the "anti-commandeering" doctrine of the Supreme Court places the federal and state levels on equal footing and strictly disallows federal intrusion to state autonomy. Under this principle, state authorities cannot be forced to take part in the implementation or enforcement of the federal policies but may only be given incentives to do so.88 The US federalism stands also on a strong tradition of interstate cooperation without the involvement of the federal level which gave body to the concept of "federalism without Washington". 89 Since the colonial times, the states have cooperated vigorously and taken coordinated actions against issues of common concern, developed interstate conflict resolution mechanisms such as compacts, and voluntarily harmonised state laws through the adoption of uniform codes.⁹⁰

In summary, in contrast to imposed and one-directional style of cooperation in the EC, the US tradition foresees a flexible partnership model between the federal and state authorities which enjoy equal positions. On the other hand, the US also enjoys a strong horizontal cooperation tradition. The flexible partnership dimension of the US federal philosophy is reflected on the informal and discretion-based mechanism of the US network, whereas the strong horizontal federalism tradition explains the

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⁸⁶ "New Deal" was the regulatory program initiated by the President Roosevelt to address the effects of the Great Depression. The program was based on extensive federal economic regulation enforced by specialised agencies. See Gary W. Walton, Hugh Rockoff (1998), *History of the American Economy*, 8th Ed., Dryden Press, Orlando, at 541.

⁸⁷Daniel J. Elazar (1972), *American Federalism: A View from the States*, 2nd Ed., Harper&Row Publishers, New York Hagerstown San Francisco, at 70.

⁸⁸ Printz v. United States, 521 U.S. 898, 921 (1997); New York v. United States, 505 U.S. 144. 147 (1992)

⁸⁹ Geoffrey Sawer (1976), *Modern Federalism*, Pittman, Carlton at 57; Elazar, supra note 87, at 174.

⁹⁰ National Association of State Attorneys General, Committee on the Office of the State Attorneys General, Report on the Office of State Attorney General, 1971, at 323-24.

emergence of the network as a product of voluntary collective action at the state level and its evolution through an experiential learning process.

IV. Transatlantic Policy Learning: What Can They Learn From Each Other?

As it is explained so far, the EC and the US networks appear as largely distinct models, and such differences in the design and management style of the networks are only the reflections of more fundamental divergences in the federal traditions of these polities. The dissimilar federalist equilibria of the US and the EU make the possibility of transatlantic policy learning highly controversial and questionable. As argued by Daniel J. Elazar, when there are fundamental differences in the federal dynamics of polities, policy learning and implantation cannot be possible without substantial alterations. Naturally, under such a brief comparison of the federalist dynamics of the two polities, addressing the possibility of transatlantic policy learning to the full extent is out of the scope of this Paper. Therefore, this Paper confines itself to raising the question and emphasising the necessity and desirability of future work at this front. However, even if the question is hereby left largely as an open one, as a very early observation this Paper argues that the EC and the US may still have something to learn from each others' relative strengths in network management.

When it comes to Europe, the Union seems to be more overwhelmed than ever with the multiple ambitious projects it has initiated both in general and in the sphere of its competition policy. The enlargement and Constitution experiments, which take place at the same time, gave the debate on the effectiveness, legitimacy and accountability of the European governance methods a new vigour. At the competition policy front, the reform process initiated by the Modernisation movement still continues with assessments of substantive aspects of the policy⁹² as well the methods of its enforcement. Surprisingly, the reform of competition policy takes place on a technical level and largely in isolation of the debates on the future of the Union and its governance methods. Yet, analysis of potential implications of the general EU agenda on the administration of its competition policy is essential for the durable success of the reform process. Particularly, the ECN deserves close attention in terms of the

⁹¹Elazar, supra note 5.

⁹² E.g. Commission Discussion Paper on the Application of Article 82 to Exclusionary Abuses, December 2005.

⁹³ Commission Green Paper on Damages Actions for Breach of the EC Competition Rules, Brussels, 19.12.2005, COM(2005) 672 final.

workability of its hierarchical structure and rigid rule-driven mechanisms in a more deeply integrated Union. From this perspective, the US network experience may stand as a lesson that things would not necessarily get as chaotic and complicated as assumed under a more flexible and discretion-based set of relations when the authorities share a high level of mutual trust and loyalty.

When it comes to the US, as it is mentioned in the introduction, the AMC, which was founded in 2002 to study the substantive as well as enforcement aspects of the federal antitrust policy, ⁹⁴ recommended a more systemised set of relationships between the federal and states authorities which particularly incorporates a better work division, does not burden the businesses with multiple information requests and inconsistent federal and state proceedings.⁹⁵ Nevertheless, the Commission did not propose any legislative amendment and left the matter to the mutual will of the federal and state authorities. The weakness of the US network appears to be the lack of a dispute resolution system coupled with the loose discretion-based cooperation mechanisms, which although on rare occasions, at times impede the consistency of enforcement, especially when the authorities act with political motivations. It is not certain yet whether the federal and state authorities will take action to address this weakness, but if they ever decide to do so they may turn to the ECN in order to draw some general lessons on a more systemised style of cooperation, although the specific rigid and rule-driven mechanisms of the ECN would not work under the partnership style US federalism.

V. Conclusions

Modern multi-jurisdictional polities face complex problems in the enforcement of their policies which go beyond the simplistic decentralisation-centralisation dichotomy. Rigid jurisdictional tests designed in abstract fail to designate the best placed authority and multiple actors get involved into the process through alternative channels when they have vested interests. Under these circumstances, the design and management of complex relations among multiple authorities establishes itself as the ultimate challenge. In order to reach the ideal, such design should accomplish the somewhat contradictory goals of diversity and consistency at the same time. The

⁹⁴ See the Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856.

⁹⁵ AMC Final Report, supra note 4.

network management model reflects the complexity of modern multi-jurisdictional polities and offers a sensible solution to the enforcement dilemma. Under effective network management, all interested actors are invited to take part in the process and voice their perspectives, whereas consistency still is maintained through vigorous utilisation of cooperation channels in the short-run and mutual loyalty and comity building in the long run.

Analysis of the EC and the US antitrust enforcement regimes under the model reveals the distinct characteristics of networks in these polities. In contrast to the imposed, hierarchical and juridified nature of the ECN, the US network appears as a product of voluntary collective action and experiential learning which functions through discretion-based, flexible and informal mechanisms. In other words, as their relative strengths, the structure of the ECN enshrines consistency to the utmost extent, whereas the US network tolerates diversity better.

Different EC and US traditions of regulatory federalism largely explain the divergences in the design and management style of networks. Consequently, the different federalist equilibria on which these polities stand render the possibility of transatlantic policy learning highly controversial and questionable. More comprehensive analyses regarding the characteristics of federalism in these polities need to be conducted before reaching to the final conclusions at this front. Nevertheless, as a very early observation, this Paper argues that the EC and the US may still have something to learn from each others' relative strengths. Specifically, the ECN may set an example of a more systemised style of cooperation for the US, whilst the US experience may be taken by the EC as a lesson that consistency may still be sustained under a more flexible framework when actors share a certain level of mutual trust and comity.