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*Networking Competition Authorities
in the European Union:
Diversity and Change*

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Networking Competition Authorities in the European Union: Diversity and Change

By *Imelda Maher**

I. Introduction

The proposed reform of the enforcement of Articles 81 and 82 EC exemplifies the fragmentation of regulatory responsibility within the policy space of competition (Scott, 2001: 331). EU competition law will be enforced by at least 15 national competition authorities (NCAs) as well as the EC Commission but those NCAs will only enforce the EU rules within their own jurisdictions, thus fragmenting the geographical scope of the competition rules. The response to this fragmentation of authority and jurisdiction is a robust and stable network of national competition authorities with effective enforcement powers. The greater formalization of a network, that to some extent exists already, (Gerber, 2002: *) is predicated on the assumption that there is sufficient similarity of purpose (the effective enforcement of the EU competition rules) underlying it. Given the Draft Regulation (EC Commission, 2000), this is a fairly safe assumption if viewed in a static manner. However, the enforcement of the law is only effective when it implements the policy underlying it and, as Gerber's work shows, neither policy nor law stand still (Gerber, 1994). The dynamic nature of EU competition policy and the way the law has been able to respond to that dynamism is one of its key strengths. However, in the context of formalizing a network of national competition authorities this dynamism needs to be managed so that there is agreement over time as to the policies underlying the competition norms. In short, while the text of Articles 81 and 82 EC has remained constant over time, and the Commission's Directorate-General for Competition (DG Comp) is viewed as generally insulated from the political fray, competition nonetheless is politics in the sense of the day-to-day bureaucratic politics of decision-making and negotiation; in the contests that can occur between DGs in relation to e.g. energy and telecommunications; and at the level of adoption of decisions which go before the full College where in difficult cases there may be compromises (Wilks and Bartle, 2002: 164, 169; Wilks and McGowan, 1996: 254). Most fundamentally, to the

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extent that competition policy favors one particular economic theory over another is itself a political choice – economic theory is not neutral (Fraser, 1992: 5). Thus, one important function of the network of competition authorities will be to ensure there is a clear understanding of the direction of policy at the supra-national level and that, in so far as possible, that policy is itself clearly articulated.

This question of policy formation and its communication from the top down highlights the extent to which institutions matter. Institutions here is not limited to the agencies responsible for implementing the rules but also extends to the norms and procedures which constrain and reflect the policies being implemented (Steinmo and Thelen, 1992: 2). Institutions matter not only because they determine policy (as the Commission clearly does in the sphere of competition policy), but also because they mediate those economic and political forces which also shape that policy – often in unanticipated ways (Armstrong, 1995: 165; Maher, 1999: 599). Institutions as mediators of policy, facilitate the incorporation of changes in policy (such as the modernization of competition law), and the way policy is applied into the existing legal culture. It is this role of institutions as mediators of policy change and their subsequent impact on the operation of the law that makes the organization of the network of NCAs so important and such a challenging task. This is especially so because just as institutions influence the implementation of policy, so too are they shaped by the context in which they operate. Across the Union, in different sectors of the economy, in different states, among different interest groups, there will be different expectations about the purpose of competition regulation, about what activities and economic operators should be regulated and how. These expectations in turn are shaped by cultural references such as location, time and the legal culture within which these rules operate (Hancher and Moran, 1989:3; Maher, 1996: 230). The extent to which institutional influences can shape the implementation of EU competition law at the national level in a manner that reflects its context as well as (or, more drastically, instead of), EU policy raises what is the central question of this session: to what extent does the function of the EU network of competition authorities depend on a certain degree of homogeneity of membership.

This paper uses an institutional analysis in order to explain the patterns and characteristics (particularly organization, practices and informal rules), which limit the scope of adaptation and change by NCAs to the decentralization plans. It in effect provides a check list against which to evaluate difference among NCAs. Moving beyond these largely formal and organizational differences and drawing on the theory of responsive regulation, (Ayres and Braithwaite, 1992; Braithwaite, 2002) it then argues that the extent to which enforcement strategies vary between NCAs in relation to sectors, size of undertaking and across states is crucial to the credibility of the new framework of enforcement. The key function of the network will be to ensure an effective balance between flexibility and fairly fixed guidelines for action which run the risk of a one-size-fits-all model and the attendant dangers of inappropriate regulation and a lack of responsiveness.

II. Institutional endowments of NCAs

Levy and Spiller (1996: 4) suggest in their work on telecommunications regulation that the choices about regulatory governance are constrained by the specific institutional endowments of a nation. They identify six endowments: legislative and executive institutions, judicial institutions, customs and other norms that restrain action, the character of social interests in a society, and administrative capabilities. Drawing on their work but adapting it to take account of formal and informal characteristics specifically relevant to competition authorities, we focus on independence, (an over-arching consideration in relation to competition agencies), administrative capabilities, social interests, and customs and norms that restrain action. If a reductionist approach is taken, the nature of a competition authority can be gleaned from the level of its independence and the other characteristics can be subsumed within that. Instead, we will briefly discuss independence – why it is important and what are its consequences, before disaggregating it and exploring it in the light of other characteristics.

1. Independence

Independence of competition agencies from government is deemed important for the credibility of competition policy as it ensures that the agency is in a better position to act in the public interest without interference from party politics (Peters, 1996: 48). Decisions are not influenced by the approach of elections allowing for longer-term perspectives and great consistency and neutrality in decision-making as between different interests and over time. Like monetary policy, competition policy is seen as technical in nature and requiring a high level of expertise by those implementing the law. As recent experience in relation to the European Central Bank has shown, an independent agency creates a highly visible commitment to a policy goal (e.g. price stability in the case of EMU or effective competition in relation to competition policy), which is easy to articulate and hence can garner relatively wide political support, but is vague and difficult to apply in practice thus leaving a wide margin of discretion to the relevant agency (Hodson and Maher, 2002). Where the policy goal has a quasi-constitutional status, this in turn enhances the status of the agency responsible for giving effect to it and increases its margin of discretion, provided its actions are seen to achieve the articulated goal. The status of competition policy in EU law is arguably quasi-constitutional given its centrality to the creation of the internal market. At the national level the status of competition policy varies, with compliance with some of the recently repealed but longstanding UK laws deemed optional, while it has a very high constitutional status in Germany (Gerber, 1998: 207, ch. 8). The extent to which the policy goal is vague and the greater the delegation of power to the agency, the greater the pressure for additional accountability to ensure the policy objective is being realized (Majone, 1998:24). Agencies exercising public power need to be accountable in order to ensure that they hold with the public will; promote fairness and act rationally in their decision-making (Scott, 2000: 39). Accountability can be through inputs (how democratic is the decision-making process?); outputs (is the agency achieving its goals?), and process (is there transparency – in so far as possible – of decision-making processes such that the independence of the agency from influence is without doubt?) (Hodson and Maher, 2002). In the enforcement of competition policy, the perceived need for the independence of competition agencies minimizes

accountability through inputs, leaving outputs and process as the primary accountability mechanisms within traditional public law models.

In relation to the creation of any network of public agencies, the extent to which they are accountable for that particular aspect of their work to parliament, the courts, other agencies and auditors is important. Thus the NCAs will need to be accountable specifically for their work within the network. From an EU perspective, the network is a form of intensive trans-governmentalism (Wallace, 2000: 33) and thus it is not strictly speaking a supra-national body with the need for concomitant Union accountability mechanisms. Picciotto has been critical of the emergence of policy networks (of which the proposed network would be one) albeit in the international context (Picciotto, 1997: 263; Maher, 2002: 135). The concern is that fragmentation of government erodes traditional accountability mechanisms. Slaughter, on the other hand, argues that at least in relation to technocratic networks, they are insulated from some politics but ultimately remain accountable through existing national channels (Slaughter 2000: 195). In relation to the proposed European network, it can be seen to some extent as shoring up the state by delegating enforcement responsibility back to the national level in a manner entirely in the spirit of subsidiarity. It is also designed to ensure more effective compliance and enforcement with any changes in enforcement policy having been discussed by the NCAs. Despite this optimism, and in the light of the debate concerning legitimacy and the European Central Bank (de Grauwe, 2000: 164), it behoves the NCAs to remain ever conscious of the importance of legitimizing the network through greater public accountability which can be put in place by the network ensuring at least some transparency in its practices.

The extent to which NCAs are independent from government varies in the EU. The longest established competition agencies in the EU (the Bundeskartellamt, the EC Commission and the UK Competition Commission and Office of Fair Trading), are not fully independent agencies as the term is used in US literature (Horn, 1995: 55), with some potential for majoritarian influences, but there is little evidence of regulatory capture (Wilks, 2002: 151). Using a principal-agent analysis, Wilks shows how the establishment of an independent competition authority often has a strong symbolic element. Early symbolism, where competition agencies were not seen as having much of a policy impact, has given way over time to entrenched competition agencies with extensive technical expertise having influence and a sense of priorities shaped by their own experience in a policy climate where governments now express an overt preference for stronger competition laws (Wilks, 2002: 149 and 170). The time frame is significant here as it allows for the embedding of competition policy within the polity, shaping expectations of those subject to the law and of the general public. The agency can develop a body of rules and ensure its processes are legitimate and consistent with the norms of natural justice. The longevity of an agency alone is however not sufficient. Its status, resources and the exact nature of its powers (in particular the credibility of the sanctions it can deploy), are significant in ensuring the agency is effective in its allocated role (see table 1).

Status	Resources	Powers	Constraints
Location	Equipment	Role in policy debates (advocacy)	Dependency on courts
Recruitment/ appointment	Personnel	Arsenal of decision-making and sanctions	Constitution/ human rights
Media/public perception	Budget		Ideological constraints (social interests)
Position v. other NCAs and other domestic agencies			

Table 1. Institutional endowments of NCAs

2. Status

Status is something that is dependent on powers and resources. It is important in determining and augmenting the agency's influence in the policy domain and in achieving its role. The degree of independence, the expertise of staff, its presence in the media and its position in relation to other agencies are important formal and informal factors in determining its status. The location of the agency is symbolically important. For example the UK Office of Fair Trading (a government department) is located near the edge of the City and the Competition Commission has just vacated premises which it shared with other government agencies for new premises - both a couple of kilometers from Whitehall, the home of government. The Irish authority initially had offices rented from a major insurance company located near one of the main shopping districts not far from the main travel hubs. It is now located about 1 km from government at a more prestigious and central address. The move to some extent reflected the increase in its powers following statutory changes in 1995.

Recruitment and appointment are important for two reasons. First, if appointment is by government, it is an important way of exercising some control over the direction of the agency at key junctures, although it can be difficult to predict how a particular appointee will perform once within the agency especially if the basis for dismissal is tightly controlled. Second, the terms of appointment (remuneration, duration, additional benefits) and the perceived status of the agency are relevant factors in attracting suitably qualified and widely respected personnel to the agency and in particular, to the head of the agency. The reputation of the Head in turn is important in attracting other highly qualified staff, as is the reputation of the agency in relation to other regulators important. If there are other regulatory agencies with an ambience of power that is not present in the competition authority, then it will find it more difficult to recruit and retain staff who may be more interested in working with other regulators. In Ireland the authority experienced staffing crises in the 1990s where the Authority was not quorate for some months due to the failure of the Minister to appoint

sufficient members and later, due to the resignation of the Chair and a delay in replacing him (Maher, 1999: 75; OECD, 2001: 62). The more limited criminal powers of the Authority and its smaller staff compared with e.g. the Office of the Director of Telecommunications Regulation could arguably make it a less attractive destination than that regulator. This phenomenon, in so far as it exists for NCAs, will dissipate when the NCA has power to enforce the European norms. Association with the highly successful DG Competition and the ability to enforce EU rules, and membership of European-wide network all will be important factors in improving status in relation in particular to other utility regulators at the national level.

Sometimes, personnel are drawn from the civil service bringing with them values and practices imbued within a permanent closed-career structure where there are received ways of conducting business and mutual rating by other civil servants (of the valued qualities of cleverness, reliability and influence) are important (Hall et al, 2000:35). These 'loans' are part of the career path of the civil servants concerned and they are motivated to perform well so their status within the government bureaucracy can be enhanced and they will proceed to interesting and dynamic work when they move on from the agency. These loans also facilitate links between the agency and other parts of government as civil servants have their own networks and understand the modus operandi of various government departments. This information can be useful but at the same time, the independence of the agency can be undermined if it is part of the civil service or employs a very large number of them on its staff.

All of these factors affect public perception of the agency and the kind and amount of coverage it gets in the national media. Where the agency enjoys broad public support for its work, is seen as advocating the public benefit and as doing 'a good job', this increases its status making it more difficult for its independence to be eroded (should government be so minded), and in fact underpins that independence as it is seen as having an identity separate from government.

3. Resources

Linked to status is the issue of resources. Limited budgets are not a bar to an agency developing its role and its effectiveness (as can be clearly seen in the history of the DG for Competition), but it can impede effective enforcement in particular when there are insufficient resources to deal with the number of cases arising. Opportunities for policy innovation are also curtailed, as staff attention remains focused on day-to-day management of caseload. Where the creation of the agency is symbolic and is not intended to lead to real policy change, then restricting resources ensures the legislation and agency remain largely symbolic (Wilks, 2002: 155, quoting Mitnick). Limited resources can reflect an uncertain commitment on the part of government to the policy. Even if the agency enjoys wide formal powers, if they have limited resources which affects office space, I.T. and administrative support, it will be difficult to attract dynamic personnel respected in their field and with relevant expertise which in turn will reduce the status of the agency further. In general, where an agency is dependent on a government department for its budget and personnel it can experience indirect ministerial control over priorities (OECD, 2001: 62).

4. Powers

Formally, the scope of the agency's powers is central to the effectiveness of its role. In the EU context, the substantive scope of national competition rules is largely consistent with Articles 81 and 82 EC (Maher, 1996; Drahos, 2001 199). For competition agencies these powers fall under two main headings:

- *policy formation*: to what extent is government and other agencies required to seek its opinion in relation to relevant policy formation?
- *rule enforcement*: how effective is it?

The extent to which an NCA can influence emerging policy debates is an indicator of the commitment of the government to competition policy and its position within the wider policy framework. Effective advocacy in relation to competition policy requires a high level of agency independence and adequate resources so this overview function can be undertaken without jeopardizing day-to-day enforcement issues. Such advocacy also provides some safeguards against the whittling away of the impact of competition law and policy. It can advocate the removal of anomalies such as that found in Greece where competition legislation applied to publicly owned undertakings but government intervention created and preserved state monopolies – initially at least (Vainanidis and Pournara, 1992:229). It provides the agency with an opportunity to raise anomalies in the law and to advocate removal of the more blatant e.g. the amendment of legislation that allows blatant anti-competitive activity by professions governed by older statutes.

More fundamentally, the specific enforcement powers available to the authority are central to its effectiveness. It needs its sanctions to be credible such as to encourage compliance with the law and when it does decide to impose sanctions that they are sufficient, and can be secured in a timely manner so as to act as an effective deterrent and to create an example for other subjects of the law. For competition agencies, the key requirements are: an ability to impose fines; adequate investigative powers including the ability to secure search warrants; the power to impose interim measures; and, where there is non-compliance with their investigations, the power to impose periodic fines for non-compliance. Whether criminal sanctions are necessary as well as civil remedies is a much debated topic at the moment (OECD, 2002; Hammond and Penrose, 2001; Wils, 2002). The ability to imprison directors of a company for breach of the competition rules can bring the rules into the boardroom and focus minds in a way a financial penalty on the company cannot. One aspect of the process surrounding criminal actions is whether they can be brought directly by the competition authority or must be brought through a government body (like a public prosecutor) with responsibility for bringing criminal actions more generally. If and when such actions are brought, the question of whether they arise before a specialist court or not is also important, given the technical nature of the dispute. While criminal sanctions may focus the mind, substantial fines that can be imposed by the competition authority without recourse to a court of law may be less cumbersome and hence more effective. At the same time, if within a hierarchy of sanctions the competition authority can point to the possibility of imprisonment, a criminal record for the company and/or its liable officers, then this may provide additional incentives for compliance and improve the overall effectiveness of the law even if rarely invoked in practice. Whether sanctions are civil or criminal, where the authority lacks the power to impose fines and is reliant on persuading another government body of the

importance of pursuing prosecutions, this more cumbersome process makes the costs and risks associated with enforcement greater for the authority.

5. Constraints

Even where there are adequate formal powers of action there remain constraints – formal and informal. Formally, the constitution and human rights law (in particular the Convention), may impose considerable procedural constraints on action even allowing for the doctrine of supremacy. Thus in Ireland, the Competition Act 2002 gave the Authority the power to enforce Articles 81 and 82 but it can only do so by pursuing undertakings through the civil or criminal courts, and in relation to the latter, can do so only through the agency of the Public Prosecutor. This is because the imposition of fines could be regarded as criminal and under the constitution, criminal sanctions can only be imposed by a court of law (Maher, 1999: 53; Jones, 2001: 406). It could be argued that the Authority should be able to impose fines itself in relation to Articles 81 and 82, but it would have to be shown first that the effectiveness of the competition rules is being undermined by this particular means of enforcement. There may be human rights constraints on procedures, either under the Convention or domestic law, either on the way fines are imposed and/or if they are deemed to constitute criminal charges. The precise status of Commission decisions – and whether they are criminal or civil – is certainly open to debate with Wils arguing that they are criminal and hence within Article 6 of the Convention (Wils, 2002). Jones also argues that there is a conflict between the Convention's right against self-incrimination and the defense rules under Regulation 17 and he is of the view that the Convention should take precedence, if there is a challenge (Jones, 2001: 415).

Finally, there are informal constraints – customs and culture – that may restrict action. Some sectors may be more difficult to tackle, even where there is no regulatory capture, because of the lackluster commitment of government to the imposition of competition norms on what are often viewed as traditional sectors or because of a grass roots revolt to the operation of the law. For example, an Irish farmers association chose to pay a sizeable contempt of court fine when it continued a boycott of meat factories in demand of higher prices in defiance of an injunction secured under competition law (Irish Times, 2000). The extent to which competition is recognized and endorsed as an important policy by the general public is another important constraint. In the UK, a recent survey of experts showed only 10% of them believed competition policy to be important to the UK public (Price, Waterhouse, Coopers: 2001). This may reflect the limited effectiveness of the previous laws and, with the emphasis on education under the new regime this may change (Maher, 2000).

III. Enforcement strategies

Within the proposed EU enforcement model, the nature of the substantive rules is (relatively) clear. Article 5 of the Draft Regulation gives NCAs the power to apply Articles 81 and 82 in their entirety. While sanctions are listed – interim measures, fines, accepting commitments – there is no obligation to harmonize sanctions across Member States. Instead, Article 36

requires states to designate NCAs (there may be more than one especially if sectoral regulators are included), and to take the measures necessary to empower those authorities by a date to be determined, elaborating the general duty of loyalty under Article 10 EC. Given the explicit obligation, the Commission could pursue a state through the courts if it is tardy in introducing appropriate sanctions under Article 226 EC, having exhausted less formal attempts to secure compliance with the regulation. The difficulty will be proving that procedures are ineffective – while there may be extreme cases, effectiveness is very much a matter of degree. There will also be a role for the network to undertake *ex post* review of the availability of sanctions, and how they are being applied to allow some comparison to be drawn and to identify best practice. The information is available through the *ex ante* consultation requirements in Article 11(4) where the Commission must be consulted by an NCA prior to adoption of a decision under the EU rules and under Article 14 where the Advisory Committee can give opinions on decisions of NCAs. This information needs to be collated and reviewed say annually to compare and contrast enforcement practice. Ideally, the information should be available publicly e.g. through an appendix to the annual competition report or as a freestanding document. Discrepancies (if they exist), could then be explored. Uniformity should not be expected given differences between national economies, but the factors influencing different outcomes in similar decisions could be usefully identified.

The table below shows the variation in sanctions for breaches of domestic competition laws that are expected to apply to the EU rules when applied at the national level.

State	Fines (max) In Euro	Prison (max)
Austria	720,000 (u) and 130,000 (I)	3 yrs (price fixing)
Belgium	10% of annual turnover for Belgian sales & exports	
Denmark	No limit	
Greece	15% of worldwide group annual turnover	
Spain	10% of turnover	
Finland	10% of worldwide annual turnover	
France	3250,000 (I); 5% French annual turnover (u) or 65 million (non profit u)	4 yrs
Germany	More than the financial benefit of the breach to the u.	
Ireland	3.8 million or 10% of annual turnover	5 yrs
Italy	10% of Italian annual turnover for relevant market	
Netherlands	454,000	
Portugal	1 million	
Sweden	578,000 or 10% of worldwide annual turnover	
United Kingdom	10% of aggregate turnover for last 3 yrs in UK re relevant market	5 yrs hard core cartels (Enterprise Bill, 2002)

U – undertaking; I - individual

Table 2 Procedures for enforcement of national competition laws in EU states (drawing on Jones, 2001)

Research has shown that perceived fairness of procedures in decision-making processes affect general satisfaction with a decision, support for the regulator and acceptance of and compliance with the decision (Wenzl, 2001: 6; Braithwaite, 2002: 84 discussing Tyler and Blader, 2000). Procedural fairness here refers to neutrality, trustworthiness and respect. Procedural justice and the fairness of the decisions-making process are significant for subjects because such treatment is seen as indicative of their inclusion within the social group (i.e. the law-abiding, competitive business community). Where there is perceived procedural fairness then co-operative behavior with regulators increases because the subjects receive the message that they are respected within the group (Braithwaite, 2002: ch. 4). These concerns are important in relation to the proposed reform of the EU rules because they highlight not so much the importance of uniformity (something of a chimera at any rate), but of consistency and fairness of process. This further highlights the issue of different outcomes in relation to application of the EU rules by different NCAs – and the important advocacy role that the network (preferably) or the Commission will have to play in explaining how differences to some extent are predicated on economic differences.

The imposition of sanctions is however only one aspect of effective enforcement. Arguably the key characteristic of an effective competition policy is one where a competition culture is embedded in business practice and all government policy. Hence an advocacy role is important for competition authorities to ensure that competition policy infuses government policy (Dabbah, 2000: 371). Effective advocacy shores up the commitment of the state to competition policy, ensures consistency in the scope of competition law and facilitates compliance. A second aspect of advocacy is focused not on government but on those subject to the law. Here, competition authorities can fulfill a vital role in educating and informing both potential complainants, victims and perpetrators of anti-competitive practices of the exact scope of the law, what it is designed to achieve, how this is beneficial, how the law is applied and what the consequences of breach can be. To fulfill such a function, agencies require resources to allow them e.g. to go on information road-shows, present papers, public leaflets for display in public libraries, supermarkets, local chambers of commerce etc.

Resourcing is going to be a problem for NCAs who it seems are unlikely to get many extra resources to carry out their new role (Kingston, 2001: 346). This renders it all the more important to secure compliance without recourse to formal (and expensive) enforcement strategies. Compliance can be encouraged in a number of ways. An excellent recent example was the way the UK Office of Fair Trading used the lead time between the signing of the 1998 Competition Act into law and its actual implementation to launch a well targeted and highly effective education campaign that included a well organized web site, conference papers, useful booklets on various aspects of the Act, an emphasis on compliance programs (Rodger, 2000: 253) and more formally, the introduction of a large number of guidelines (Office of Fair Trading, 2001: ch. 2; Maher, 2000: 549). This information campaign seem to have had some success in particular, the campaign to discourage notification led to only 7 requests for decision and 15 requests for guidance in the first 18 months of the Act's operation (Vickers, 2001).

An emphasis on securing compliance before having recourse to formal sanctions reflects two features of competition regulation. First, the authority is dependent on business for information and thus it has to engage to some degree, in a cooperative relationship with those being regulated. This cooperation is qualified of course when the authority is supported by

strong and effective sanctions either for breach of the substantive norms or for failing to assist in any formal investigations conducted. In practice the presence of these powers make it difficult for firms not to offer some level of cooperation if and when approached. Second, no competition agency can have a proverbial policeman at every street corner or in every office. Resources will never be such as to ensure complete command-and-control. Thus, it pays to secure cooperative compliance by companies so personnel can be directed to the serious breaches of the law that warrant sanction. Similarly, it pays for firms as voluntary adaptation of behavior removes the (real) risk of investigation and sanctions e.g. a compliance program is cheaper than investigation and/or litigation. This approach – called responsive regulation (Ayres and Braithwaite, 1992; Braithwaite, 2002) and adopted to some degree by the Australian Competition and Consumer Commission – operates within the shadow of the law in that compliance and cooperation can be best achieved where there is a substantial threat of detection and sanction (with substantial sanctions up to and including ‘incapacitation’ which in the competition sphere would mean e.g. imprisonment). Responsive regulation where co-operative compliance is encouraged minimizes regulatory interference so as to maximize freedom of action within the law (Braithwaite, 2002: 33). Detection is more likely if compliance becomes more widespread and firms are less willing to tolerate breaches of the law by others so complaints and whistle blowing become important. The status of the authority, its access to the media and the wide reporting of its decisions all add to the impression of a powerful agency capable of detecting and widely publicizing breaches of the law. The strategy is represented by what is called a regulatory pyramid.

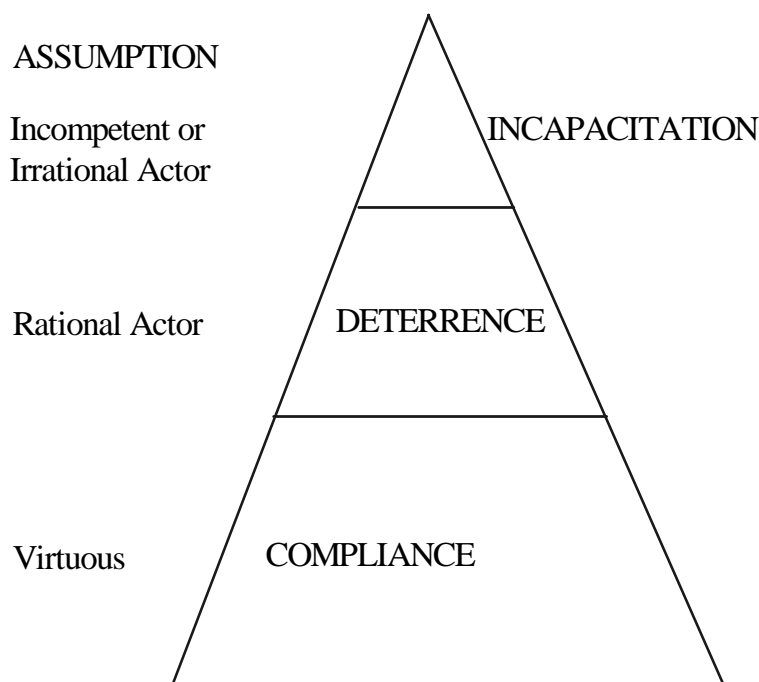


Figure 1 *The Regulatory pyramid (Ayres and Braithwaite, 1992: ch. 2; Braithwaite, 2002: ch. 2)*

The extent to which individual NCAs exercise a compliance strategy in relation to the EU norms or domestic law, significantly affects the extent to which competition policy is embedded within national culture which in turn affects the extent to which anti-competitive behavior is viewed as unacceptable. The extent to which there are differences in relation to the attitudes to competition policy and the way NCAs approach compliance outside the realm of strict legal enforcement will necessarily impact on the more visible and more easily measurable standard of how many decisions are taken a year and what were the fines imposed. And yet, these compliance strategies can have a fundamental impact not just on competition culture within the state but also on perception as to the consistency of the operation of European norms throughout the EU.

One aspect of enforcement which will be central to the operation of the network is the exchange of information – an issue discussed at length under Section III of this Workshop. Article 12 of the Draft Regulation does not require NCAs to exchange information – nor to assist each other in investigations – they are simply empowered to do so, ‘notwithstanding any national provision to the contrary’. This provision is problematic on two fronts (at least). First, it does not require authorities to transfer information – it merely provides a legal power to do so that overrides national law (Kingston, 2000: 345). This emphasizes the cooperative nature of the relationship. Second, while functionally the exchange of information is crucial to the effective operation of decentralized enforcement to ensure consistency and to avoid jurisdictional disputes, the regime as yet is so new, that there is little to underpin the proposed exchange of confidential information apart from one proposed provision. In short, the existing national competition law systems may be intolerant of such exchanges. It will be for the network to create a climate of confidence to facilitate trust and mutuality such that transfer of information – even where proceedings are regarded as criminal in nature – will be engaged in without undue difficulty.

IV Conclusions

The network proposed under the Draft Regulation is in many ways resonant with another soft policy co-ordination mechanism in the EU – that of the open method of coordination (Lisbon, 2001; Hodson and Maher, 2001). Conditions similar to those that saw the development of the open method in the sphere of economic policy are also present in relation to competition policy. There is a common dominant theoretical framework; common goals; key elites who coordinate in the policy area; and a commitment by the Commission (in this case) to the project. The characteristics of the open method: peer review, surveillance, bench marking and best practice could well serve the tasks of the network especially in relation to non-formal enforcement strategies and institutional endowments. The network will be more supra-national and hierarchical than the analogy with the open method would suggest. The Draft Regulation sets out a specific agenda backed by 40 years of law enforcement and is supported by a DG of the Commission, i.e. DG Competition, which exercises considerable influence and power. Lesson drawing – where lessons are drawn from other places or times but do not necessarily lead to any policy change (Dolowitz and Marsh, 1996: 344) - will hardly be enough for NCAs or an effective competition policy. Instead, what may best characterize the network is some form of policy transfer with an emphasis on compliance and enforcement

strategies. Policy transfer is a process where ‘governments study each other’s different methods, gauge the success of various policy alternatives and mimic best practices employed elsewhere, with successful policies transferred deliberately and willingly’ (Bomberg and Peterson, 2000, 6). One form of transfer that seems most pertinent in relation to the network is indirect coercive transfer where the presence of externalities or functional interdependencies lead to joint action (Dolowitz and Marsh 1996). Functional interdependencies arise not only at the level of the Heads of NCAs but lower down the administrative structure. Just as the Sutherland Report found that a key issue in the completion of the internal market was an increase in trust among national officials at all levels (High Level Group, 1992; Council, 1994), so too in the competition sphere will mutual trust between officials at different levels in NCAs be necessary to ensure the effective operation of the network. The network is one where there is a hierarchy with the Commission in charge though acting in a cooperative spirit with the NCAs. Thus while the success of the network is dependent on the NCAs – including but not only the their Heads - there is also a responsibility on the Commission to ensure its smooth operation both in shaping the agenda of the network and facilitating the sort of policy learning that will best ensure the common goal of an effective competition policy.

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