

Management of Networks between the Competition
Authorities of Different
Layers in the US and the EC: Different Polities,
Different Designs

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Introduction

- The tension in multi-jurisdictional policy enforcement: diversity-consistency.
- In antitrust: violations affect multiple markets, engender action by multiple authorities.
- Management of the complex relations is the ultimate challenge.
- The ideal regime realises both diversity and consistency.

Introduction (2)

- Reasons for EC-US comparison:
 - both polities have strong antitrust traditions,
 - both polities have strong multi-jurisdictional foundations,
 - both revised their enforcement regimes.
 - **In the EC:** Modernization Movement (2004)
decentralisation of enforcement
 - **In the US:** Antitrust Modernization Commission (AMC)
Report (2007)
recommendation of more systemised relations between
federal and state authorities.

Introduction (2)

- Benefits of a comparative study (Daniel J. Elazar, *International and Comparative Federalism*, Political Science and Politics, 1993 26(2):190-95):
 - Better self-knowledge,
 - Better knowledge on the experiences of others and policy learning,
 - Common theory building,
 - Value and pleasure of sharing information.

The Model: Network Management

- In modern multi-jurisdictional polities the main problem is management of complex relations between multiple authorities. *Why?*
 - Rigid jurisdictional tests fail.
 - When they have a vested interest, authorities get involved using alternative channels.
- Effective enforcement requires effective management of inter-agency relations.

Network Management (2)

- The ideal regime:
 - provides channels through which authorities “voice” their perspectives,
 - maintains consistency.
- **Networks:** Complex dialectical relations between multiple and mutually dependent actors which take part in the formulation or enforcement of policies.
- Networks are formed due to resource interdependencies. (financial, human resources, experience, expertise etc.)

Network management (3)

- Network relations should be managed effectively in order to reach superiority in policy-making and enforcement.
- Effective network management realises diversity through incorporation of all actors with the necessary resources.
- It realises consistency through:
 - Communication and dispute resolution in the short run,
 - Mutual trust and comity building in the long run.

Network Management (4)

- Tools of management:
 - 1) Actor activation and signalling mechanisms
 - 2) Information exchange-communication mechanisms
 - 3) Dispute resolution mechanisms
- Policy-making and enforcement stages are essentially connected.
- Network management has a time dimension.

Network Management in the EC

- European Competition Network (ECN): *Imposed Network*
 - Came into existence as a result of the Modernisation.
 - Commission initiated the Modernisation due to resource dependencies.
 - Safeguard against the risks of decentralisation.
 - Protects uniformity and consistency:
 - through network dynamics,
 - through *hierarchical network structure*.

ECN (2)

- *Hierarchical Network*

- Commission's authority to stop investigations of the national competition authorities (NCAs) (Modernisation Regulation 11(6))
- Commission's oversight powers:
 - NCAs are required to inform Commission at the outset of their proceedings (Modernisation Regulation 11(3)).
 - NCAs are required to inform Commission before imposing remedies (Modernisation Regulation 11(4)).

ECN(3)

- Commission's near monopoly on the design of the policy
 - Block exemptions, individual decisions, guidelines , notices.
 - Restricted contribution through national laws: In the cases where national/EC laws apply concurrently,
 - national law cannot be laxer than the EC law.
(C-14/68, *Walt Wilhelm v Bundeskartellamt*)
 - national law cannot be stricter than the EC law.
(Except for merger rules, rules of unfair trade practices and unilateral conduct-Modernisation Regulation 3(2))

ECN(4)

- Compulsory cooperation mechanisms:
 - Obligation to initiate proceedings under EC law
(Modernisation Regulation 3(1))
 - Obligation to cooperate with the Commission
(Modernisation Regulation 19(6), 22(1))
 - Imposed cooperation amongst the NCAs under network dynamics & Commission's differentiated position
(Modernisation Regulation 12, 22(2))

ECN(5)

- ***Juridified network*** (Modernisation Regulation, Network Notice)
 - safeguard against the commitment problems in the lack of inter-agency cooperation tradition.
- **Practical network Management**
 - case allocation regime (Network Notice, paras.5-10)
 - signalling mechanisms (Modernisation Regulation 11(3), (4))
 - coordination under single lead authority (Network Notice para.13)
 - information exchange, cooperation in fact-finding (Modernisation Regulation 12, 18,22)
 - dispute resolution: Advisory Committee (Modernisation Regulation 14)

Network Management in the US

- Authorities:
 - **Federal level:** Federal Trade Commission, Antitrust Division of the DOJ
 - **State level:** State Attorneys General (State AGs)
 - actions for treble damages/injunctions on behalf of the citizens
 - actions for treble damages/injunctions on behalf of the State
 - chief legal officers, –in most of the States- elected by the citizens.

US Network (2)

- Network creation due to resource dependencies
- Network development through experiential learning
- 1980s: invigorated State enforcement
 - damage actions on behalf of the State in the 1970s
 - Hart-Scott-Rodino Antitrust Improvements Act (1976)
 - “market response” to the federal agenda

US Network (3)

- 1980s: Horizontal (interstate) Network
 - natural solution to resource interdependencies
 - cooperation in individual cases
 - institutionalised under the Multistate Task Force of National Association of Attorneys General (NAAG)
- Vertical (federal-state relations): confrontational
 - rival NAAG Guidelines to Federal Guidelines
 - rival amicus briefs and bills
 - conflict on information exchange
 - NAAG Premerger Disclosure Compact
 - Information sharing through Multistate Task Force

US Network (4)

- 1980s: “State Activism”
 - High Policy Front: NAAG Guidelines
Amicus Briefs
Legislative Proposals
 - Practical Enforcement Front: Cases of national dimension
 - In general a “bottom-up” development, nevertheless still under the lead of more powerful actors.

US Network (5)

- 1990s: Formation of Vertical Networks
 - Internationalisation of the federal agenda
 - Pressure from outside actors (Congress, American Bar Association)
 - Depoliticisation of antitrust policy
 - Experiential learning

US Network (6)

- High-Policy Coordination: Harmonisation of Federal and NAAG Guidelines
- Practical Network Management:
 - Vertical network experience simplified federal-state relations.
 - actor signalling
 - information exchange
 - interstate: Multistate Task Force
 - federal-state: upon the waiver of confidentiality

US Network (7)

- coordination
 - federal-state: cross-deputization
 - interstate: lead authority under the Task Force
 - work division (on the basis of geographical dimension and remedies)
- universal consent decrees

US Network (8)

- In contrast to the ECN:
 - mechanisms developed through experiential learning, work in flexible and informal ways
 - agency discretion prevails
 - actors enjoy equal positions
- Only similarity to ECN: lack of strong dispute resolution mechanism
 - only factors minimising conflicts: mutual trust, comity
 - only mechanisms of conflict resolution: informal contacts, discussions

US Network (9)

- Adversarial nature of US regime gives the authorities incentives to cooperate.
 - Federal authorities benefit from access to local evidence.
 - State authorities benefit from superior economic expertise.
- Conflicts emerge particularly when;
 - there is time pressure ,
 - the case is technically or politically complicated.
- Courts function as clearing houses.

US Network (10)

- Access to the design of federal policy: Federal and state authorities enjoy equal channels through;
 - Guidelines,
 - Amicus Briefs,
 - Bills,
 - States may also strategically design state law under the flexible pre-emption doctrine.

General Comparison of Networks

- Both the EC and the US networks follow the model with small variations, but the designs of networks are dramatically different:
 - ECN: hierarchical network with juridified and compulsory mechanisms.
 - US Network: flexible network evolved through experiential learning, discretion-based mechanisms, actors enjoy equal positions.
- From the perspective of diversity/consistency:
 - ECN is committed to consistency.
 - US network tolerates diversity better.

Federalism in the EC and the US: Why are they different?

- Each multi-jurisdictional polity stands on a unique “federalist equilibrium”. (Daniel J. Elazar)
- Both the EC and the US stand on “cooperative” styles of federalism.
- But the nature of such cooperation is dramatically different in the EC and the US.

Cooperative Federalism in the EC

- one-directional (from the Member State to the EC Level)
- top-down (under oversight of EC institutions)
 - EU pursues the goal of “ever evolving Union”.
 - Effective enforcement of EC policies contribute to integration.
 - EC relies on national enforcement mechanisms.
(Duty of loyalty of the Member States- Art.10 EC)

Cooperative Federalism in the EC (2)

- Under the oversight of the EC institutions
 - **Commission-** actions for infringement (Art.226 EC)
informal guidance
 - **ECJ-**preliminary rulings (Art.234 EC)
 - **Citizens-**actions for damages (ECJ C-6 & 9/90, *Frankovich and Bonifaci v Italy*)
- Weak horizontal federalism (member state-to-member state spontaneous cooperation)

Cooperative Federalism in the EC (3)

- Imposed and nature of the ECN : reflection of one-directional top-down style cooperation and the lack of horizontal cooperation.
- Juridified, hierarchical nature of the ECN and its compulsory cooperation mechanisms: reflections of general principal-agent style relationship.

Cooperative Federalism in the US

- Cooperative federalism in the US: “partnership style”
 - Flexible approach to jurisdiction
 - Cooperation is desirable, but depends on agency discretion
 - Federal-state authorities enjoy equal positions
 - anti-commandeering principle: federal will cannot be imposed on the states.
 - strong horizontal federalism tradition (“federalism without Washington”).

Cooperative Federalism in the US (2)

- Informal, discretion-based mechanisms of the network: reflections of flexible partnership model
- Formation through voluntary collective action, evolution through experiential learning: reflections of horizontal cooperation tradition

Transatlantic Policy Learning: What can they learn from each other?

- Different enforcement regimes due to different federal traditions.
- Different federalist equilibria make policy-learning questionable.
- (Very early observation): They may turn to learn from each others' relative strengths.

Transatlantic Policy Learning (2)

- Comparative Lessons
 - For the EC
 - Would ECN work in a more deeply integrated Union?
 - US experience proves that cooperation may still take place under a flexible regime.
 - For the US
 - The AMC report: more systemised relations desirable.
 - ECN –in general- may set an example.