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## Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement?

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## **Abstract**

The Article first locates the modernization of European Community antitrust enforcement within the context of the regulatory state and the Lisbon agenda before turning to the debates on new governance. It then specifically analyzes the emergence of networks in general and the European Competition Network in particular before concluding.

# REGULATION AND MODES OF GOVERNANCE IN EC COMPETITION LAW: WHAT'S NEW IN ENFORCEMENT?

*Imelda Maher\**

## INTRODUCTION

European Community (“EC”) competition law is long established, but has undergone a ten year period of reform that is nearing completion. Reform has addressed both substantive issues (such as the extent to which vertical agreements fall within the competition rules,<sup>1</sup> state aids,<sup>2</sup> mergers,<sup>3</sup> and currently the scope of the prohibition on abuse of market dominance<sup>4</sup>) and enforcement. The focus of this Article is on enforcement and, specifically, on one of the most distinctive features of the reformed institutional architecture—the European Competition Network (“ECN”) which consists of competition enforcement officials from the EC Commission and the Member States.<sup>5</sup> The Network arises out of the decentralized enforcement of the EC antitrust rules<sup>6</sup> with national competition authorities (“NCAs”)

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1. See *generally* Commission Regulation No. 2790/99, O.J. L 336/21 (1999); Commission Regulation No. 1790/99, O.J. L 213/18 (1999); ALISON JONES & BRENDA SUFRIN, *EC COMPETITION LAW: TEXT, CASES AND MATERIALS* (3d ed. 2007); FRANK WIJCKMANS, FILIP TUYTSCHAEVER & ALAIN VANDERELST, *VERTICAL AGREEMENTS IN EC COMPETITION LAW* (2005). Earlier versions of this paper were presented at the Law and Society Association of 2007 conference, Humboldt University, Berlin, Germany; the Europa Institute, University of Edinburgh as part of its seminar series “The Treaty of Rome: The 50th Anniversary” and at a University of Glasgow School of Law staff seminar. Thanks to participants and Colin Scott for helpful comments.

2. See *generally* Commission of the European Communities, *State Aid Action Plan: Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009*, COM (2005) 107 Final (June 7, 2005).

3. Council Regulation No. 139/2004, O.J. L 24/1 (2004).

4. See Directorate General (“DG”) for Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (Dec. 2005), <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>. For commentary see Wolfgang Wurmnest, *The Reform of Article 82 EC Treaty in the Light of the Economic Approach*, in *ART. 82 EC: NEW INTERPRETATIONS, NEW ENFORCEMENT MECHANISMS* (Josef Dreier et al. eds., forthcoming 2008).

5. Council Regulation No. 1/03, recitals 15-18, arts. 11, 12, O.J. L 1, at 4, 10-11 (2002) [hereinafter Reg. 1].

6. The term “antitrust law” will be used here to refer to Articles 81 and 82 EC, which prohibit restrictive agreements and abuse of market dominance.

and national courts<sup>7</sup> now having competence to enforce the anti-trust rules in their entirety.<sup>8</sup> Shared competence immediately raises questions of jurisdiction: under what conditions does any particular competition authority assume jurisdiction under the EC rules? This question is inadequately answered by Regulation 1 itself with the ECN the forum created to address the allocation of cases, the sharing of (confidential) information and discussions as to policy development. This Article analyzes the ECN through the lens of the governance literature in European Studies and International Relations where the emergence of governmental networks is recognized as one of the key responses to the twin phenomena of globalization and the fragmentation of the state. In doing so, the Article argues that the modernization of EC antitrust enforcement combines “old” and “new” governance showing the transformative potential of combining different processes.

The Article first locates the modernization of EC antitrust enforcement within the context of the regulatory state and the Lisbon agenda before turning to the debates on new governance. It then specifically analyzes the emergence of networks in general and the ECN in particular before concluding.

### I. *THE REGULATORY TURN: AN ANALOGY*

Competition law reforms have taken place in parallel with the shift to new governance methods seen in the European Union (“EU”). De Búrca and Scott have described “new governance” as a wide range of processes and practices that have a normative dimension, but do not operate primarily or at all through the formal mechanism of traditional command-and-control-type

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7. This Article will focus on national competition authorities (“NCA”) and will not discuss the role of national courts in European Community (“EC”) competition law enforcement.

8. See Council Regulation No. 1/03, recitals 4-8, arts. 5-6, O.J. L 1, at 1-2, 8-9 (2002). Under the previous regime the EC Commission had exclusive power to grant exemptions to the prohibition on anticompetitive agreements. NCAs could only enforce the prohibition and then only if they had been granted the power to do so by their own governments. See generally Council Regulation No. 17, art. 9, O.J. L 13 (1962); Commission Notice on Cooperation Between National Competition Authorities and the Commission in Handling Cases Falling Within the Scope of Articles 85 or 86 of the EC Treaty, O.J. C 313/3 (1997); Claus-Dieter Ehlermann, *Implementation of EC Competition Law by National Anti-Trust Authorities*, 17 *EUR. COMP. L. REV.* 88 (1996).

legal institutions.<sup>9</sup> Command-and-control regulation is “the exercise of influence by imposing standards backed by [in some jurisdictions] criminal sanctions.”<sup>10</sup> In essence, the coercive force of law is used to prohibit certain conduct or to require some positive action or to set down conditions of entry to particular sectors.<sup>11</sup> Baldwin and Cave point to a number of concerns that arose in relation to this traditional form of hierarchical exercise of public authority, e.g., regulatory capture where the regulator and the regulatee become too close so policy reflects the interests of the regulatees rather than the public interest; excessive legalism and over-regulation; information deficits for regulators that makes standard-setting difficult; and the costs of enforcement of rules and uncertainty as to the effects of enforcement.<sup>12</sup> Because of these concerns, Baldwin and Cave note that alternative forms of regulation have emerged such as self-regulation, for example, where trade associations or professional bodies set down their own standards in order to avoid state regulation and incentive-based regulation, e.g., through subsidies or tax incentives such as lower tax rates for “greener” cars. Governments can regulate through contracts as more and more of the traditional business of government is outsourced and the private contractual relation between a government department and contractor is the key regulatory mechanism determining the conduct of the contractor.

Competition law and regulation can both be viewed as governance tools, and like the shift towards new modes of regulation, the modernization<sup>13</sup> of EC competition law also reflects diffusion and government fragmentation. To equate competition

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9. See Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* (Gráinne de Búrca & Joanne Scott eds., 2006).

10. ROBERT BALDWIN & MARTIN CAVE, *UNDERSTANDING REGULATION: THEORY, STRATEGY AND PRACTICE* 35 (1999).

11. *See id.*

12. *See id.*

13. The EC Commission has consistently referred to the process as one of modernization rather than mere reform, perhaps to grasp the seismic scale of the institutional and substantive changes involved. *See* Commission of the European Communities, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, COM (99) 101 Final (Apr. 1999) [hereinafter White Paper]; *see also* James S. Venit, *Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty*, 40 *COMMON MKT. L. REV.* 545, 545 (2003) (referring to modernization as the “great leap forward”).

law with regulation flies in the face of conventional understanding that sees them as opposites, but the analogy is appropriate within the wider context of governance.<sup>14</sup> As regulation moves away from traditional command-and-control methods the conceptual divide between competition and regulation also weakens with competition laws used in conjunction with regulation to sustain levels of competition so as to underpin the standards set, for example, in relation to service provision in a sector. Given this shift, it is not surprising to see changes in competition law reflecting wider changes in governance and regulation.

It is enlightening to cast the modernization of the EC competition rules within this framework. The competition reforms occurred within the traditional governance structures of the EC. It was a radical turn for competition law. “Throwing out” Regulation 17, one of the oldest statutes in the EC, was largely a heretical notion if ever even articulated until the mid-1990s. Nonetheless, the system that operated under the Regulation was faulty. It was highly interventionist and centralized (and inefficient) with a system of notifying agreements to the Commission.<sup>15</sup> This was replaced by self-regulation and has been accompanied by an increased use of sanctions—manifest by recent huge fines in, e.g., the lift manufacturers’ cartel case,<sup>16</sup> strength-

14. Julia Black defines regulation as “the intentional activity of attempting to control, order or influence the behaviour of others.” Julia Black, *Critical Reflections on Regulation*, 27 *AUSTL. J. LEGAL PHIL.* 1 (2002). Competition law, on the other hand, is concerned with the maximization of consumer welfare through the promotion of competition by enabling the market to operate as freely as possible. Thus, regulation tends to be equated with control (including price controls) of specific domains (e.g., communications, energy markets) where markets cannot operate fully due to public interest requirements such as universal service while competition is generic and prohibits, rather than demands, specific behavior or positive obligations. These distinctions are reinforced by institutional characteristics where regulators are sectoral and exist in conjunction with competition agencies that apply general competition rules. See generally Imelda Maher, *Regulating Competition*, in *REGULATING LAW* 187 (Christine Parker et al. eds., 2004).

15. See generally David J. Gerber, *The Transformation of European Community Competition Law?*, 35 *HARV. INT’L L.J.* 97 (1964); STEPHEN WILKS, *Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?*, 18 *GOVERNANCE* 431-52 (2005) (providing a more critical assessment of the seriousness of the burden of notification).

16. See generally Commission Decision Summary No. 2008/C75/10, O.J. C 75/19 (2007) (imposing fines just under one billion Euros on an elevator cartel). The decision is currently under appeal. See Council Regulation No. 1/03, art. 12, O.J. L 1, at 11 (2002); see generally Commission Notice, O.J. C 155/27 (2007); Commission Notice, O.J. C 140/39 (2007).

ened leniency programs for whistle-blowers,<sup>17</sup> and an extensive debate on increasing private enforcement.<sup>18</sup> More fundamentally, authority has been decentered to the national level and across agencies and courts with enforcement risks (and costs) spread more.

Modernization of antitrust enforcement in the EU has had three main dimensions. First, and discussed at greater length below, enforcement has been decentralized to the national level strengthening the previously weak multi-level governance nature of antitrust law in the EC. Competence is now shared between NCAs and the EC Commission<sup>19</sup> for the enforcement of the EC competition rules. Second, this is supplemented by a shift towards self-regulation by undertakings<sup>20</sup> in relation to their compliance with the prohibition on anti-competitive agreements. Under Article 81, agreements that fall within the prohibition are only exempt if they meet the four cumulative, stringent and narrowly construed criteria set out in Article 81(3).<sup>21</sup> Historically, only the Commission could grant an exemption through a notifi-

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17. Commission Notice, O.J. C 298/17 (2006).

18. See generally Commission of the European Union: White Paper on Damages Actions for Breach of the EC Antitrust Rules Brussels 2 April 2008 COM (2008) 165 final and accompanying Commission Staff Working Paper SEC (2008) 404 both available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html> (last visited June 3, 2008). Francisco Marcos & Albert Sánchez Graells, *Towards a European Tort Law? Damages actions for breach of the EC antitrust rules: harmonising Tort Law through the back door?*, (Oct. 25-26, 2007) (presented at IV Int'l Congress, European Private Law Beyond the CFR, Leida, Spain), available at <http://ssrn.com/abstract=1028963>.

19. Formal decisions in individual cases both before and after reform are taken by the entire College of Commissioners with day-to-day operations carried out by DG Competition ("DGComp"). See generally Stephen Wilks & Lee McGowan, *Competition Policy in the European Union: Creating a Federal Agency?*, in *COMPARATIVE COMPETITION POLICY: NATIONAL INSTITUTIONS IN A GLOBAL MARKET* 225-67 (G. Bruce Doern & Stephen Wilks eds., 1996).

20. See Consolidated Version of the Treaty Establishing the European Community arts. 81, 82, O.J. C 321 E/37, at 73-75 (2006) [hereinafter EC Treaty]. Articles 81 and 82 EC apply to "undertakings," which is a term of art that has been very widely interpreted by the European Courts. See Victoria Louri, *"Undertaking" as a Jurisdictional Element for the Application of EC Competition Rules*, 29 *LEGAL ISSUES OF ECON. INTEGRATION* 143-76 (2002).

21. Under Article 81(3), the prohibition on anti-competitive agreements will apply to an agreement:

[W]hich contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment

cation system characterized by an ever-increasing backlog of notified agreements.<sup>22</sup> Commission resources were directed towards reviewing innocuous agreements rather than tackling more serious issues such as cartels. The re-deployment of Commission resources to ensure more effective enforcement of EC competition law required the abolition of the notification system. Undertakings now evaluate their agreements in light of Article 81 in its entirety and decide whether the agreement falls within the provision at all and, if it does, whether or not it can qualify for exemption.

Thus the old, excessively legalized, highly interventionist system of notification where the Commission controlled (in theory at least) the extent to which agreements could be exempt under EC law, has been replaced by a form of self-regulation where firms must evaluate for themselves the extent to which they are antitrust compliant. Such self-evaluation occurs in the shadow of the law with the potentially significant consequences of failing to do so correctly: the agreement is void and hence unenforceable;<sup>23</sup> the undertakings could be subject to large fines;<sup>24</sup> in some Member States, individuals could be subject to criminal fines and imprisonment or could be banned from holding directorships for up to five years;<sup>25</sup> and/or the undertakings could be at risk of private actions for damages being taken against them.<sup>26</sup> Thus, under the new competition regime, responsibility for com-

of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

EC Treaty, *supra* note 20, art. 81(3), O.J. C 321 E/37, at 74.

22. See generally David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT'L L.J. 97 (1994); Stephen Wilks, *Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?*, 18 GOVERNANCE 431-52 (2005).

23. See EC Treaty, *supra* note 20, art. 81(2), O.J. C 321 E/37, at 74.

24. See Council Regulation No. 1/03, arts. 5, 23, O.J. L 1, at 8-9, 16-17 (2002).

25. There is no harmonization of remedies for breach of EC competition rules. For an outline see Imelda Maher, *Networking Competition Authorities in the European Union: Diversity and Change*, in EUROPEAN COMPETITION LAW ANNUAL 2002: CONSTRUCTING THE EU NETWORK OF COMPETITION AUTHORITIES, 223-36 (2005); Tim Jones, *Regulation 17: The Impact of the Current Application of Articles 81 and 82 by National Competition Authorities on the European Commission's Proposal for Reform*, 22 EUR. COMP. L. REV. 405-15 (2001); EUROPEAN COMPETITION NETWORK, ECN WORKING GROUP ON COOPERATION ISSUES: RESULTS OF THE QUESTIONNAIRE ON THE REFORM OF MEMBER STATES (MS) NATIONAL COMPETITION LAWS AFTER EC REGULATION NO. 1/2003 (2007), available at [http://ec.europa.eu/comm/competition/ecn/ecn\\_convergencequest\\_28112007.pdf](http://ec.europa.eu/comm/competition/ecn/ecn_convergencequest_28112007.pdf).

26. See generally White Paper, *supra* note 18.



pliance is more firmly placed with those subject to the prohibitions, while the risk of detection is increased through the competence of NCAs to enforce the EC rules.

The move to self-review was justified by the fact there were thirty-five years of precedent on which undertakings could rely.<sup>27</sup> The Commission monopoly on the award of exemptions has therefore been removed. NCAs and national courts can now evaluate an agreement in light of all of Article 81 as Article 81(3), under which exemptions can be granted, is now directly applicable within the domestic legal order.<sup>28</sup> The abolition of notification has changed the “learning-by-reviewing” process of the Commission in advance of the introduction of a block exemption.<sup>29</sup> One of the unintended consequences of the shift towards self-regulation is that the Commission no longer has the notification system to provide it with information about the nature of agreements in the EU. Instead, it now has the power to conduct investigations into sectors of the economy and particular types of agreements.<sup>30</sup> Thus, it must now be proactive in its gathering of information, rather than being the passive recipient of information provided by undertakings. In addition, a key function of the ECN is information sharing, including the sharing of confidential information.<sup>31</sup>

Third, and closely allied to the second dimension of modernization, the approach of the Commission to vertical agreements (i.e., distribution) changed at the same time as modernization was first mooted. The Commission has the power to enact regulations exempting categories of agreements from Article 81.<sup>32</sup> These agreements were highly formalized—in effect imposing standard form contracts as they were very narrowly drawn, reflecting a cautious and highly legalized Commission.<sup>33</sup>

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27. See White Paper, *supra* note 13, ¶ 48.

28. See generally Council Regulation No. 1/03 O.J. L 1 (2002).

29. See Imelda Maher, *Competition Law and Intellectual Property Rights: Evolving Formalism*, in THE EVOLUTION OF EU LAW 597-624 (Paul Craig & Gráinne de Búrca eds., 1999).

30. See Council Regulation No. 1/03, art. 17, O.J. L 1, at 13 (2002).

31. See *id.* arts. 12, 23, O.J. L 1, at 11, 16-17 (2002).

32. See *id.* recital 10, O.J. L 1, at 3 (2002).

33. See Council Regulation No. 19/65, 8 J.O. 533, O.J. Eng. Spec. Ed. 1965-66, at 35. For a discussion of the rigid effect of the regulations, see Jean-Eric de Cockborne, *Franchising and EC Competition Law*, in FRANCHISING AND THE LAW: THEORETICAL AND COMPARATIVE APPROACHES IN EUROPE AND THE UNITED STATES 281, 287 (Christian Joerges ed., 1991).

Vertical agreements were controversially seen as often anti-competitive given their capacity to restrict cross-border trade (and competition).<sup>34</sup> After the completion of the single market program, the need for an integrationist competition policy that defied the standard economic understanding of consumer welfare was no longer apparent. A less restrictive approach was adopted in the revised vertical agreements block exemption.<sup>35</sup> This revision, with its more broad brush approach, is less interventionist and increases the margin of discretion for undertakings. This reform, carried out within the existing powers of the Commission and not requiring the level of reform found in Regulation 1, is indicative of the extent to which the Commission and Directorate General for Competition (“DGComp”) in particular was internally differentiated, with the reforms as the result of a process of internal negotiation and conflict.<sup>36</sup>

The high costs of the old regime have been addressed. These costs were practical, (e.g., in relation to the cost of reviewing notified agreements) and reputational, with the back-log of agreements and perceived over-regulation, in particular of vertical agreements undermining the credibility of the competition regime. The misallocation of resources to relatively trivial agreements in the notification system also undermined the credibility of the EC competition regime in general and the Commission in particular as more serious issues, such as cartels, could not be properly addressed. Thus, the over-regulation that characterized both the notification system and the block exemption regime was swept aside with a move to enforced self-regulation and decentralized enforcement.

## II. *COMPETITION MODERNIZATION AND “LISBON”*

Governance can be understood as the diffusion and fragmentation of governmental arrangements, which in this context is exemplified by the multi-level governance structures of the EU. In the last decade there has been much debate about the

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34. See generally Barry E. Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 *COMMON MKT. L. REV.* 973 (1995).

35. See generally Commission Regulation No. 2790/99, O.J. L 336/21 (1999).

36. See generally Hussein Kassim & Kathryn Wright, *Revisiting Modernisation: The European Commission, Policy Change and the Reform of EC Competition Policy* (Centre for Competition Policy, Working Paper 07-19, 2007), available at <http://www.ccp.uea.ac.uk/publicfiles/workingpapers/CCP07-19.pdf>.

nature of new governance in the EU. De Búrca and Scott warn against taking the moniker “new governance” too literally, as what is new in one policy field may well turn out to be well-established in others.<sup>37</sup> New governance in European Studies is associated most closely with the Lisbon agenda and the spur that that policy initiative gave to academic and policy debates about the nature of governance in the EU.<sup>38</sup> The Lisbon agenda arose out of the European Council summit meeting in March 2000, in anticipation of the start of the Economic and Monetary Union. The Council committed to the EU becoming “the most competitive knowledge based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion” and environmental protection by 2010.<sup>39</sup> The governance tool identified as the key mechanism for the realization of this objective was the open method of coordination (“OMC”) which draws on the Organisation for Economic Co-operation Development (“OECD”) practice of benchmarking, monitoring and peer review, in order to facilitate lesson-learning and ultimately change in governance or policy.<sup>40</sup> The method is different from the classic Monnet method where a proposal from the Commission may ultimately culminate in binding legislation, usually either in the form of a Directive (binding only as to outcome) or Regulation (binding in its entirety and directly applicable at the national level throughout the EU).<sup>41</sup> It is predicated on a principle of information gathering and sharing, and evaluation according to agreed benchmarks. Thus, there is a top-down and bottom-up dimension to this method, with Member State officials providing the information in the light of

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37. See De Búrca & Scott, *supra* note 9, at 3; see generally Kenneth Armstrong & Claire Kilpatrick, *Law, Governance, or New Governance? The Changing Open Method of Coordination*, 13 COLUM. J. EUR. L. 649 (2007).

38. See, e.g., THE OPEN METHOD OF COORDINATION IN ACTION: THE EUROPEAN EMPLOYMENT AND SOCIAL INCLUSION STRATEGIES, (Jonathan Zeitlin et al. eds., Brussels 2005); Dermot Hodson & Imelda Maher, *The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination*, 39 J. COMMON MKT. STUDIES 719 (2001); see also David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination*, 11 EUR. L.J. 343 (2005).

39. Lisbon European Council Press Release, 100/1/00 (Mar. 23, 2000); see generally Göteborg European Council Press Release, 200/1/01 (June 15, 2001).

40. See generally Armin Schäfer, *A New Form of Governance? Comparing the Open Method of Co-ordination to Multilateral Surveillance by the IMF and OECD*, 13 J. EUR. PUB. POL'Y 70 (2006).

41. See generally *id.*

guidelines and benchmarks set at the European level, but the process remains open as to outcome. This is a stylized description as there is considerable variation in different policy fields as to how the method works. The openness of the method as to outcome, the very ambitious objective, tight deadline and perhaps, most significantly, a marked downturn in the European economy in general and the German economy in particular at the start of 1990s, meant that the Lisbon agenda almost immediately ran into difficulties.<sup>42</sup> Now, the deadline is no longer seen as significant (or realizable),<sup>43</sup> and there is much debate about how new the governance tool is and the extent to which it is different from and is a “threat” to existing governance structures—either institutionally, substantively, functionally or formally.<sup>44</sup> It is no longer seen as landmark in the same way as some other major initiatives were in the EU such as “1992” and Economic and Monetary Union (“EMU”) mainly because of the uncertainty of identifying clear, firm outcomes that can be directly associated with Lisbon.<sup>45</sup>

The antitrust reform agenda within DGComp pre-dated Lisbon by a year and operated separately from it. Lisbon is associated with new governance, while competition policy (more specifically antitrust enforcement) has long established roots in traditional forms of EC law and decision-making.<sup>46</sup> The Commission has long enjoyed far-ranging powers of enforcement conferred on it by the Member States and has increased those powers over time, for example, the Commission became responsible for evaluating EC mergers in 1989 and, while there were suggestions that there should be a separate and independent European Competition Office in the mid-1990s,<sup>47</sup> ultimately, the

42. See, e.g., Jean Pisani-Ferry, *Only One Bed for Two Dreams: A Critical Retrospective on the Debate Over the Economic Governance of the Euro Area*, 44 J. COMMON MKT. STUDIES 823 (2006).

43. See generally THE HIGH LEVEL GROUP, FACING THE CHALLENGE: THE LISBON STRATEGY FOR GROWTH AND EMPLOYMENT (2004), [http://ec.europa.eu/growthandjobs/pdf/kok\\_report\\_en.pdf](http://ec.europa.eu/growthandjobs/pdf/kok_report_en.pdf).

44. See, e.g., NEW GOVERNANCE AND CONSTITUTIONALISM IN EUROPE AND THE US (Gráinne De Búrca & Joanne Scott eds., 2006).

45. Cf. COMMISSION OF THE EUROPEAN COMMUNITIES, TIME TO MOVE UP A GEAR: THE EUROPEAN COMMISSION'S 2006 ANNUAL PROGRESS REPORT ON GROWTH AND JOBS (2006), [http://ec.europa.eu/growthandjobs/pdf/illustrated-version\\_en.pdf](http://ec.europa.eu/growthandjobs/pdf/illustrated-version_en.pdf).

46. See generally Armstrong & Kilpatrick, *supra* note 37.

47. See generally Claus-Dieter Ehlermann, *Reflections on a European Cartel Office*, 32 COMMON MKT. L. REV. 471 (1995).

Commission has remained the key actor in EC competition law. Competence is shared with the Member States in two different ways. First, every Member State has its own competition laws—many of them modelled on the EC norms<sup>48</sup>—and now designated NCAs can enforce the EC rules also. There is a clear and long-articulated role for EC competition law within the EU and for the EC Commission. Despite this long pedigree, at the heart of the EC, soft law, now associated with new governance, has in fact been a feature of competition law since the 1960s. With reform, it has introduced a key new governance technique—the Network—and in doing so has emphasized the hybrid nature of competition law. While the Network may be new in this particular sphere, as the Lisbon experience and the wider academic debates show, the emergence of the Network reflects a wider phenomenon in Europe and beyond. Thus, modernization of EC competition law allows us to question the novelty of what is happening in the competition sphere given developments elsewhere, while at the same time acknowledging the extent to which these reforms are indeed radical within this particular field and highlighting the extent to which notions of newness and novelty in relation to governance should be treated with great caution.

### III. NEW? GOVERNANCE

Treib, Bähr, and Falkner see governance as a spectrum reflecting the intensity of state/polity intervention, with hierarchical government backed by coercive sanctions at one end and self-regulation at the other.<sup>49</sup> The novelty, or otherwise, of governance is not of significance. Trubek and Trubek call emerging processes “new governance” which have the capacity to encourage experimentation, employ stakeholder participation to devise solutions, rely on broad framework agreements which have flexible and revisable standards and use benchmarks, in-

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48. See generally Imelda Maher, *Alignment of Competition Laws in the EC*, 16 Y.B. EUR. L. 223 (1996); see generally MICHAELA DRAHOS, *CONVERGENCE OF COMPETITION LAWS AND POLICIES IN THE EUROPEAN COMMUNITY* (2001).

49. See Oliver Treib et al., *Modes of Governance: A Note Towards Conceptual Clarification* European Governance Papers (EUROGOV) No. N-05-02 (2005), available at <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-05-02.pdf>.

dicators and peer review to ensure accountability.<sup>50</sup> They suggest that the use of the term “new” does not necessarily mean that the techniques under discussion are recent.<sup>51</sup> What is new is that the use of these approaches is regularized and self-conscious as an alternative or supplement to traditional forms. It is in this sense that the term new governance is discussed here. Armstrong and Kilpatrick point to six themes in the literature on new governance.<sup>52</sup> New governance is defined as what is not old governance (though the label “old” is never used). In the context of the EU, this is often about comparing new governance to the Monnet method. A second theme relates to the increasing involvement of private actors in governance. The tools and instruments used are also seen as indicative of newness with regulations and directives associated with traditional EU governance and framework directives and the OMC seen as new. In discussing different modes of governance, Armstrong and Kilpatrick note the risk of conflating instrument with mode so that, for example, legislation becomes equated with hierarchy as a mode of governance. It may be possible for an instrument to be the product of different governance modes.<sup>53</sup> Thus in the competition domain the shift to networked governance—a classic instrument of new governance—was institutionalized through a regulation—the most hierarchical and traditional governance tool in the EC.

What is a mode of governance? Armstrong and Kilpatrick note that several classifications have emerged.<sup>54</sup> Scott’s four-fold classification of governance as hierarchy, community, market and design is indicative of this abstraction.<sup>55</sup> Hierarchy is usually associated with traditional forms of governance—where the threat of sanction is used to secure a change in conduct. Com-

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50. See David M. Trubek & Louise G. Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry and Transformation*, 13 *COLUM. J. EUR. L.* 539, 541 (2007).

51. See *id.* at 543 n.9.

52. See Armstrong & Kilpatrick, *supra* note 37, at 652-55.

53. See *id.* at 654.

54. See *id.*; see generally Treib et al., *supra* note 49.

55. See Colin Scott, *The Governance of the European Union: The Potential for Multi-Level Control*, 8 *EUR. L.J.* 59, 64-65 (2002); see also Jerry L. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, *ISSUES LEGAL SCHOLARSHIP* art. 4 (2005), available at <http://www.bepress.com/ils/iss6/art4/> (discussing the first three categories as accountability regimes). Given that accountability is one aspect of governance, the sub-classification in relation to accountability is consistent with the wider abstraction of governance. *Id.*

munity as a governance mode emphasizes peer esteem and the concomitant pressure that comes with that, such as, governance through networks which internally generate their own reciprocal obligations. Market or competition as a mode of governance looks primarily to outcomes—has the policy objective been realized? The EU with its historic use of objectives and deadlines has made use of this mode, although the redefining of the Lisbon agenda and the abandonment of the deadline points to the problems of adopting such a mode. Finally, design as a mode of governance is found most often in regulation literatures concerned with enforcement, e.g., the use of bollards to prevent illegal parking. Treib, Bähr and Falkner, in their discussion of modes of governance with reference to institutions, identify the same classification as Scott (but for governance by design).<sup>56</sup> They also regard as significant the extent to which authority is dispersed and the degree of institutionalisation of decision-making.<sup>57</sup>

The fifth theme identified by Armstrong and Kilpatrick is governance attributes. They mention six identified by Scott and Trubek: participation and power-sharing; multi-level integration; diversity and decentralization; deliberation; flexibility and revisability; and experimentation and knowledge-creation.<sup>58</sup> Armstrong and Kilpatrick warn of the risk of slippage in analysis when seeking to evaluate a governance mode in light of these attributes.<sup>59</sup> In particular, it is not clear if compliance with the list is desirable or how such compliance could be measured. The list is also not exhaustive, which limits its value as a benchmark. This can be contrasted with the final theme of governance architecture<sup>60</sup> which, unlike the list approach of Scott and Trubek, is more prescriptive. Armstrong and Kilpatrick's analysis shows the difficulty of separating out themes and the tendency towards normative analysis: the provision of ideal-types of governance against which to measure the particular forms of governance being scrutinized. The problem with such a normative analysis is that it tells us little of intrinsic value: whether gov-

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56. See Treib et al., *supra* note 49, at 8-9.

57. See *id.* at 9.

58. See Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1, 5-6 (2002).

59. See Armstrong & Kilpatrick, *supra* note 37, at 654.

60. See *id.* at 658 n.32.

ernance is new. It is only useful if it challenges claims of novelty in particular spheres so governance innovations can be located within the context of fragmenting, multi-level polity and within theoretical and policy debates that shed light on the effectiveness and legitimacy of particular modes of governance.

Treib, Bähr, and Falkner provide an overview of modes of governance that may be used to analyze changes in the way the EU is trying to achieve its different policy objectives.<sup>61</sup> They identify three categories of analysis through which scholars have explored governance: actors, institutions and policy.<sup>62</sup> The authors provide an overview of existing conceptions of modes of governance within each of these three categories with the intensity of each attribute reflecting the intensity of state intervention in society.<sup>63</sup> Their typologies within the policy and institutions modes are most useful for the purposes of our analysis of anti-trust enforcement.<sup>64</sup>

They identify five modes: law (hard or soft), sanction, norms (fixed or malleable), implementation (how flexible?), and standards (substantive or procedural). First, the extent to which soft law mechanisms are used is an important indicator of the intensity of state/EU intervention. Soft laws are rules of conduct which in principle have no legally binding force, but nevertheless can have practical effects.<sup>65</sup> This can be contrasted with legal binding-ness of hard law or legalization, characterized by Abbott et al. as the intensity of obligation, precision and delegation (of interpretation).<sup>66</sup> Finnemore and Toope provide a constructivist critique of this definition noting the vagueness of the notion of obligation and the largely positivist conception of the law. These criticisms are well made, but the failure to evaluate the significance and nature of sanction as a dimension of legalization is a significant omission.<sup>67</sup> While Treib, Bähr, and

61. See generally Treib et al., *supra* note 49.

62. See *id.* at 7-11.

63. See *id.*

64. The actor mode is primarily concerned with the extent to which private actors are involved in governance—an issue not addressed in this Article. See *id.*

65. Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, in *IMPLEMENTING EC LAW IN THE UNITED KINGDOM: STRUCTURES FOR INDIRECT RULE* 64 (Terence Daintith ed., 1995).

66. See Abbott et al., *The Concept of Legalization*, 54 *INT'L ORG.* 401, 401-02 (2000). This appears in a special issue of the *Journal* devoted to hard and soft law.

67. See Martha Finnemore & Stephen J. Toope, *Alternatives to "Legalization": Richer*



Falkner refer to the fixed or malleable nature of norms as another mode of governance it is not clear to what extent this differs from soft law, especially if adopting Abbott et al.'s definition of legalization. Treib, Bähr, and Falkner do see sanction as relevant to the intensity of state/EU intervention.<sup>68</sup> There is much debate in the literature (e.g., Bovens,<sup>69</sup> Harlow,<sup>70</sup> Rawlings, and Harlow<sup>71</sup>) about the effectiveness of sanction, the extent to which it can limit ownership of a policy through the externalization of obligation and responsibility (Rawlings and Harlow) and the fact that sanction tends to carry with it a legal connotation that fails to grasp the wider notion of "consequence." Such consequences may have little, in fact, to do with legal bindingness and a lot to do with exclusion, peer pressure and other less tangible, but sometimes effective consequences (Bovens).

Implementation and standards are closely linked to each other. The greater the flexibility allowed in implementation the less strong intervention there is by the state/polity. Thus, the EC directive, with the freedom it allows to states as to methods (while binding as to outcome), provides greater flexibility than the regulation (binding in its entirety). There is a huge scope for flexibility in enforcement (one dimension of implementation) of antitrust law as there is no harmonization of procedures or sanctions used by NCAs when giving effect to the EC rules. The extent to which material or procedural standards are chosen also reflects the intensity of state/EU intervention. For example, the use of safe harbor clauses in EC competition law

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*Views of Law and Politics*, 55 INT'L ORG. 743, 743-58 (2001); Dermot Hodson & Imelda Maher, *Soft Law and Sanctions: Economic Policy Coordination and Reform of the Stability and Growth Pact*, 11 J. EUR. PUB. POLICY 806, 806-21 (2004) (regarding sanctions). For an overview, see David M. Trubek, Patrick Cottrell & Mark Nance, "Soft Law," "Hard Law" and EU Integration, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, 65-94 (Gráinne de Búrca & Joanne Scott eds., 2006).

68. See Treib et al., *supra* note 53, at 8.

69. See Mark Bovens, *Analysing and Assessing Public Accountability: A Conceptual Framework* (European Governance Papers (EUROGOV) No. C-06-01, 2006), available at <http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf>; Imelda Maher, *Economic Governance: Hybridity, Accountability, and Control*, 13(3) COLUM. J. EUR. L. 679, 688-93.

70. See generally CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION (2002).

71. See Carol Harlow & Richard Rawlings, *Promoting Accountability in Multi-Level Governance: A Network Approach* (European Governance Papers (EUROGOV) No. C-06-01, 2006), available at <http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-02.pdf>; Imelda Maher, *Economic Governance: Hybridity, Accountability, and Control*, 13(3) COLUM. J. EUR. L. 679, 688-93.

removes public oversight below the threshold.<sup>72</sup> Where it is impractical to set substantive standards, procedural devices are used instead to achieve particular policy goals, for example, the use of transparency as a means of preventing cross-subsidization by firms that previously enjoyed state monopolies between their business in protected markets and competitive markets.<sup>73</sup> Treib, Bähr, and Falkner go on to provide a typology of modes of governance based on two axes: the extent to which hard or soft law is evident and the flexibility within implementation. Soft law is a hallmark of new governance, but has had a long history in competition law. Understanding what constitutes soft law is central to an analysis of governance methods in this sphere.

#### IV. *COMPETITION AND SOFT LAW*

A hallmark of EC antitrust enforcement from the earliest days has been the use of soft law instruments.<sup>74</sup> Their prevalence in this highly juridified field shows how “newness” per se limits governance analysis. What matters is both the fact that the adoption of soft law is more self-consciously done within the context of the political and academic debates on new governance and the intensity of soft law instruments, rather than their presence per se in a policy field. Trubek, Cottrell, and Nance compare and contrast constructivist and rationalist accounts of soft law before discussing the hybridity of law.<sup>75</sup> They note how rationalist accounts suggest that soft law is a way out for Member States unable for whatever reason to make certain decisions.<sup>76</sup> Soft law gets around an impasse that the detailed obligation and precision associated with hard law renders impossible. Constructivist accounts, on the other hand, see soft law as a tool for ultimately facilitating the difficult choices that are being deferred. They suggest the two perspectives can be integrated.<sup>77</sup> Thus, rationalist accounts may help explain why soft law became the pre-

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72. See, e.g., Commission Regulation No. 2790/99, art. 2(4), 3 O.J. L 336/21, at 23 (1999).

73. See, e.g., Council Directive No. 97/67/EC, O.J. L 15 (1998) (referring to postal services).

74. See Håkon A. Cosma & Richard Whish, *Soft Law in the Field of EU Competition Policy*, 14 EUR. BUS. L. REV. 125, 125-52 (2003).

75. See Trubek, Cottrell & Nance, *supra* note 67.

76. See generally *id.*

77. See *id.* at 91.

ferred option, while constructivist accounts, with their emphasis on “becoming,” are better at explaining how soft law works, in particular how it works through networks.

Hybridity—where hard and soft law are merged—may be a positive choice or the consequence of overlapping and complementary fields of action.<sup>78</sup> Given the complexity of EU governance that arises from the fragmentation of government and compounded by the issue of competence that becomes more complex due to the multi-level nature of governance and the varying strength of obligation and responsibility for the governmental actors in treaties, we should expect hybridity. Perhaps the question is not whether this is new, but how long it has been around.

De Búrca and Scott refine this notion of hybridity into three categories.<sup>79</sup> (1) Baseline—where new governance is largely complementary to traditional forms of law—the two modes operate in parallel but largely without much interaction (e.g., in relation to race where the action plans and the agency seem to operate more or less independently of the race discrimination directive).<sup>80</sup> (2) Instrumental hybridity—where new governance is a means for developing existing legal norms—a form of what Trubek and Trubek call “complementarity.”<sup>81</sup> Thus new governance methods are used to complement existing legal frameworks such that one form is used to launch the other or they can operate independently yet have an effect on the same policy domain. (3) Default hybridity—governance in the shadow of law—a legal regime will be triggered where coordination/compliance does not occur.<sup>82</sup> The boundaries between these categories are difficult to draw. Therefore, it is perhaps more useful to think of Trubek and Trubek’s discussion of hybridity where they point to tensions between the old and new and to rivalries between them where there is a choice as to which process to implement. Alternatively, one can take over the field and identify the largely speculative, but interesting idea of transformative rivalry for law and governance.<sup>83</sup> This arises where the rivalry between law and new governance leads to the transformation of one or both and

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78. See Trubek & Trubek, *supra* note 50, at 544.

79. See De Búrca & Scott, *supra* note 9, at 11.

80. See *id.* at 12.

81. See Trubek & Trubek, *supra* note 50, at 544.

82. See De Búrca & Scott, *supra* note 9, at 15.

83. See Trubek & Trubek, *supra* note 50, at 544.

hence to a hybrid. Finally, they suggest that where law and new forms operate together in a hybrid form, then this may lead to transformation in the law. The two processes can be integrated creating a new form of law. There are several possibilities discussed:<sup>84</sup> law creates new governance procedures; new governance solves problems with law providing a safety net; law creates minimum standards, and new governance processes can apply above that; or law provides general norms and these are concretized through new governance processes.<sup>85</sup>

What we see emerging in the competition sphere is an increasing hybridity in the law. Several modes of governance have been introduced: a decentering of authority; the use of a network and peer esteem, a high level of flexibility in implementation due to a lack of uniformity in procedures and sanctions at the national level, and a growing emphasis on private actors through the use of whistle-blowers, and encouragement of private enforcement. At the same time, a Regulation remains at the heart of the procedures, there is a large body of case law, a received orthodoxy as to the importance of economic analysis—competition law being perhaps unique in the legal domain in that it cannot even be defined without reference to a discourse beyond itself, and an important episteme of lawyers that ensures competition law remains proceduralized, even as the emphasis on outputs and goals increase for competition agencies.

## V. NETWORKS

In her seminal work, Anne-Marie Slaughter discusses the emergence of network governance at the supra and international levels.<sup>86</sup> She notes the definition that Keohane and Nye provide for transgovernmental activity as “sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the executives of those governments”<sup>87</sup> and how, through governmental networks, officials seek to ensure that those in charge of the implementation of the law apply it in a similar manner.<sup>88</sup> Thus networks

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84. *See id.* at 548.

85. *See id.* at 548-49.

86. *See generally* ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

87. Robert Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 *WORLD POLITICS* 39, 43 (1974); *see also* SLAUGHTER, *supra* note 86, at 10.

88. *See* SLAUGHTER, *supra* note 86, at 10.

address the needs of consistency and fairness in enforcement, both being a hallmark of even the narrowest conception of the rule of law. While networks have been a feature of governance for more than 100 years, Slaughter argues that the scope, range and intensity of governmental networks have expanded and that this expansion is what is new.<sup>89</sup> The ECN is part of this expansion in two ways: first, in that it exists as yet another transgovernmental network and second, that it is at the high end of intensity given the strong legal base it has and the ability of members to share confidential information. The ECN is best characterized as an enforcement network which necessarily has an information exchange function and a lesser harmonization function.<sup>90</sup> It also has strong vertical and horizontal dimensions, reflecting its locus within a multi-level governance polity. Thus, it is horizontal in that its members come from all the Member States and all enjoy enforcement powers under Articles 81 and 82. It is also vertical as the Commission is a member and as a vertical network it “pierces the shell of state sovereignty by making individual government institutions responsible for the implementation”<sup>91</sup> of the supranational EC rules. Slaughter suggests that vertical networks have much greater coercive power than horizontal networks and can become a power base, both for the supranational institution (in this case the Commission) and the national members who can use their membership in the network to advance particular agendas domestically. This dual powerbase highlights another feature of such vertical networks: that given its locus within multi-level governance it should not be seen as the creature of the supranational authority. Hence, the Commission can be seen as being the first among equals.<sup>92</sup> Slaughter draws an analogy with the relationship between the European and national courts where the ECJ has been subject to what at times has been considerable counter-pressure from national supreme

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89. *See id.* at 44.

90. For a discussion of the different kinds of networks, *see id.* at 131-65. See also the discussion of the ECN in relation to Slaughter's work in Stephen Wilks, *Agencies, Networks, Discourses and the Trajectory of the European Competition Enforcement* 3(2) EUR. COMP. J. 437, 439 (2007).

91. *Id.* at 132.

92. *See*, Imelda Maher, *The Rule of Law and Agency: The Case of Competition Policy* 12 (International Economics Programme, Working Paper No. 06/01, 2006); *see also* Wilks, *supra* note 22, at 445.

courts in its interpretation of the scope of EC law.<sup>93</sup> In short, vertical governmental networks exercise a mixture of hard and soft power.<sup>94</sup>

Information and access to information is an important dimension to the regulation of behavior. Slaughter identified information sharing as an important form of soft power,<sup>95</sup> but it is hybrid in nature within the ECN because of the express statutory power to share confidential information.<sup>96</sup> This to some extent sets the ECN apart from many other networks without the power to share such information.<sup>97</sup> Sharing of information can lead to policy and implementation convergence—the latter being the rationale for the ECN—though it may also lead to informed divergence.<sup>98</sup> It can encourage compliance by members who do not want their reputation tarnished by being seen as a weak member of the group—the socialization of the group being important. Sharing of information can encourage cooperation which, for EC antitrust enforcement, is essential on the vertical level (and is written into Regulation 1),<sup>99</sup> but also on the horizontal level, for which there is no statutory basis other than the general obligation of close cooperation of all the NCAs.<sup>100</sup> There is no statutory basis for NCA-to-NCA cooperation. Instead all obligations are to the Commission and all rights can be claimed from the Commission—the horizontal dynamic not being something on which the EC legislated. Thus this is an issue where community, as a mode of governance, is most important. Information sharing creates a sense of shared objectives which in the context of the ECN is supported by the episteme of competi-

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93. See SLAUGHTER, *supra* note 86, at 151; see also KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 182-208 (2001) (discussing the relationship of the European and national courts).

94. See SLAUGHTER, *supra* note 86, at 168.

95. See *id.* at 169.

96. See Council Regulation No. 1/03, recitals 16, 32, O.J. L 1, at 4, 6 (2002).

97. See, e.g., Imelda Maher, *Competition Law in the International Domain: Networks as a New Form of Governance*, 29 J.L. Soc'y 1, 117 (2002); see also Oliver Budzinski, *Prospects and Limits on the Road Towards International Competition Governance* 5, 11, 14 (International Competition Policy—Towards a Decentralised System of International Merger Control, Draft, 2004); The International Competition Network <http://www.internationalcompetitionnetwork.org> (last visited Apr. 2, 2008).

98. See SLAUGHTER, *supra* note 86, at 171.

99. See Council Regulation No. 1/03, art. 11, O.J. L 1, at 10-11 (2002) (imposing a requirement on NCAs to share information with the Commission).

100. See *id.*

tion lawyers and officials—a close network that transcends national borders with a shared vision of how competition law is to be used to advance consumer welfare.<sup>101</sup> The fact that the members all enforce the same rules and are part of the EU of course emphasizes this sense of shared objectives and may help to develop a sense of common interest within the network. Where there is a sense of shared identity, then the network can also provide moral support to an NCA facing challenges domestically. Given the importance of regulation, the exchange of information within the network will enhance the status of the members who enjoy improved information flows.

There are no criteria set down in Regulation 1 for NCAs. The test is purely a formal one: has the national government designated an agency (or, in the Irish case, the courts) as an NCA?<sup>102</sup> Because of the alignment of EC and national competition regimes, both substantively and institutionally, NCAs were largely already independent of their governments (arguably the single most important criteria for an executive agency). And where there are discrepancies as to the nature of the independence, this is not something that can easily be resolved through formal, statutory criteria, independence being a multi-faceted phenomenon.<sup>103</sup> In addition, the ECN itself will act as a regulator of its members. Slaughter notes that once established, a network not only exchanges information about their decision-making and policies, but also information about the effectiveness and status of the members themselves is necessarily conveyed. Thus, reputation is shaped by and becomes relevant within the network—even if members did not consider reputation as a factor beforehand.<sup>104</sup> Dehousse underlines the fact that networks develop a community of views only when they are structured by common rules.<sup>105</sup> This structure manages interaction and shapes expectations internally and externally and also enhances

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101. See Frans van Waarden & Michaela Drahos, *Courts and (Epistemic) Communities in the Convergence of Competition Politics*, 9 J. EUR. PUB. POL'Y 6, 913-34 (2002).

102. See Council Regulation No. 1/03, recital 35, art. 35, O.J. L 1, at 6-7, 21-22 (2002).

103. See Stephen Wilks & Ian Bartle, *The Unanticipated Consequences of Creating Independent Competition Agencies*, 25 W. EUR. POLITICS 148, 148-72 (2002); see generally Maher, *supra* note 25.

104. See SLAUGHTER, *supra* note 86, at 54.

105. Renaud Dehousse, *Regulation by Networks in the European Community: The Role of European Agencies*, 4 J. EUR. PUB. POL'Y 246, 254 (1997).

the status of the network and its members.<sup>106</sup>

A network like that of the ECN, concerned with enforcement of shared rules, tends to be deeply pragmatic.<sup>107</sup> This makes for efficiency in decision-making, but as can be seen from the application of a principal-agency analysis,<sup>108</sup> the delegation of executive power raises issues of transparency and accountability.<sup>109</sup> Arguably the network, when applying EC law, is dealing mainly with large corporations capable of ensuring their rights are well-protected, i.e., power needs to be factored into a more abstract analysis of rule of law procedural requirements. Accountability, however, goes beyond those subject to the rules. As executive agencies carrying out power delegated to them by governments (either at the national or supra-national level), they are also accountable to those governments. Accountability is usually assessed through outcomes at the EU level. This is only one measure and indeed one of the weaknesses of the EU model is an over-reliance on outcomes as a legitimating mechanism.<sup>110</sup> Slaughter suggests that national officials have to be seen as having a dual function,<sup>111</sup> both a domestic and transnational function—and must be accountable domestically for both functions. In the EU context this carries extra weight given its supra-national quality, but it is not clear to what extent national reporting mechanisms ensure accountability for international and European responsibilities, leaving a vacuum.<sup>112</sup>

## VI. GOVERNANCE OF COMPETITION

Regulation 1 is a landmark piece of legislation because it

106. Prior to the ECN there was the Association of European Authorities, which was an informal network. See A. Vindelyn Smith-Hillman, *EC Approach to Governance as Applied to the Modernisation of Competition Policy*, 18 *EUR. BUS. REV.* 33-49 (2006).

107. See SLAUGHTER, *supra* note 86, at 193; Wilks, *supra* note 90, at 450.

108. See Dirk Lehmkuhl, *On Government, Governance and Judicial Review: The Case of European Competition Policy* 28 *J. PUB. POL'Y* 139-59 (2008); see generally Maher, *supra* note 97.

109. See SLAUGHTER, *supra* note 86, at 219.

110. See Mark Thatcher and Alex Stone-Sweet, *The Theory and Practice of Delegation to Non-Majoritarian Institutions*, 25 *W. EUR. POLITICS* 1, 1-22 (2002); Elizabeth C. Fisher, *The European Union in the Age of Accountability*, 24 *OXFORD J.L. STUDIES* 495, 495-515 (2004).

111. See SLAUGHTER, *supra* note 86, at 231.

112. For example, the 2007 report of the Irish Competition Authority simply notes that it was active in three of the four of the ECN Working groups and sectoral sub-groups. See Competition Authority, Annual Report 55 (2007) available at <http://www.tca.ie/NewsPublications/AnnualReports/AnnualReports.aspx>.



gives effect to a shift from a highly centralized system of notification and exemption to a system of decentralized enforcement coordinated through networks of national officials and DGComp, with an emphasis on self-assessment, and hence self-regulation by firms. Thus, we see a move from centralized and highly-interventionist steering to decentered, fragmented, networked governance where NCAs and national courts have the power to directly implement all of Articles 81 and 82.<sup>113</sup> The NCAs also have a legal duty to coordinate.<sup>114</sup> A neat solution would have been a clear divide between national and EU competition rules—something Rodgers and Wylie advocated,<sup>115</sup> but one which proved impossible to agree upon, thus the soft law fudge of the network—a form necessitated by political impossibility, but also by functional need. The Commission could not secure additional resources, the EC was expanding and a network could secure the development of a cadre of officials acculturated (to a greater or lesser extent) to the values of EC competition law for which they would then become advocates in the Member States. Thus, the network can also be seen as a forum which can lead to effective enforcement and clearer rule articulation, not just in relation to jurisdiction, but also in relation to substantive and procedural matters with the soft nature of this forum leading into rule-creation over time, providing clear complementarity.

Regulation 1 says very little about the network, leaving the guidelines published<sup>116</sup> with it to complement the formal rules, and this in turn was complemented by a supporting joint statement from the Council and Commission, as to the states' commitment to the smooth running of the network.<sup>117</sup> Political ownership of the regime becomes more important where the values and operations of the process lie largely outside formal rules,

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113. See generally Wilks, *supra* note 22 (providing a skeptical view of decentralization under Regulation 1).

114. See Council Regulation No. 1/03, art. 11(1), O.J. L 1, at 10 (2002).

115. See generally Barry J. Rodger & Stuart R. Wylie, *Taking the Community Interest Line: Decentralisation and Subsidiarity in Competition Law Enforcement*, 18 EUR. COMP. L. REV. 485 (1997).

116. See generally Commission Notice, O.J. C 101/43 (2004).

117. See European Council and EC Commission, Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities (Dec. 10, 2002), <http://register.consilium.eu.int/pdf/en/02/st15/15435-a1en2.pdf> (last visited Apr. 2, 2008).

with less precise obligations and no apparent sanction. In more functional terms, political commitment was sought in order to overcome the perceived shortcomings of the architecture in relation to consistency, stability and clarity. The ECN is created under Regulation 1, Recital 15 and Chapter IV. The NCAs and Commission:

- Inform each other of cases
- Share information (subject to certain limitations)
- Help with investigations
- Coordinate investigations
- Discuss areas of common interest.<sup>118</sup>

An annual meeting of heads of the NCAs and DGComp is held and there are regular plenaries where matters of policy are discussed. Working groups are where best practice is exchanged.<sup>119</sup> Groups include, e.g., the chief economists, leniency, A82, transition to Regulation 1; procedural variety; and information and communication within the ECN. A report on each of these is included in the DGComp Annual Report—and practices vary as between the groups, with some relying mainly on their intranet and others having more regular meetings (although it is not clear what “a high level of activity” translates to). There are then thirteen sectoral subgroups, e.g., professional services, telecoms, energy, pharmacy, etc. All of these groups operate in English.

NCAs must inform the Commission of when they decide to take on a case (the Commission can intervene to take over a case)<sup>120</sup> and before they make a formal decision.<sup>121</sup> In practice, the Commission is often approached informally before the legal requirement to inform is triggered.<sup>122</sup> While a network is in place, it is very much one where the Commission is at the hub—

118. The ECN was created under Regulation 1, Articles 11, 12, and 13. *See* Commission Notice, O.J. C 101/43, 44 (2004).

119. *See* COMPETITION AUTHORITY, *supra* note 112, at 55; *see also* COMMISSION OF THE EUROPEAN COMMUNITIES, ANNUAL REPORT ON COMPETITION POLICY, at 32 (2006) [hereinafter 2006 REPORT].

120. *See* Council Regulation No. 1/03, art. 11(6), O.J. L 1, at 11 (2002).

121. *See id.* art. 11(3), 11(4), O.J. L 1, at 10 (2002).

122. In its 2006 report, the Commission mentions formal and informal approaches for advice. *See* 2006 REPORT, *supra* note 119, at 32-33. In its 2005 report the Commission stated that such informal advice constitutes internal correspondence and is confidential. *See* Commission of the European Communities, ANNUAL REPORT ON COMPETITION POLICY 73 (2005) [hereinafter 2005 REPORT].

as agenda-setter and with the capacity ultimately to remove a case from an authority if it so decides, provided the authority is consulted.<sup>123</sup> The Commission's decisions also bind all the national authorities and cover the entire EU. The Commission, in its 2005 Annual Report, gave guidance as to when it is likely to take up a case—prefacing these criteria by encouraging citizens to use alternative strategies, notably to approach its own NCA or to go to court—with the Commission and NCAs seeking to encourage private actions to supplement public enforcement.<sup>124</sup> The Commission is most likely to act where the matter is likely to have an effect on the internal market and is particularly complex. The rule of thumb is that if three or more Member States are affected, the Commission may act.<sup>125</sup>

In theory, each and every NCA can deal with any conduct falling within Articles 81 and 82 provided it affects trade between Member States, although the objective is that only one authority will deal with any case.<sup>126</sup> This authority will usually be the first seized of the case, but following consultation the case can be reallocated with an emphasis on a timely transfer.<sup>127</sup> They can refuse to deal with an agreement/conduct already subject to investigation or decision by another authority, but they are not obliged to do so. Their decisions do not bind each other, but the Regulation stipulates that their relationship is one of mandatory close cooperation that arguably imposes a duty on them to address whatever difficulties this incomplete legal architecture may create.<sup>128</sup> The scope of powers and autonomy of the national authorities is not stipulated and that variety itself creates the potential for considerable divergence with procedural variation and different sanctions leading to differences in predictability, consistency and stability.<sup>129</sup> Since the Network com-

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123. See Council Regulation No. 1/03, recital 17, art. 11(6), O.J. L 1, at 4, 11 (2002).

124. See 2005 REPORT, *supra* note 122, at 25.

125. See Commission Notice, *supra* note 116, recital 14, O.J. C 101/43, at 44 (2004).

126. See Council Regulation No. 1/03, recital 18, O.J. L 1, at 4 (2002); see also Silke Brammer, *Concurrent Jurisdiction Under Regulation 1/2003 and the Issue of Case Allocation*, 42 COMMON MKT. L. REV. 1383, 1385 (2005).

127. See Commission Notice, recitals 6, 7, O.J. C 101/43, at 43 (2004). Three cumulative conditions under which an NCA is deemed well placed to deal with a matter are set out in paragraph 8 of the Notice. See *id.* recital 8, O.J. C 101/43, at 44.

128. See Council Regulation No. 1/03, art. 11, O.J. L 1, at 10-11 (2002).

129. See Margaret Bloom, *Exchange of Confidential Information Among Members of the*

menced operation up to the end of June 2008, the ECN has been notified of 886 investigations (of which 159 were Commission notifications) and of 270 envisaged decisions.<sup>130</sup> Work sharing was discussed in the 2005 report. The Commission noted that it arose in two scenarios: cartel investigation (flat glass) (the Commission organized the inspections because of the number of states involved) and leniency. The second scenario relates to complaints submitted to more than one authority or to the Commission. The issue of overlap is relatively rare.<sup>131</sup> Thus far there hasn't been any serious challenge to its functioning. Should a serious issue arise, there are no mechanisms in the Notice or the Regulation to deal with them,<sup>132</sup> although the Commission is well placed to act as broker.

The ECN is seen as a success.<sup>133</sup> Thus far there hasn't been any serious challenge to its functioning. Its operation has been characterized by a "can-do" attitude.<sup>134</sup> In fact, the Commission in its 2005 Annual report casts the ECN as the primary vehicle for ensuring the consistent and coherent application of EC competition law and yet, it does so without binding rules on case allocation, and no rules on the responsibilities of NCAs (other than that of mandatory close cooperation). It acknowledges the risk to consistency identified by the OECD<sup>135</sup> and sees the Network as the answer.

What has happened in EC antitrust law is a fragmentation of enforcement that may well lead to greater coherence as NCAs can now enforce EC law rather than only having to apply their own competition rules which, while mainly based on EC norms,

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*EU Network of Competition Authorities: Possible Consequences of a Relatively Broad Scope for Exchange of Confidential Information on National Procedural Law and Antitrust*, in *EUROPEAN COMPETITION LAW ANNUAL 2002*, *supra* note 25, at 389-404; Maher, *supra* note 29, at 223-36; Alan Riley, *EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part 2: Between the Idea and the Reality: Decentralisation Under Regulation 1*, 24 *EUR. COMP. L. REV.* 657-72 (2003).

130. See EC Commission Website, Statistics, <http://ec.europa.eu/comm/competition/ecn/statistics.html> (last visited Jul. 28, 2008).

131. See 2005 REPORT, *supra* note 122, at 72; see generally The Antitrust Source, *The European Competition Network: What It Is and Where It's Going*, available at <http://www.abanet.org/antitrust/at-source/05/07/Jul05-ECNBrBag7=28f.pdf>.

132. See Brammer, *supra* note 126, at 1402.

133. For a list of six risks to decentralization see Wilks, *supra* note 22, at 446. See also Wilks, *supra* note 90, at 440-42.

134. See THE ANTITRUST SOURCE, *supra* note 131, at 6 (statement of Ray Leonard).

135. See 2005 REPORT, *supra* note 122, at 72.

nonetheless carry local differences. Thus, EC competition law seems to be going against the trend of increasing differentiation towards more generalized norms. We can cast the competition law experience as an example of a transformative rivalry where a system characterized by traditional law forms and centralized governance is supplemented with one that is institutionally nested within formal legal norms but operates largely without them, that is expressly designed to develop a culture of ownership of the rules, and advocates development of best practice in general and facilitates confidential information exchanges to a degree not previously possible.<sup>136</sup> Through the network, further legal reform and rule formation is discussed, supplementing other channels. This is a form of instrumental hybridity where soft law develops existing legal norms. Arguably it is precisely because the competition sphere was so highly juridified that it is possible to delegate. Not only does the network lead to policy change at the EU level, but may provide the impetus for change at the national level. This has two dimensions: first it is arguable that the network would not have been possible if Member States had not largely spontaneously started to adopt the EC model of competition law in the 1990s. It is perhaps a rare example of legal transplant from the EU to its Member States without any legal obligation (other than the negative obligation to do nothing to interfere with the EC rules and their effectiveness). Convergence continues—thanks in part to the effect of the Network. This can be seen in relation to leniency programs of which there were three national programs in 2000 and now there are twenty-five such programs,<sup>137</sup> with a commitment by all the Heads of NCAs to use their best efforts to align their programs (existing or future) with the model adopted in September 2006.<sup>138</sup>

### CONCLUSION

The governance debates surrounding Lisbon may shed

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136. See generally Daniel Reichelt, *To What Extent Does the Co-operation Within the European Competition Network Protect the Rights of Undertakings?*, 42 COMMON MKT. L. REV. 745 (2005).

137. See Authorities in EU Member States Which Operate a Leniency Programme, [http://ec.europa.eu/comm/competition/ecn/leniency\\_programme\\_nca.pdf](http://ec.europa.eu/comm/competition/ecn/leniency_programme_nca.pdf) (last visited Apr. 2, 2008).

138. See ECN Model Leniency Programme, [http://ec.europa.eu/comm/competition/ecn/model\\_leniency\\_en.pdf](http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf) (last visited Apr. 2, 2008).

some light on our understanding of what has happened in the competition sphere and the softening of competition law sheds further light on the interaction of hard and soft law. Soft law went from being purely complementary to the core of the business of competition law enforcement. This can be seen as the “old” governance having reached its limits and traditional governance methods not having the tools to facilitate the brave new world of modernization. The primary value remains consistency and coherence of the law and yet, the traditional method of securing it—clear, concise rules—has been eschewed in favor of a dynamic model without many such rules, but instead a working method based on cooperation and mutual learning and respect. The closed nature of the network means its members are small in number, it is secret, elite and they share a common commitment to the competition regimes. The network acts as a buffer even against perhaps a more hostile environment at home. Its technocratic and limited focus also sets it apart from the much broader policy canvas found in other policy contexts. Finally, the Commission remains in the driver’s seat. The absence of rules as to how to resolve conflicts leaves it as broker. There is a hierarchy written into the rules in its favor. The legal nature of the work of the network also removes it from the hustle and bustle of “real” politics, leaving bigger disputes to be resolved in a political context where the duty to coordinate is perhaps less binding.

The network model of fragmented decentered governance is a form of transformative rivalry where the relationship between hard law and soft law is transforming our understanding of hard law—giving it an instrumental edge—that means that soft law is not seen as a threat to values seen as underpinning law, but instead as advancing them albeit by different means.