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Review of the Balance of Competences
Call for Evidence

1. Page 18 of the Government Review of the balance of competences between the UK and the EU in relation to competition law lists several questions. This paper focuses on two questions, particularly Question 11(b) and Question 12:

   11. How could action in these areas be undertaken differently, e.g.
       a. Are there ways of improving EU legislation in these areas, e.g. revision of the existing legislation, better ways of developing future proposals, or greater adherence to the principle of subsidiarity and proportionality?
       b. Are there ways the EU could use its existing competence in these areas differently which could deliver more in the national interest?
   12. What future challenge/ opportunities might we face in these areas of competence and what impact might these have on the national interest?

2. In order to discuss these issues one needs to take a step back from the competition rules themselves and think about the EU Treaties as a whole, the distribution of competences between the EU and the Member States more generally. Only by placing them in this wider context can one begin to make precise recommendations for how to interpret the competition rules.

3. Most think that the EU competition rules should be applied uniformly. By placing these rules in a wider EU context, this paper argues that the national competition authorities (NCAs) should be able to diverge in their application of Article 101 (anti-competitive agreements) and Article 102 (abuse of dominance). This better respects the EU legal order's substantive and procedural diversity. It also helps learning when there is disagreement on how best to achieve the relevant goals. There are limits, however. The first boundary is set by the EU Courts' case law. Within the limits that they impose, there are still many grey areas. Within these shadows, I suggest co-ordinating diversity in networks so that the NCAs and the Commission can share policy solutions and ideas.

4. So, this submission, which argues for Co-ordinated Diversity in EU competition law, is organised as follows:

   A. A Sense of Problem (or two reasons why diversity in the application of EU competition law is valuable)
   B. The Advantages and Disadvantages of More Diversity in the Application of EU Competition Law
   C. Diversity in EU Free Movement of Goods (a comparison)
   D. How the Current EU Competition System Allows Diversity
   E. The Limits to Diversity in the EU Competition Rules (co-ordination)
   F. Two Jurisdictions that Embrace Diversity
   G. Conclusion

5. My argument largely focuses on Article 101 TFEU, in order to save time and space. However, the implications apply to Article 102 TFEU too.

6. I believe that the changes that I suggest can be made without any legislative changes at the EU level.

7. This submission is based upon a book that I am currently writing on the distribution of competences between the EU and the Member States; and an article that I have recently finished. Please refer to the latter publication for more detailed references to the literature.[1] My particular focus is competition law. I am very happy to discuss these issues with you in more detail.

8. I am happy for you to publish my name, affiliation and this response after 1 January 2014, but not before.

9. Finally, we are being put under increasing pressure in UK universities to demonstrate that our research has real world impact. If anyone that finds these arguments useful and bases later work upon them, albeit academic, or policy or government-related; please cite this source.

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A. A Sense of Problem (or two reasons why diversity in the application of EU competition law is valuable)

Two kinds of disagreements that are important here: disagreements on aims and disagreements on methods. I treat them separately, although they overlap to some degree.

There are several varieties of capitalism, and competition law's goals (for example consumer welfare or Ordoliberalism) are affected by the one that we select. Many aims have been suggested for Article 101. Even within the consumer welfare standard (the most commonly accepted standard today), disagreement exists about whether to focus on short or long-term gains. In addition, public policy goals are important in EU law. Recent EU Court judgments confirm their relevance in Article 101; think of values such as: market integration, public health, environmental protection, administration of justice, culture, etc.[2]

Let's take these two points in turn. Many assume that there is only one 'correct' result in Article 101. Uniformity is important, but diversity has benefits too. Assume that, the NMa (Dutch NCA) considers the administration of justice to be more important in the Article 101 balance than the OFT (UK NCA). This might be because the Dutch value administration of justice more highly; or, because the British do not believe in public policy balancing in Article 101. Imagine two legally identical cases in those two countries, with different parties, both agreements appreciably restrict competition under Article 101, but there are considerable benefits for the administration of justice. The NMa might 'allow' the agreement;[3] but the OFT might prohibit in a legally identical case. The relevant actors might form different conclusions, *when applying Article 101*, because of different value judgments.

This is not just a theoretical problem. In line with EU Court judgments, the NMa's *Annual Report 2009* explains that it considers public policy goals in Article 101.[4] On the other hand, in 2010 the OFT had a roundtable to discuss Article 101's goals implying that it would not.[5] In 2012 the UK government proposed changes to the UK competition regime, including giving a new competition authority a single primary duty, even when applying Article 101, to

[1] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298588

[2] Case C-136/12 *Consiglio nazionale dei geologi v Autorità garante della concorrenza e del mercato*, 18 July 2013, not yet reported, paras 52-7; Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, nyr, 28 February 2013; Case C-519/04 P *Meca Medina v Commission* [2006] ECR I-6991, para 45; and Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209, para 102.

[3] Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska*, 3 May 2011, not yet reported, paras 19-30, does not allow NCAs to find no breach of Article 101 and 102, although they can decide not to enforce it. The position is different for the Member States' courts.

[4] NMa, *Annual Report: Weighing Interests* (2009), 9. The NMa (now the ACM) have currently released draft guidelines on this topic too, ACM, *Acm Position Paper: Competition and Sustainability* (2013).

[5] OFT, *Article 101(3) - a Discussion of Narrow Versus Broad Definition of Benefits: Discussion Note for an Oft Breakfast Roundtable on 12 May 2010* (2010).

'...promote effective competition in markets...for the benefits of consumers.'[6] This mirrors recent Commission policy statements.[7]

Even if there were agreement on Article 101's aims, allowing difference may also be beneficial where there are ***disagreements on methods***. Assume that Article 101's sole goal[8] is consumer welfare, however defined. There is considerable disagreement about how to achieve this. How much competition is optimal to encourage innovation and (ultimately) consumer welfare? To some extent, firms with market power have less incentive to innovate than firms that face more competition. In a competitive market, firms have an incentive to invest in technological development. Successful firms can reduce their prices/ improve quality, forcing less efficient rivals to exit. This is not a linear relationship, however. Firms' incentives to innovate are not only determined by the existence of competition. They also consider their own ability to appropriate the results of their investment. Strong competition reduces the chances of this and thus the incentive to innovate.

So, an intermediate level of competition is often optimal for encouraging innovation and, ultimately, consumer welfare. Yet, Motta says that it is hard '...to use this result for practical policy purposes, for instance to choose the 'right' level of competition.'[9] Economists disagree about how much competition is best for innovation. This is of great practical significance in Article 101.[10] An NMa study asked NCAs, and others, about the emphasis that they place on innovation in their consumer welfare analysis. There was no consensus about where the appropriate balance lies either.[11] Uniformity advocates assume that one body can solve problems alone, or by talking to others. However, the cost of exploring all solutions can be too great; especially if there is a lot of complexity.

B. The Advantages and Disadvantages of More Diversity in the Application of EU Competition Law

By way of example, Article 101(1) prohibits arrangements between undertakings which may affect trade between Member States and which restrict competition within the internal market. Arrangements that breach this provision can be saved by Article 101(3); which has four cumulative conditions. In brief the arrangement must: improve the production or distribution of goods or promote technical or economic progress; and allow consumers a fair share of the resulting benefit. The arrangement must not: impose restrictions which are not indispensable to the attainment of these objectives; and eliminate competition in respect of a substantial part of the products in question.

[6] http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response.pdf, para 10.7. The Enterprise and Regulatory Reform Act 2013, section 25(3), dilutes this somewhat.

[7] Commission, *Guidelines on the Application of Article 81(3) of the Treaty* (2004), para 13. The Commission cannot contradict the EU Courts.

[8] I do not accept this assumption, see Christopher Townley, *Article 81 Ec and Public Policy* (Hart 2009). However, I say this here to simplify the discussion about disagreement on methods.

[9] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004), 57.

[10] Alexander Italianer, 'Défis De La Politique De La Concurrence' (Cercle des Européens) discusses some cases where the impact upon innovation was important.

[11] NMa, *Competition Enforcement and Consumer Welfare: setting the agenda*, (2011), 11-4 and 25-31, available at http://www.icn-thehague.org/page.php?id=78

Under Regulation 17, the Commission, the NCAs and Member States' courts (the relevant actors) all implemented Article 101(1). Only the Commission applied Article 101(3). Council Regulation 1/2003 now allows all of the relevant actors to apply all of Article 101.[12]

Legal provisions cannot be applied perfectly uniformly. The real question is how much difference is desirable in the EU. As all the relevant actors applied Articles 101(1) and 102; uniformity was not present. Yet, many feared that, with the 2004 loss of the Commission's Article 101(3) monopoly, the '...uniform application of EC competition law would be unwound through the independent actions of the various actors.'[13] Obviously, in times of (legal) doubt the national courts can make an Article 267 reference to the ECJ. This avenue is not open to the NCAs. So, received wisdom states that the NCAs should mimic the Commission's application of Article 101. Some argue that Council Regulation 1/2003 takes consistency in Article 101 '...very seriously...'[14] Similarly, the Commission wants a '...consistent application of the rules, and the preservation of the unity of competition policy...'[15]

A uniform application of Article 101 has many benefits. Kokott argues that it ensures some parity of purchasing and selling conditions. 'Not only the fundamental objective of equal conditions of competition for undertakings on the single market but also the concern for uniform protection of consumer interests in the entire Community...'[16] de Visser believes that undertakings have the right to have similar situations treated in the same way throughout the EU.[17] In any event, when firms play on a level playing field, it helps to encourage competition on the merits between them.[18]

However, it is unclear whether a right to equality goes as far as de Visser suggests. Nor must one over-state the value of the level playing field in the EU legal order. The EU Treaties allow the Member States to create different conditions of competition at home.[19] Similarly, while consumer interests may have a minimal level of protection throughout the EU, there are often differences in the actual level of protection, some Member States provide significantly more protection than this agreed minimum.[20] If consumers purchase EU-wide, they will push competition between systems.

[12] Respectively, Council Regulation, *First Regulation Implementing Articles 85 and 86 of the Treaty*, OJ 1959-62, p. 87; and Council Regulation, *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ 2003 L1/1.

[13] Maartje de Visser, *Network-Based Governance in Ec Law* (Hart 2009), xx-xxi. See also, Jonathan Faull and Ali Nikpay (eds), *The Ec Law of Competition* (Second edn, OUP 2007), para 2.05; and Commission, *Commission Explanatory Memorandum, Proposal for a Council Regulation Implementing Articles 81 and 82 of the Treaty* (2000), 6.

[14] Jonathan Faull and Ali Nikpay (eds), *The Ec Law of Competition* (Second edn, OUP 2007), paras 2.203-4.

[15] Commission, *European Commission White Paper, on Modernization of the Rules Implementing Articles 85 and 86 of the Ec Treaty* (1999), para 104.

[16] Opinion of Advocate General Kokott, Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529, para 85. See also, Opinion of Advocate-General Mazák, Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. zoo, now Netia SA w Warszawie*, 3 May 2011, not yet reported, paras 43-4.

[17] Maartje de Visser, *Network-Based Governance in Ec Law* (Hart 2009), 153-4.

[18] Recital 8, Regulation 1/2003, see also article 3(2), it does not defend perfect uniformity. See also, Michael Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart 2004), 86-91.

[19] For example, article 3(3) of Regulation 1/2003; and Articles 34 and 36 TFEU.

[20] Case C-484/08, *Caja de Ahorros de Piedad de Madrid v Ausbanc*, [2010] ECR I-4785, paras 27-44, interpreting Directive 93/13, *on unfair terms in consumer contracts*, OJ 1993 L95/29.

International trade is affected where there is a risk of conflicting decisions, even if both answers are equally legitimate. This is particularly so if behaviour is mandatory in one territory and prohibited elsewhere. Where behaviour is *possible* in one territory, but not in another, then international trade, even if feasible, becomes more expensive. Firms have costs, for example, in understanding what the different rules are. Costs arise as soon as difference is possible. This affects our desire for uniform public policy valuations in EU rules and identical appropriate mechanisms.

However, facilitating international trade, even within the EU, is not the only value in our system. Where different applications of Article 101 would arise due to different valuations of another relevant value, then increased transaction costs probably arise out of this difference, whether or not it is tolerated within Article 101. Imagine that one Member State values benefits to future consumers in Article 101, while another thinks that they should be considered, but uses other laws instead. Firms must comply with other laws protecting such values, as well as competition law. If these different valuations of e.g. future consumers' benefits, must be achieved through other laws, transaction costs, lawyer's fees, and complying with all the different laws, etc. might not change.

Moreover, increased transaction costs may be *tolerated* if the benefits derived from diversity are sufficiently important, or at least if the cost of uniformity is more than the benefits of preventing diversity. Even though competition is an exclusive EU competence and internal market is a shared one,[21] given differing fields of competence for public policy goals, neither the EU nor the Member States are always able to address these clashes (e.g. competition (EU) v culture (MS)) in their entirety alone. Good solutions must accept both interests.[22] Where diversity is unavailable, the relevant actors can: accept the uniform rule; refuse to co-operate; or 'cheat' to achieve their ends.[23] As the competition rules' wide remit, grudging acceptance is hard to tolerate. So far, Member States still apply Article 101, but there are signs of 'cheating', sometimes encouraged by the EU Courts; for example, narrowly defining an appreciable affect on trade between Member States.[24] If no space is left for genuine difference, decision-makers may seek to achieve unstated aims, secretly. This contributes to legal uncertainty; which, in turn, frustrates our ability to learn and debate which rules are best.

In regulatory theory, Majone suggests that one can have economic integration without political integration. Even though competition law has distributive consequences, he believes that delegation to an independent institution is democratically justifiable in order to achieve credible policy commitments. In the US, Majone says that they found that politics

[21] Articles 3 and 4 TFEU; there are also difficulties defining the limits of the internal market, Paul Craig and Gráinne de Búrca, *Eu Law: Text, Cases and Materials* (Fifth edn, OUP 2011), 78-9.
[22] Christian Joerges, "Deliberative Political Processes' Revisited: What Have We Learnt About the Legitimacy of Supranational Decision-Making' 44 Journal of Common Market Studies, 794-5.
[23] Firat Cengiz, 'Management of Networks between the Competition Authorities in the Ec and the Us: Different Polities, Different Designs' European Competition Journal, 418; Eric Philippart and Monika Sie-Dhian-Ho, 'Flexibility and Models of Governance for the Eu' in Gráinne De Búrca and Joanne Scott (eds), *Constitutional Change in the Eu: From Uniformity to Flexibility?* (Hart 2000), 303; Neil Walker, 'Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the Eu: From Uniformity to Flexibility?* (Hart 2000), 28; and Stephen Weatherill, 'Finding Space for Closer Co-Operation in the Field of Culture' in Gráinne De Búrca and Joanne Scott (eds), *Constitutional Change in the Eu: From Uniformity to Flexibility?* (Hart 2000), 254-5.
[24] Case 229/83 *Association des Centres distributeurs Édouard Leclerc v Sàrl 'Au blé vert'* [1985] ECR 1, para 20. The Commission does this too, Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), xxx; as do some Member States, for example, Wouter Wils, 'Ten Years of Regulation 1/2003 - a Retrospective' SSRN.

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and technical issues could not be separated. One solution was to have clear statutory goals, set fixed deadlines for achieving them and empower citizens to take slow-moving agencies to court.[25] Article 101 is such a general provision that this does not seem possible.[26] By contrast, Majone thought that accountability should be 'political' if distributive concerns prevail. This allows separation of the political and the economic.

However, this suggestion generates three problems. Article 101 cuts across many policy domains. Majone creates a democratic deficit once the local, often Member State, population's regulatory wishes are ignored. Secondly, pure technical work is a chimera. Value judgments are constantly made. For example, even if we could agree a sole consumer welfare goal, re-distributive and political (more than merely re-distributive[27]), issues still arise.[28] There are also disagreements on methods. Many see regulatory competition as an important spur for EU development. Thirdly, defining a '(predominantly) efficiency-orientated decision' is critical, yet circular. Competition decisions are only (predominantly) efficiency-orientated if efficiency is selected as the sole goal. Majone concedes that even in areas of exclusive competence, such as competition law, the tendency is to move towards a co-operative partnership with the national regulatory authorities.[29]

Externalities may be problematic here, however. Unlike the Member States, the EU institutions act for Europe as a whole. There may be efficiency (and public policy) losses if Member States favour their constituents while hurting people or groups based:

> "...outside the state, such as manufacturers or issuers...The costs of such laws are externalised in the sense that they do not effect voters or, by extension, their elected officials. Uniform lawmakers presumably must take into account interstate social welfare rather than only the narrow constituent interests that would matter to state regulators."[30]

If capital relocates to jurisdictions where the regulatory costs are lower, it drags the other Member States down, in a race to the bottom to scrap environmental, and other rules. This '...approach would, in this vision, be rather ineffective in protecting values other than trade liberalization.'[31] One may get a race to the bottom if Article 101 only pursues consumer welfare and public policy goals are not achieved in legislation. However, regulatory races to

[25] Giandomenico Majone, 'Regulatory Legitimacy in the United States and the European Union' in Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001), 259, 265.
[26] Christopher Townley, 'Is There (Still) Room for Non-Economic Arguments in Article 101 Tfeu Cases?' in Caroline Heide-Jørgensen (ed), *Aims and Values in Eu Competition Law* (DJØF Publishing 2013); Christopher Townley, 'Which Goals Count in Article 101 Tfeu?: Public Policy and Its Discontents' European Competition Law Review; and Christopher Townley, *Article 81 Ec and Public Policy* (Hart 2009).
[27] Christian Joerges and Jürgen Neyer, '"Deliberative Supranationalism" Revisited' EUI Working Paper Law No 2006/20, 16.
[28] C. Townley, 'Remembering Those Not yet Born: Inter-Generational Impacts in Competition Analysis' European Competition Law Review; Paul Craig, *Eu Administrative Law* (OUP 2006), 52.
[29] Giandomenico Majone, 'Regulatory Legitimacy in the United States and the European Union' in Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001), 255.
[30] Larry Ribstein and Bruce Kobayashi, 'An Economic Analysis of Uniform State Laws' 25 The Journal of Legal Studies, 139.
[31] Eric Philippart and Monika Sie-Dhian-Ho, 'Flexibility and Models of Governance for the Eu' in Gráinne De Búrca and Joanne Scott (eds), *Constitutional Change in the Eu: From Uniformity to Flexibility?* (Hart 2000), 320; in a different context, but applies here too. Thatcher in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), 24, gives the example of telecoms regulation.

the top are also possible; and evidence of actual races to the bottom is limited. It may be possible to stop races to the bottom through minimum standards. One has to consider the impact of diversity in the round in any event.

Ribstein and Kobayashi note that uniformity can facilitate the development of a detailed body of case law applying the rules. It eliminates the deadweight litigation costs involved in forum shopping.[32] This may be particularly important for the EU competition provisions, which tend to be principles, rather than clear rules. However, diversity will cause less damage in this regard if the areas of divergence are clear and small; and the reasons for divergence are explicitly explained.

In fact, in addition to those already mentioned, difference has many potential benefits. It allows rules to be made more easily. Everyone's agreement is not needed. Within limits, the relevant actors can strike the balance that they think is appropriate. This helps to avoid deadlock and facilitates joint work towards a common solution in the end, by demonstrating the efficacy of an NCA's solutions to the others. In turn, this facilitates more transparent decisions. The cost of mistakes is also reduced. Bad choices mainly affect the Member State concerned, not the whole EU. Furthermore, diversity allows greater options going forward, which facilitates modification and re-negotiation as circumstances change. Diversity also accommodates diverse legal systems and helps us to better cope with uncertainty. For example, if we do not understand the underlying problems and so cannot easily predict all of the consequences of an action.

When solutions are applied at a local level, some say that the relevant actors better understand the conditions affecting implementation, and can better tailor solutions to the specific context. The national administrations of France, Britain and Germany are all increasingly able to decentralise administrative control for this reason, and because they favour more regulatory and administrative experimentation.[33] The development makes sense from an experimentation perspective, but, in principle, better information transfers should allow this to occur, even at the supranational level. In any event, this point has been made for local authorities, the idea is that they are more accountable to their local populations. This might not be true of independent courts and NCAs.

C. Diversity in EU Free Movement of Goods

We tend to think of many areas of EU law as being entirely harmonised and centrally run by the EU. This section takes a core area of EU law and shows that this is not entirely true.

The EU's openness to regulation has changed over time. Take Article 34, for example, it prohibits '...quantitative restrictions on imports and all measures having equivalent effect...between Member States.' In the 1960s, the Commission (and the EU Courts) began to use the free movement rules, especially Article 34, to target national rules, often social regulation. It wanted detailed, harmonised, EU rules for all. Agreement was elusive, given the regulatory challenges and the need for unanimity for EU harmonisation rules at that time. These clashes undermined public policy protection; and affected the Member State/ EU balance of power.

[32] Larry Ribstein and Bruce Kobayashi, 'An Economic Analysis of Uniform State Laws' 25 The Journal of Legal Studies, 138. Commission, *Commission Explanatory Memorandum, Proposal for a Council Regulation Implementing Articles 81 and 82 of the Treaty* (2000), 8, for the modernisation of Article 101.

[33] Peter Lindseth, 'Delegation Is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002), 154; for similar EU trends, p.155. Also, Miguel Poiares Maduro, *We, the Court: The European Court of Justice and the European Economic Constitution* (Hart 1998), 113-26.

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In the absence of exhaustive EU-level regulatory harmonisation, *national* rules can only be saved if they fall within the mandatory requirements (MRs), or Article 36. The MRs are '...in the general interest and such as to take precedence over the requirements of the free movement of goods.'[34] They include fair commercial transactions and environmental protection.[35] Article 36 provides for some exceptions based on '...public morality, public policy or public security; the protection of health and life of humans, animals or plants...or the protection of industrial and commercial property.'

As the case law under Article 34, the MRs and Article 36 develops, it affects the equilibrium under Issues 2 and 4. In 1974 the ECJ responded to the EU legislative blockage by expanding Article 34.[36] The balance tilted towards the market and the EU. Member States responded with new *national* rules (re-seizing power). By the 1980s Europe faced an economic crisis. Companies complained of burdensome regulation. An EU consensus emerged, favouring re-regulation at the EU level. In *Cassis de Dijon*,[37] the ECJ gave the Commission a new tool for pursing this, mutual recognition. The Single European Act 1985 pushed power towards the EU. It made generating (harmonised) EU level rules easier as qualified majority voting (QMV) began to replace unanimity in Council voting.

The Member States' power to disrupt trade changes in the shadow of unanimity and QMV. Under unanimity, strict Member States with high regulatory standards, can ban 'bad' products from their territories; the cost falls on producers in other Member States. Under QMV, strict Member States cannot hold out alone. This impacts upon democratic legitimacy. Furthermore, the ECJ (an EU body) decides upon '...the right balance between market integration on the one hand and social policy...' on the other; and so controls national regulation. The ECJ has been criticised for failing to adequately reflect a change in the EU Treaties; as they move from a pure economic community, to one increasingly based on socio-economic values.

The Commission also persuaded Member States to pursue public policy through minimum EU-level requirements, leaving scope for national variation, subject to mutual recognition. Member States lose some control, but getting agreement is easier as some flexibility is preserved.

Diversity can undermine the internal market, but it can be beneficial. Europe's diverse language, cultural and consumer preferences are '...an invaluable asset and source of innovation...'[38] From a democratic legitimacy perspective, anger is directed at the EU when it does not respect national tastes/ choices:

> "The persistent socio-political/ socio-cultural attachment to national constitutional bodies as the privileged expressions of democratic legitimacy is an empirical reality that simply cannot be theorized away. This attachment is a background constraint so fundamental as to be sometimes overlooked in non-hierarchical theories of EU governance."[39]

[34] Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung* [1979] ECR 649, para 14.

[35] Respectively, Case 120/78, *Ibid.*, para 13; and Case 302/86 *Commission v Denmark* [1998] ECR 4607, para 8. Member States must (often) accept in their own markets products approved for sale by other Member States.

[36] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837.

[37] Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung* [1979] ECR 649.

[38] Commission, *A Single Market for 21st Century Europe* (2007), 5.

[39] Peter Lindseth, 'Delegation Is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002), 142-3.

De-regulation has a political dimension. The Commission now says that the internal market must be more responsive to EU citizens' concerns; especially on socio-environmental issues. Democracy cannot always be (re)gained at the EU level. So, the right actor, be it EU or the Member States, must act, when necessary, to protect relevant values. The Commission says that regulation must be '...designed as closely to the market as possible and account, where needed, for national diversity...' [40] Since the 1990s the paradigm of '...uniformity, homogeneity and one-dimensional integration is gradually being replaced by one of flexibility, mixity and differentiation.'[41] We have seen that this is true for free movement; similar stories can be told in: EMU, social policy, labour law, culture and environmental protection.[42] The Lisbon Treaty paved the way for stronger supranational features, while balancing this with heterogeneity in new, interesting ways.

D. How the Current EU Competition System Allows Diversity

One issue that might stand in the way of diversity is the idea of direct effect. Here I show how diversity, of the kind discussed here, is compatible with direct effect. Direct effect is the capacity of an EU norm to be applied in a domestic court or administrative proceedings. Directly effective Treaty provisions must be justiciable. If Article 101 is directly effective, does this prevent diversity there? Can one balance public policy interests in directly effective provisions; and can Member States arrive at the same results in this balance even if they value things differently? Temple Lang has said, for example, that national courts must do '...what is reasonably necessary to ensure that Community law is uniformly applied throughout the Community.'[43] This may make diversity inappropriate in Article 101.

Originally, the pre-condition for direct effect was that the provision had to contain a clear and unconditional prohibition;[44] for which no further legislative intervention was required.[45] However, the ECJ has relaxed these criteria, to include many '...Treaty articles dealing with the common market, even those that did seem to require national or Community implementing acts and even those granting to the Member States a power to derogate.'[46] Today, a Treaty provision is directly effective if it is '...sufficiently operational in itself to be applied by a court...'[47] This is widely interpreted.[48] We have already discussed the interaction between Articles 34 and 36.[49] Both articles are directly effective, yet both require a balancing of public policy interests within them.[50] This must be done by the Member State

[40] Commission, *Instruments for a Modernised Single Market Policy* (2007), 8. Also page 3; Commission, *A Single Market for 21st Century Europe* (2007), 12; Commission, *European Governance: A White Paper* (2001), 12-3, 32-4.

[41] Gráinne de Búrca and Joanne Scott, 'Introduction' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the Eu: From Uniformity to Flexibility?* (Hart 2000), 2.

[42] de Búrca and Scott (2006).

[43] John Temple Lang, 'The Duties of National Courts under Community Constitutional Law' European Law Review, 15.

[44] Case 26/62, *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, section II(B).

[45] Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53, paras 27-40.

[46] Bruno de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of Eu Law* (OUP 2011), 330; also 327-9.

[47] Opinion of Advocate-General van Gerven in the *Banks Case* [1994] ECR I-1209, para 27.

[48] Case C-413/99 *Baumbast* [2002] ECR I-7091; Bruno de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of Eu Law* (OUP 2011), 334.

[49] See text around footnote 34.

[50] http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art34-36/new_guide_en.pdf, 37. See, Case 34/79 *R v Henn and Darby* [1979] ECR 3795 (morality); and Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265 (public health).

courts and administrative authorities. They are likely to arrive at different results (within Member States and across the EU) when balancing here.

The application of Article 101 requires the relevant actors to balance short and long-term competition (today most speak of consumer welfare), environmental protection and other public policy goals. For example, in *Wouters*, the Dutch court reviewed the legality of an agreement under, directly effective, Article 101(1).[51] At issue was the Dutch Bar Council's 1993 Regulation basically prohibiting lawyers in the Netherlands from forming partnerships with non-lawyers. Mr Wouters, a lawyer, wanted to enter an accounting partnership. On an Article 267 reference, the ECJ found a restriction of competition.[52] However, the ECJ conducted a public policy balancing exercise; holding that, for the purposes of applying Article 101(1), account must first of all be taken of the overall context in which the Bar Council's action produces its effects. More particularly, account must:

> "...be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience...It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives."[53]

The ECJ seems to balance here, contrary to Article 267;[54] the relevant actors should normally do it.[55] Note too that a private party asks for the balance to be done within Article 101; and it is a non-state actor – albeit one with special legal privileges, the Bar Council, that balances in its 1993 Regulation. Private actors assess public policy balancing in the shadow of many Treaty articles.[56]

Even if public policy balancing is compatible with direct effect, in this balance, must all of the relevant actors arrive at the same outcome? Prechal says, critically:

> "The establishment and proper functioning of the Common Market as *one single market* requires a system of common rules and principles which safeguards its unity. Any unilateral interference with these rules by the Member States or other actors has to be excluded."[57]

Yet, when public policy balancing in the free movement rules, Member States have a margin of appreciation according to their '...social circumstances and to the importance attached by those States to a legitimate objective under Community law...the measures which are likely to achieve concrete results.'[58] A similar position has arisen in Article 101. In *Wouters*, the

[51] Case C-234/89 *Delimitis* [1991] ECR I-935, para 45, finds Article 101(1) directly effective.

[52] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, paras 86-96.

[53] *Ibid.*, para 97.

[54] Case C-226/11 *Expedia*, 13 December 2012, nyr, para 34.

[55] The ECJ justifies this with Article 101 cases - Case C-250/92 *DLG* [1994] ECR I-5641, para 35; and freedom of establishment/services cases (also directly effective) - Case 107/83 *Klopp* [1984] ECR 2971, para 17, Case C-3/95 *Reisebüro Broede v Sandker* [1996] ECR I-6511, para 37.

[56] Case C-415/93 *URB v Bosman* [1995] ECR I-4921, para 86; Case C-281/98 *Angonese v Cassa di Risparmio* [2000] ECR I-4139; Case C-350/96 *Clean Car v Landeshauptmann* [1998] ECR I-2521.

[57] Sacha Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in Catherine Barnard (ed), *The Fundamentals of Eu Law Revisited: Assessing the Impact of the Constitutional Debate* (OUP 2007), 39.

[58] Case C-394/97 *Heinonen* [1999] ECR I-3599, para 43; and Case C-208/09 *Ilonka Sayn-Wittgenstein* [2010] ECR I-13693, para 87. C.f. Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, paras

restriction of competition prohibited lawyers and non-lawyers entering into partnerships. The ECJ held that:

> "...the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community law (see, to that effect, Case C-108/96 *Mac Quen* [2001] ECR I-837, paragraph 33). Even if multi-disciplinary partnerships of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means (see, to that effect, with regard to a law reserving judicial debt-recovery activity to lawyers, Case C-3/95 *Reisebüro Broede v Sandker* [1996] ECR I-6511, paragraph 41)."[59]

When noting that Member States could come to different views on the importance of public policy criteria, vis-à-vis Article 101's restriction on competition, the ECJ makes reference to the free movement case law to support this idea.[60] There it is clear that if a Member State protects, for example, the environment more than others, it does not necessarily breach EU law.

However, justifications must serve a legitimate purpose. In both Article 101 and the free movement rules, the ECJ is the ultimate arbiter;[61] and the restraint must be proportionate.[62] Member State rules can be inappropriate if EU legislation exhaustively harmonises an area. The ECJ made similar points in *Wouters* when balancing public policy in Article 101.[63] It is also wary of opportunistic protectionism. The ECJ often demands that Member States protecting specific goals show that they coherently and consistently protect them in their legal systems.[64]

As we saw for the free movement rules, a unitary focus in Article 101 has incidental impacts on other goals too. This would leave a gap in the socio-economic protection in the Member State(s). Article 101's footprint means a big impact; testing acceptance of market liberalisation.

Many argue that, where public policy goals are important, the Member States should individually, or collectively through the EU, legislate to protect them, rather than distorting competition. This has advantages: many think it more efficient and clearer for firms. As we have seen, it creates problems too: Member States cannot always agree; legislation may not happen if legislators are busy; it undermines joined up government; and largely abandons self regulation, an efficient policy tool:

25-50. This may vary in different areas, see Catherine Barnard and Simon Deakin, 'Market Access and Regulatory Competition' (The Legal Foundations of the Single Market: unpacking the premises), 28-34

[59] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, para 108.

[60] The objectives of the competition and free movement rules are regularly linked, Joined Cases C-468/06 etc. *Sot. Lelos kai Sia EE v GlaxoSmithKline* [2008] ECR I-7139, para 65.

[61] Case C-254/05 *Commission v Belgium* [2007] ECR I-4269, paras 36-7.

[62] Case 13/78 *Eggers v Freie Hansestadt Bremem* [1978] ECR 1935, para 30; Case 174/82 *Sandoz* [1983] ECR 2445, para 18; and Paul Craig and Gráinne de Búrca, *Eu Law: Text, Cases and Materials* (Fifth edn, OUP 2011), 673.

[63] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, paras 99-110.

[64] Case 121/85 *Conegate v CCE* [1986] ECR 1007, paras 15-6; and Case C-169/07 *Hartlauer* [2009] ECR I-1721, para 55.

> "Self-and co-regulation...mean that relevant industry players, not the Commission, edict norms. They may be quicker to adopt and may lead to more acceptable results for stakeholders, who produce the rules themselves and may even use them as a 'marketing tool'. Co-regulation may also be a means of accommodating national diversity – by allowing national co-regulation practices on the basis of general EU regulatory framework. But there are also potential drawbacks that must be managed, in particular the risk of anti-competitive collusion amongst industry members to the detriment of consumers, as well as the risk of non respect.[[65]]"[66]

The EU should be more cautious about imposing its own ideas of how the Member States should 'regulate' specific issues. To do otherwise does not respect local regulatory solutions; abandons the principle of regulatory neutrality; and negates a growing EU belief that we need a smarter mix of policy instruments. Many other substantive areas of EU law already do this.

That is the theory, however there are arguments by Everson and Whish and Bailey that may undermine it. Relying on *Verband der Sachversicherer*, Everson says that the ECJ does not permit, under Article 101, '...co-operative public/ private economic regulation at the national level.'[67] This could rule out diversity in Article 101. In that case, the parties said the Commission could not apply Article 101 to the German insurance sector because, in the absence of EU harmonisation, German legislation excluded the German equivalent of Article 101, and also, so the argument went, Article 101. The judgment is unclear, but the ECJ seems to resent the complete exclusion of insurance from Article 101's scope, rather than public policy balancing of private restrictions within Article 101.

Alternatively, Whish and Bailey argue that, in *Wouters*, like the free movement cases, the rules basically had a public law character.[68] If a public law character is necessary, this could significantly restrict diversity's scope. However, the ECJ did not highlight this issue in *Wouters*; nor in the later *Meca Medina* case balancing public health in Article 101(1), where, no state actors were involved. The ECJ recently hinted that this was irrelevant.[69] In fact, public policy has been considered in many cases without a public law character, think of the single market cases, for example.[70] This issue may not have arisen so clearly before because public balancing was normally conducted within Article 101(3), where the Commission had the monopoly until 2004; making divergent judgments rarer. However, *Wouters* was debated under Article 101(1), the agreement did not fall within a block exemption, nor had it been notified to the Commission at the relevant time. Some believe that demanding state involvement in public policy balancing is sensible. Otherwise, so the argument goes, we abandon the balance to self-centred companies, rather than democratically elected Member States (unlike legislation). Just to engage with this argument, let's ignore the influence that undertakings have over legislative activity too. The ECJ focuses on the outcome of the Article

[65] The relevant actors must ensure that collusive outcomes do not result. However, only insofar as this means that there is a proper balancing of competition and other, relevant, public policy goals.

[66] Commission, *Instruments for a Modernised Single Market Policy* (2007), 12.

[67] Michelle Everson, 'The Crisis of Indeterminacy: An 'Equitable' Law of 'Deliberative' European Market Administration?' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002), 233-4.

[68] Richard Whish and David Bailey, *Competition Law* (Seventh edn, OUP 2012), 132-3.

[69] Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, nyr, 28 February 2013, para 93; and Case C-136/12 *Consiglio nazionale dei geologi v Autorità garante della concorrenza e del mercato*, 18 July 2013, not yet reported, para 44.

[70] Christopher Townley, *Article 81 Ec and Public Policy* (Hart 2009), 111-99.

101 balance, not undertakings' motivations.[71] The Commission, NCAs and Member State courts 'judge' the cases. As a result, these public actors can protect us in the balance.

Direct effect cannot be discussed in isolation; it is influenced by meta-doctrines on the nature of EU law. We have seen several regulatory challenges, which impact upon decision-making in the EU. Even before the Maastricht Treaty's social chapter expressly tolerated it, there was an established practice of allowing some '...differentiation between Member States even within the most hallowed parts of the EC's supposedly uniform and shared internal market acquis...'[72] Given the increasing emphasis on social and environmental goals in the EU Treaties and the greater willingness to consider local preferences, direct effect should not prevent diversity in Article 101.

The presence of disagreements on aims and methods suggest that diversity within Article 101 furthers constitutional tolerance, helps to resolve complex jurisdictional problems, furthers democratic legitimacy and supports diverse national views of the good life (both substantively and through appropriate mechanisms). A similar view has been expressed within the International Competition Network.[73]

As Eberlein notes, 'Decentralisation encourages flexible rule adjustment tailored to specific local conditions that may vary substantially with a heterogeneous polity...'[74] Homogeneity can be a curse. Paradoxically, diversity can be '...a pre-condition for preservation of identity...'[75] and liberate the network to openly experiment with different aims and methods, which is especially important for resolving uncertainty. Network members become public laboratories.[76] Sharing outcomes generates a rich pool of learning experiences. Comparing results against the best performers, and redefining aims or methods when others' are better, should more rapidly lead to best practice and harmonisation; or, at least, informed divergence. In the words of Budzinski:

> "If many competition regime experiment with different theories and methods (or even with differing goals), then this offers scope for dynamic institutional learning (dynamic and evolutionary efficiency). In case of diversity, competition regimes learn from their own successes and failures and, additionally, they learn from other regimes' successes and failures. This mutual learning speeds up the learning process and offers potential to dynamically improve competition policy...Mutual learning through decentralized experimentation is particularly fruitful if there is no safe academic consensus on the 'right' solution – like it is the case with competition economics..."[77]

[71] Joined Cases 29/83 etc. *CRAM v Commission* [1984] ECR 1679, para 29.
[72] Gráinne de Búrca, 'Differentiation within the 'Core'? The Case of the Internal Market' in Gráinne De Búrca and Joanne Scott (eds), *Constitutional Change in the Eu: From Uniformity to Flexibility?* (Hart 2000), 134.
[73] ICN, *A Statement of Mission and Achievements up until May 2005* (2005), 2; and ICN, *A Statement of Mission and Achievements up until May 2006* (2006), 2.
[74] Burkard Eberlein, 'Policy Co-Ordination without Centralisation? Informal Network Governance in Eu Single Market Regulation' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), 146.
[75] Oliver Gerstenberg and Charles Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002), 291-2.
[76] Fingleton in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), 180, although he assumes that these will only be competition considerations.
[77] Oliver Budzinski, 'International Antitrust Institutions' 17 Ilmenau Economics Discussion Papers, 8.

On the other hand, at a certain point, this might undermine the internal market, increase the cost of international trade, raise the spectre of externalities and races to the bottom, and retard the development of a unified body of case law.

Uniformity and diversity are both valuable. Despite the risks to the clarity of the EU's message, and the threat of externalities, I see more advantages in accepting diversity in Article 101 to deal with disagreements on aims and methods. It allows heterogeneous states to join together in the pursuit of consumer welfare, but with tolerance and respect for their differences. In the space they build, they can openly experiment, sharing best practice in the pursuit of their best solution(s). Here, we are more likely to find, and to find more quickly, better answers. There is unity in diversity.

It is difficult to allocate competences in a multi-level governance structure; we need meaningful interaction between the various levels. In essence, this also demands a balance between coherence, as a basic condition for the internal market; and respect for local preferences. Some diversity is important, even in Article 101. This is not a crude grab for power by the Member States, but a rational way to deal with disagreements on aims and methods. However, there must be:

> "...certain limits to flexibility and to differentiation, some minimum degree of commitment to a basic and shared set of policies. This notion of commitment combines the idea of acceptance of both the content of particular policies and the specific legal and constitutional characteristics of such measures."[78]

Growing Member State influence and competence in Article 101 and increasing distrust in 'pure' market solutions demand a revitalization of the Member States' role. I believe that Article 101's core should be consumer welfare. As I have explained elsewhere, this goal seems to be reflected in the EU Treaties, it often also helps us to achieve many other relevant public policy goals, indirectly.[79] Sometimes this is not the case; then, relevant public policy goals may have to be directly considered within Article 101. There should, however, be limits to diversity. The next section explores them.

E. The Limits to Diversity (co-ordination)

This section discusses the limits to diversity. Policy and information sharing networks are useful for providing the experimentation, information and learning that is needed for dealing with the problems that we have outlined above. Part (a) asks whether there is a competition network at all. This may be a surprising question, but I argue that the Commission is trying to create a hierarchy rather than a network of equals. Having said that, Regulation 1/2003 leaves room for a policy network. So, Part (b) uses insights from political science to explain what we need to create such a policy network. Then, it investigates how this could be achieved within the European Competition Network (ECN) as currently structured and asks whether better co-ordination requires any changes.

a. Is it a hierarchy, or is it a network?

The Commission's policy role may leave no room for networking. Article 17 TEU instructs it to promote the EU's general interest and to apply the EU Treaties. Article 103 demands Council regulations and directives which, amongst other things, Article 103(2)(b) '...lay down detailed rules for the application of Article 101(3)...' and Article 103(2)(d) '...define the respective positions of the Commission and the...' EU Courts. Article 105(1) adds '...the

[78] Gráinne de Búrca, 'Differentiation within the 'Core'? The Case of the Internal Market' in Gráinne De Búrca and Joanne Scott (eds), *Constitutional Change in the Eu: From Uniformity to Flexibility?* (Hart 2000), 135.
[79] Christopher Townley, *Article 81 Ec and Public Policy* (Hart 2009), Chapters 1 and 6.

Commission shall ensure the application of the principles laid down in Articles 101 and 102...' In 2000, the ECJ held that, for Articles 101 and 102, the Commission is '*...responsible for defining and implementing the orientation of Community competition policy.*'[80] The Commission explicitly tried to retain this role in the 2004 modernisation process; saying that decentralisation must not result in inconsistent application:

> "...of Community competition law. Competition policy will thus continue to be determined at Community level, both by means of the adoption of legislative texts and individual decisions. The Commission, as guardian of the Treaties and guarantor of the Community interest subject to the supervision of the Court of Justice, has a special role to play in the application of Community law and in ensuring the consistent application of the competition rules."[81]

At first sight, the Commission appears to have allied the Council to its cause. Council Regulation 1/2003, recital 34, retains this central role for EU bodies.[82] The Commission issues substantive guidelines and block exemptions.[83] Its selection of a sole consumer welfare goal for Article 101 leaves little room for disagreements on aims; its guidance might do the same for disagreements on methods. The Commission assumes that its decisions explain the relevant law to all (as well as making policy, see above), not only to the decisions' addressees (like EU Court judgments).

Under Regulation 1/2003, all the relevant actors can take Article 101 decisions/ judgments.[84] So many decision-makers could undermine the consistency of EU competition law.[85] However, in *Masterfoods*, the ECJ held that the Commission cannot be bound by a decision given by a national court. The Commission may adopt Article 101 decisions even where an agreement '...or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision.'[86] Furthermore, Member State courts (and, probably, NCAs) cannot decide contrary to Commission decisions, or those in contemplation.[87]

Yet, the content of the Commission's policy function is contestable. Articles 17 and 105 tell it to *apply*, rather than *make*, Article 101 principles. Regulation 1/2003 could tell the Commission to lay down detailed rules for applying Article 101(3), not Article 101(1); instead it undermines this policy role, at least compared to Regulation 17. In addition, when the EU Courts speak of the Commission's competition policy function, they: allow the Commission to prioritise some complaints before it;[88] and ensure that the Member States' courts' decisions do not conflict with contemplated Commission decisions.[89] The Commission can also declare that conduct that has already been terminated infringes Article 101;[90] and it has

[80] Case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR 1-11369, para 46.
[81] Commission, *European Commission White Paper, on Modernization of the Rules Implementing Articles 85 and 86 of the Ec Treaty* (1999), para 83.
[82] Richard Whish and David Bailey, *Competition Law* (Seventh edn, OUP 2012), p. 53.
[83] See http://ec.europa.eu/competition/antitrust/legislation/legislation.html
[84] Respectively, Regulation 1/2003, articles 5, 7 and 10, see also recitals 6, 11 and 14.
[85] Commission, *European Commission White Paper, on Modernization of the Rules Implementing Articles 85 and 86 of the Ec Treaty* (1999), 15.
[86] Case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR 1-11369, para 48. See also, Case C-478/93 *Netherlands v Commission* [1995] ECR I-3081, paras 36-42.
[87] Case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR 1-11369, paras 51-2. See also recital 14 and article 10, Regulation 1/2003.
[88] Case T-24/90 *Automec v Commission* [1992] ECR II-2223, para 73.
[89] Case C-344/98 *HB Ice Cream v Masterfoods Ltd* [2000] ECR I-11369, para 46.
[90] Case T-23/02 *Sumika Fine Chemicals v Commission*, 6 October 2005, nyr, paras 34-8.

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a lot of freedom over its fining policy.[91] Policy, then, has more to do with prioritising resources and discouraging anti-competitive behaviour, rather than Article 101's substance. [92] In *Masterfoods*, the ECJ held that while orientating and applying EU competition policy in its decisions and regulations, the Commission is subject to review by the EU Courts.[93] Even when the Commission enjoys discretion, the EU Courts demand reasons so that they can review it.[94]

In law, the ECN is not necessarily a hierarchical arrangement, with the Commission at the apex. The Council has left room for diversity in Regulation 1/2003 as have the Member States in the EU Treaties. The Commission is not the only one with a substantive policy role. The EU Courts' judicial review function ensures that all (and only) relevant issues affect Commission analysis. Commission power to constrain the other relevant actors is limited, legally. The Council gave it a power to make block exemption regulations, subject to the EU Courts' interpretation of Article 101.[95] Commission guidelines cannot create legally binding obligations or authorise arrangements that are incompatible with the EU Treaties, as interpreted by the EU Courts.[96] Nor can they bind Member State courts and the NCAs.[97] Furthermore, Commission decisions do not have the precedential value of EU Court judgments. Article 288 TFEU says that only the addressees of Commission Article 101 decisions are bound by them. *Masterfoods* should be interpreted narrowly: the relevant actors only cannot deviate from Commission decisions for the same parties, subject-matter, relevant market, etc.

However, the ECN may, *in fact*, be a hierarchy. Several mechanisms seek a consistent application of Article 101: the duty to apply EU law if there is an effect on trade; the NCAs' obligation to inform the Commission before adopting decisions; and the possibility for the Commission to relieve the NCA of its competence to act if there is a serious risk of incoherence.[98] So, NCA decisions are made in the Commission's shadow. The Commission sees itself as the arbiter of disputes between the NCAs and as hierarchically superior to them. The Commission and the Council made an explicit attempt to reserve cases for the Commission involving links with other EU policies.[99]

Many believe that the ECN is primarily concerned with enforcement rather than policy-making. Yet, even *in fact*, a policy network is possible. Networks are not like hierarchies, they do not '...have central direction or an established set of authority relations...'[100] Decentralising Article 101's application decentralised power;[101] even Article 101(3)'s wording

[91] Richard Whish and David Bailey, *Competition Law* (Seventh edn, OUP 2012), pp. 276-80.
[92] Wouter Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular Eu Antitrust Enforcement' 34 World Competition, 366-8; and Case C-226/11 *Expedia*, 13 December 2012, nyr, paras 29-31.
[93] Case C-344/98 *HB Ice Cream Ltd v Masterfoods Ltd* [2000] ECR I-11369, para 46.
[94] Case C-119/97 P *Ufex* v *Commission* [1999] ECR I-1341, para 91.
[95] Regulation 1/2003, article 29(2) sometimes allows a NCA to withdraw a block exemption.
[96] Case T-9/92 *Automobiles Peugeot and Peugeot v Commission* [1993] ECR II-493, para 44; and Case C-266/90 *Franc Soba v Hauptzollamt Augsburg* [1992] ECR 1-287, para 19.
[97] Case C-226/11 *Expedia*, 13 December 2012, nyr, paras 29-31.
[98] Regulation 1/2003, respectively: recital 8, article 3.
[99] Commission, *Commission Notice, on Co-Operation within the Network of Competition Authorities* (2004), para 15; and Council and Commission, *Council and Commission Joint Statement, on the Functioning of the Network of Competition Authorities* (2002), para 19.
[100] Stephen Wilks, 'Understanding Competition Policy Networks in Europe: A Political Science Perspective' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), 67.
[101] Council and Commission, *Council and Commission Joint Statement, on the Functioning of the Network of Competition Authorities* (2002), para 6; and Regulation 1/2003, article 1, recital 4.

invokes discretion.[102] Regulation 1/2003 instructs the Commission and the NCAs to form a *network* of public authorities applying Article 101 '...in close cooperation...'[103] It adds: 'Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.'[104] The Commission's explanatory memorandum includes the NCAs in other ways too:

> "The Commission, being the only authority that can act throughout the European Union, will necessarily continue to play a central role in the development of Community competition law and policy and in ensuring that it is applied consistently throughout the single market, thereby preventing any renationalisation of Community competition law. The development and application of the law and policy will, however, be a concern of all the competition authorities involved in the enforcement of Articles 81 and 82 [now Articles 101 and 102 TFEU]. Policy issues will be the subject of discussion within the network."[105]

The Council and Commission joint statement on the functioning of the ECN gave the NCAs full competence to apply Article 101, '...actively contributing to the development of competition policy, law and practice.'[106] All competition authorities '...within the Network are independent from one another. Cooperation between NCAs and with the Commission takes place on the basis of equality, respect and solidarity.'[107] Equality is not typical in a hierarchy. Furthermore, the ECN discusses policy. DG COMP's website, explains that there are working groups:

> "...where the Network members can discuss general issues or issues relating to certain sectors. There are no voting rules, because this type of cooperation relies on consensus building. The Commission as the guardian of the Treaty has the ultimate but not the sole responsibility for developing policy and safeguarding efficiency and consistency."[108]

So, here we have a network, based on equality, where the members, both the Commission and NCAs, discuss EU competition policy. There are no voting rules; the network relies on consensus building. The NCAs have been tasked with discussing general policy issues as well as merely deciding cases. Policy is not the sole prerogative, or responsibility, of the Commission. There has been a lot of consistency so far; however, in practice we also see substantial divergence between the enforcement actions of the NCAs. For example, the OFT do not generally proceed against vertical restrictions under Article 101, whereas the French authorities do. In part, this may reflect administrative priority decisions, but it is also likely to reflect substantive difference.[109]

Commission decisions, which can contradict Member State decisions/ judgments, can be appealed to the EU Courts, so the Member States can challenge them. Similarly, questions of EU law before the Member States' courts can be resolved by the ECJ through Article 267

[102] Christopher Townley, *Article 81 Ec and Public Policy* (Hart 2009), 253, 261, but note 252; and Wouter Wils, *Principles of European Antitrust Enforcement* (Hart 2005), 7.
[103] Regulation 1/2003, recital 15.
[104] Regulation 1/2003, recital 15.
[105] Commission, *Commission Explanatory Memorandum, Proposal for a Council Regulation Implementing Articles 81 and 82 of the Treaty* (2000), 11 and 12.
[106] Council and Commission, *Council and Commission Joint Statement, on the Functioning of the Network of Competition Authorities* (2002), para 6.
[107] Council and Commission, *Council and Commission Joint Statement, on the Functioning of the Network of Competition Authorities* (2002), para 7; c.f. para 9.
[108] http://ec.europa.eu/competition/ecn/faq.html See also Regulation 1/2003, article 14(7).
[109] Thanks to Wouter Wils for this comment.

references. The EU Courts are often reluctant to interfere with the Commission's substantive appraisals; similarly, they often allow the Member State courts a margin of appreciation. The Commission could do the same for the NCAs. Perhaps its role is to *co-ordinate* diversity; ensuring that difference does not rip the ECN apart. Alternatively, as the Commission itself takes decisions, it may have more 'right' to intervene.

The debate is better cast in the light of the division of competences in the EU. Acceptance of diversity largely depends on one's meta-constitutional view of where power should lie between the Commission and the Member States. On the one hand, we get significant benefits from our pursuit of an ever closer union amongst the peoples of Europe. To achieve this, the EU shall establish an internal market, based on free movement and competition. However, the internal market must be balanced with other policy goals, such as environmental protection and social progress.

Prior to the Lisbon Treaty, the EU Treaties did not explicitly state which areas were ones of exclusive competence. Article 3 TFEU now lists six such areas. The ECJ had already categorised most of them in this way. However, '...the establishing of the competition rules necessary for the functioning of the internal market...' is new. This was surprising. Prior to the Lisbon Treaty, the ECJ had held that the Member States share competence with the EU in the field of competition.[110] In *Akzo*,[111] the ECJ accepted that competition is now an area of exclusive Union competence. This undermines my comparison with free movement of goods, which remains an area of shared competence.

Article 2 TFEU says that 'When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.' Since the Lisbon Treaty, have the Member States lost their ability to pursue diversity within Article 101?

The EU's website says the Lisbon Treaty's '...attempt at clarification [of EU competences] does not result in any notable transfer of competence.'[112] These areas were defined as exclusive competence to contain the EU's power, not expand it.[113] Under Article 2(6) TFEU, the '...scope and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.' The EU authorised the NCAs and the Member States' courts to apply Article 101.[114]

The EU Courts' case law is binding. Within this limit, are disagreements on aims and methods allowed between the relevant actors? Is diversity caused by disagreements on aims and methods merely the application of Article 101, or are they 'legislative'? There is good reason to suspect that this is merely application and so this level of diversity is acceptable. Articles 103 and 105 TFEU are inconclusive. If one interprets 'application' widely, this reduces exclusive competence's scope and thus EU power. The Commission may be exclusively responsible for substantive Article 101 policy development, subject to the EU Courts. Alternatively, substantive policy might be a shared enterprise with the Member States; or something between the two, see above. Schütze says that exclusive competence

[110] Case 14/68 *Walt Wilhelm* [1969] ECR 1.
[111] Case C-550/07 P *Akzo Nobel Chemicals v Commission* [2010] ECR I-8301, paras 116-120. See also the Opinion of Advocate-General Kokott, paras 174-183.
[112] http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm
[113] European Council, *Laeken Declaration* (2001), 21-22; the Convention on the Future of Europe, CONV 357/02, Brussels 21 August 2002; and Paul Craig, *The Lisbon Treaty, Law, Politics, and Treaty Reform* (OUP 2010), 159.
[114] Articles 5 and 6, Regulation 1/2003.

has changed. At first, the ECJ favoured a wide interpretation. Later, it interpreted '...these competences restrictively.' Both in terms of the scope of exclusive competence powers, as well as what happens when they conflict with other non-exclusive powers.

Article 101 allows diversity. Given its importance (allowing difference and generating experimentation in uncertainty) I embrace it. If the ECN is a substantive policy network of equals, then the Commission should only step in as a last resort,[115] e.g., if diversity's problems become too great, relative to its benefits, or if learning in a certain area is complete (rare).[116] If the Commission were *legally* at the head of a hierarchical 'network' it should encourage the relevant actors to experiment, only stepping in if diversity's costs, such as externalities, become too great. Diversity is often in the EU interest.[117] So, how can we harness the power of this network while keeping the dark side of diversity in check?

b. Limits to diversity?

We have seen substantive disagreements about what competition means; and the relevance (and weight) of public policy considerations within Article 101. There are also methodological disagreements about how best to achieve these ends and who should decide such matters. All of this takes place within a climate of business uncertainty, and uncertainty from economists as to which path will best achieve what we want.

Having said that, there is much common ground. However, where this runs out (and sometimes even before this), we need experimentation and learning. There is also a need to deal with possible failures to consider 'outside interests' by the EU and the Member States. Here, the power of networks comes to the fore. There are an infinite variety of them, and situations in which they may be used. Wilks describes some key elements, including: interdependencies between the actors; no dominant actor; network stability; and transparency. Furthermore, actors need not have shared goals in policy networks, Wilks calls them values; but they must agree on norms. Norms are:

> "...expressed as shared understandings about substance and process (norms, which are tacit and specific, should be distinguished from values, which are explicit and generalised, e.g. 'do not reveal confidential information' is a norm; 'competition is beneficial' is a value)."[118]

Does this mean that limits to substantive, or even procedural, diversity are unnecessary? Sabel and Zeitlin say that, when network members experiment with different methods, framework goals are needed; and so are measures for gauging their achievement. Then, members can advance these ends as they see fit. In return for this autonomy, they must regularly report on performance:

> "...especially as measured by agreed indicators, and participate in a peer review in which their own results are compared with those pursuing other means to the same general ends. Fourth and finally, the framework goals, metrics and procedures themselves are periodically revised by the actors who initially established them, augmented by such new participants whose views come to be seen as indispensible to full and fair deliberation."[119]

[115] Through article 11(6), Regulation 1/2003.

[116] William Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms?' Competition Law International.

[117] Recital 18, Regulation 1/2003.

[118] Stephen Wilks, 'Understanding Competition Policy Networks in Europe: A Political Science Perspective' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), 68.

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It is hard to agree specific, detailed ends. Wilks seems relaxed about this, and even where there is experimentation on appropriate methods, Sabel and Zeitlin speak of agreeing 'general ends', rather than demanding total precision. This leaves space for disagreements on aims. On the other hand, I believe that there must be a minimum commonality of aims, or at least this aids experimentation. Otherwise there is limited overlap for mutual learning (inter-dependency) and the relevant actors may simply stop listening to each other; and thus being a network in any meaningful sense.

The Commission has said that the sole goal of Article 101 is consumer welfare.[120] Some NCAs, such as the OFT, appear to agree.[121] However, this is not inline with the EU Treaties, or the EU Court case law.[122] We have seen that the Commission is subject to both the EU Treaties and the EU Courts, Part (a). I have argued elsewhere that a consumer welfare test should be at the heart of Article 101. This should provide a sizeable substantive core to allow the network to work; although more research is needed on this point. I would not advocate using goals such as economic freedom and market integration as part of this core. However, these and other relevant public policy goals could be considered where the impact upon them outweighs any appreciable consumer welfare loss. In the *Wouters* case, discussed above, we saw that the ECJ is the ultimate arbiter of which public policy goals are relevant and how much weight they should have. However, both within Article 101 and elsewhere in the EU Treaties, the ECJ gives the Member States a margin of appreciation in relation to which goals are relevant and what weight they should have. This substantive limit then gives us scope for agreeing a procedural framework to drive co-ordination.

Before considering the other relevant aspects of the network, I define the network members. Thus far, I define the relevant actors as the Commission, the Member States' courts and the NCAs. Repeated interactions between network members aid policy development. Network members try to influence each other. Part (a) discusses the ECN, containing all the relevant actors except the Member States' courts. This definition is more appropriate here. Networks generate links between their members.[123] This has implications for the independence of the judiciary. Member State courts can also make a reference to the ECJ when the EU law that they are applying is unclear. So, I exclude them from my network.[124] I also exclude the EU Courts from the network. They essentially act as independent referees, dictating what space is available for disagreements, see above. A similar position arose in Germany and the USA, both encourage limited diversity in their competition laws.

The network members' identity is important because there is a tension between the similarity of them, which helps generate trust and transparency; and, on the other hand, the creative spark caused by tension and difference. Trust is important if network members, and the individuals within them, are to share failure and success. Both contribute to learning. Maher and Ştefan say that information networks often demand small, closed and stable

[119] Charles Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the Eu' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010), 3.

[120] See footnote 7.

[121] See footnote 5.

[122] See footnote 2.

[123] There is also a network of Member States' courts for competition matters.

[124] Article 267 TFEU. This is not the same for the NCAs which are not courts or tribunals, see Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) v. GlaxoSmithKline* [2005] ECR I-4605, paras 29-38.

populations, repeatedly dealing with each other. The same applies to policy networks. However, too much similarity makes it hard to destabilise current practice. A '...powerful robust network, could also be dangerous: it could become elitist, exclusionary, even closed to new ideas and critical perspectives.'[125] Remember that there are disagreements on both aims and methods. The challenge is to set a framework for deliberating disagreements, among heterogeneous social actors. Network members must '...see conflict as a process to be managed rather than as an evil to be avoided or suppressed...'[126]

Is there enough similarity and difference in the ECN? I have assumed, so far, that the NCAs represent their Member States. Is this correct? Writing about technical comitology committees, Vos says:

> "Here the dual character of these committees must be emphasised: committees are composed of national representatives who generally, but not necessarily, are civil servants. On the one hand, these committees, in their composition of national *bureaucrats*, function as a forum of interaction and co-operation between the Member States and the Commission. In this way, the significance of purely national interest has been diminished, contributing to the overall trend of greater transnational decision-making, in which national interests are replaced by technical expertise, socio-economic interests and administration. On the other hand, however, these committees, in their composition of national *representatives*, have acted as *'mini Councils'*. They potentially enhance the importance of national interests and contribute to the decline of supranational decision-making."[127]

A similar point applies to NCAs within the ECN. They are Janus-faced. However, the NCAs increasingly see themselves purely as *bureaucrats*. They argue for, and have often obtained, independence from their Member States. Under Regulation 1/2003, NCA representatives populate the Advisory Committee, rather than those from the Member States.[128] This is an important change because independence has been bought by arguing that the competition rules are value-neutral; and that those enforcing them are merely technocrats applying formulaic (apolitical) rules.

Regulation 1/2003 seems to make a mere technical change. However, it is important where an NCA's views conflict with those of its Member State.[129] Science has a political dimension,[130] economics does too. Competition is not purely technocratic (apolitical), nor is the consumer welfare test.[131] Furthermore, consumer welfare often clashes with other important values that may be better, or more readily, protected within Article 101 itself. The

[125] Stephen Wilks, 'Understanding Competition Policy Networks in Europe: A Political Science Perspective' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), 15; also 66 and 70-8.
[126] Oliver Gerstenberg and Charles Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002), 337.
[127] Ellen Vos, 'Regional Integration through Dispute Settlement: The European Union Experience' Maastricht Faculty of Law Working Paper No 2005-7, 53-54.
[128] Article 14(2), Regulation 1/2003.
[129] Courts get 'political' questions in many areas, Ran Hirschl, *Towards Juristocracy* (Harvard University Press 2007); Giandomenico Majone, 'Regulatory Legitimacy in the United States and the European Union' in Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001), 256, 271.
[130] Christian Joerges and Michelle Everson, 'Re-Conceptualising Europeanisation as a Public Law of Collisions: Comitology, Agencies and an Interactive Public Adjudication' in Herwig Hofmann and Alexander Turk (eds), *Eu Administrative Governance* (Edward Elgar 2006), 530.
[131] See text around footnote 27.

NCAs often share the same competition model, with a sole consumer welfare goal. Outside of the ECN, this model is more controversial.

The Netherlands illustrates these tensions. In 2007, the Dutch Court of Audit pushed the NMa to be more transparent about public policy's relevance in competition law. Politically, a sole consumer welfare goal was unacceptable in the Netherlands. In its initial response to the Court of Audit, the NMa's Board argued that there was no point developing a framework for balancing public policy concerns as this was so unusual. The Court of Audit criticised this response. As a result of this disagreement, several Parliamentary questions were directed at the Minister of Economic Affairs, the NMa is an independent administrative body, although its personnel are part of the Ministry of Economic Affairs. One of the questions asked whether public policy balancing was principally a political process, and thus inappropriate for an independent administrative body, i.e. more suited to the political arena. The Minister agreed that such balancing is political. She said that politicians should frame the issues to be weighed in the balance. The NMa should merely implement this framework. She was discussing Dutch competition law, but her comments can be read more widely. Certainly the NMA's response, in its Annual Report 2009, covered Article 101 as well. The NMa sought to explain how public policy goals are relevant in, amongst others, Article 101.

The division between politics and application is hard to maintain. Wilks says, '...a hundred years of administrative theory have attested to the difficulty of divorcing 'policy-making' from 'policy implementation'...'[132] This story illustrates the tensions between the NMa and other Dutch institutions when applying Article 101. There is (at least sometimes) a difference between the NCA and its Member State). This is important because one of our regulatory challenges was to re-introduce Member State values into Article 101 decisions. Note too that the NMa also risked conflict with the Commission and other NCAs. Perhaps because of this, it did not publicise or clear its Annual Report with the ECN. In fact, there may be a more general problem with policy communications there. The OFT had a roundtable on Article 101's goals in 2010. The Commission was the only ECN member invited. If difference is not embraced, such problems will continue.

Inclusiveness of relevant views is important. There is a risk that the ECN is now too homogenous. Too much trust, not enough spark. Not only are Member States' views often ignored, but the sole consumer welfare model is too dominant. The problem is exacerbated as only independent NCAs are network members. One solution is to move away from political independence for NCAs, or we could re-introduce the Member States into the process in some other way. This suggestion is controversial. I make it because competition decisions are value laden. NCAs risk losing their independence. So they may not favour the suggestions in this paper, even though they would ostensibly gain power vis-à-vis the Commission.

We also have to consider: dominance within the network; interdependencies between the actors; network stability and transparency. When dominance is present, network members may be less willing to openly share their experience (and mistakes). This is particularly important to us and Part (a) showed that dominance need not be present in the ECN. By allowing network members some freedom in applying Article 101 we can experiment with and learn from different goals and methods. However, if comparison and learning is to occur then network members must regularly, clearly and openly, report on their performance, measured by agreed indicators. We need to know what worked, as well as, what did not, for

[132] Stephen Wilks, 'Agencies, Networks, Discourses and the Trajectory of the European Competition Enforcement' 3 European Competition Journal, 442. Similarly, Michael Schillig, *Konkretisierungskompetenz Und Konkretisierungsmethoden Im Europäischen Privatrecht* (DeGruyter 2009), 156-7.

disagreements on aims and methods. Periodic pooling of results reveals the defects of parochial solutions:

> "...and allows the elaboration of standards for comparing local achievements, exposing poor performers to criticism from within and without, and making of good ones (temporary) models of emulation. [This]...depends crucially on the exploration of possibilities, and the discovery of unsuspected ones, that occur when actors come to grips with their differences in the course of solving common problems that none can resolve alone."[133]

Accountability of network members is strengthened by forcing them to explain each decision. It is helpful to expose these decisions to the risk of appeal or peer review. In particular, they must show how they consider the impact of their decisions on others. We will see that sharing information with the competition network is compulsory in Germany. Information sharing between NCAs takes place in the ECN. More is needed, think of the NMa Annual Report 2009 and the OFT breakfast meeting, discussed above. In addition, ECN discussions need to be thoughtful and deeper. Many NCAs do not prioritise these with resources and some do not even read the papers before ECN meetings. Guidelines needs to be more transparent and better explain their rationale.

It is also important to openly listen to, and be prepared to learn from, other network members. Scott notes that participation '...in such networks is likely to change one's world view...'[134] Co-operation and co-ordination duties make ECN members '...dependent on each other for resources such as information, advice, legitimacy and authority (formal and informal)...'[135] This effect is more likely to arise in small communities, with repeated interactions between actors. This describes the ECN well, it is a closed group of actors, that meet regularly to discuss problems, including on policy.

However, if information is to be of interest to other ECN members, it must be seen as relevant. This depends on how much agreement there is on aims and methods. There needs to be a vision that is largely shared. If the OFT thinks that consumer welfare is Article 101's sole goal it may not want to discuss how to balance other goals. Too much diversity might undermine the ECN as a whole. We see this in other areas of EU law. Still, we must respect diversity for the reasons stated above. Reasonable dissent must have a realistic chance of being taken seriously. I hope that agreeing a common core will bind the network. An intermediate position is to allow NCAs that agree on certain goals or methods to form mini-networks to support each other. However, they (and the others) should be challenged from time to time by those that do not agree with their approach, see below.

There is also the risk of externalities and retaliation because of them. It is possible that NCAs will give more weight to effects in their own territory than to those outside it. Some difference between NCAs in the way they deal with similar is possible, but the justification for the difference probably matters. Difference based on partisanship may be less tolerable than that based on socio-economic grounds. Peer review and transparency are important tools for discouraging beggar-thy-neighbour strategies. We saw this for externalities. Germany deals with the issue through case allocation, if more than one State is affected, the Bundeskartellamt takes the case. Case allocation is insufficient for our kaleidoscope of

[133] Firat Cengiz, 'The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement' EUI Working Papers, 7.
[134] Colin Scott, 'Regulatory Governance and the Challenge of Constitutionalism' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (OUP 2010), 32.
[135] Maartje de Visser, *Network-Based Governance in Ec Law* (Hart 2009), 238. See also Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), xx, 14 and 68.

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interests and perspectives. Fox suggests that Regulation 1/2003's rules on the relevant actors' autonomy, such as article 11(6), are there to push Member States to consider externalities.[136] Four other mechanisms help too: the relevant actors' decisions only apply in their own Member State; the Commission is particularly well-placed to act if competition is affected in more than three Member States (heterarchy and hierarchy often co-exist); public policy goals must be consistently and coherently pursued in other areas of Member State legislation; and, in the light of Article 4(2) TEU, the national identities of the Member States must be respected. Member States must not impose their values on others through trade restrictions. A similar point may apply in Article 101. Publically justifying one's motives also forces the NCAs to consider others' interests. Base motives may merely be hidden in this process. Even this might subject states to constraints that considerably modify their action.

Another issue is the transparency of the policy discussions within the ECN. Some ECN information, in relation to specific on-going investigations, for example, is commercially sensitive and must not be disclosed. However, in order to reflect societal concerns, general policy '...deliberation must not take place behind closed doors.'[137] It may be that we need to have small, closed groups to build the trust needed for proper debate. By opening them up there is some risk of jeopardising this. But, hopefully, transparency will 're-politicise' these issues, translating them from a 'technocratic' domain.

Network members must periodically meet to revise goals, metrics and procedures. This could happen within the annual ECN meetings and in response to specific EU Court judgments. A major, first principles, review should be conducted every five years or so. We need mechanisms to promote the adoption of superior norms (races to the top). The ECN is set up to do this through peer pressure. This may be sufficient, although it should be checked, article 11(6) cannot be used too much.[138] Currently, unless the EU Courts disagree, mechanisms for opting-in should be voluntary.[139]

In summary, the following aspects seem important in policy networks. Most of them are important in order to generate proper discussion, understanding and learning. Most are present in the ECN, those that are not should be added to that network:

Characteristic	Present in the ECN?
Common core	Yes
Freedom to experiment on aims and methods (margin of appreciation)	Yes
EU Court is ultimate arbiter on freedom to diverge from common core	Yes
Discussion taken in shadow of Commission power/ QMV	Yes
Small, closed and stable network	Yes
Need political, and possibly, civil society, 'destabilising' input too	No (maybe Netherlands)
Information sharing of policy papers and cases, before and after decided	Yes

[136] Eleanor Fox, 'The Elusive Promise of Modernisation: Europe and the World' 28 Legal Issues of Economic Integration, 144-5.
[137] Christian Joerges and Jürgen Neyer, '"Deliberative Supranationalism" Revisited' EUI Working Paper Law No 2006/20, 4.
[138] Similarly, for the US, William Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms?' Competition Law International, 10.
[139] William Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms?' Competition Law International, 10.

Highlight important issues in these papers to avoid information overload	No
Articulated reasons for the outcomes in policy and decisions	No
Also explain how taken others' interests into account	No
Translate documents circulated into languages so all understand	No
Take dissent seriously. Consider fundamental dissent often and openly	Maybe
Openly share peer (and self) review of network members	No
Like-minded network members can form sub-networks together	Maybe
Publication of network policy discussions in clear format	No
Protection for commercially sensitive/ privacy information	Yes

F. Two Jurisdictions that Embrace Diversity

Disagreements on methods and aims can arise in Article 101. It is unclear whether we should tolerate, or even encourage, these disagreements; or, whether we should stamp them out. Here two reputable competition jurisdictions encourage, within limits, disagreements on aims and methods.

In Germany, Federal competition law is enforced by a network comprising the Bundeskartellamt and 16 State competition authorities (in their own states).[140] Consistency in the law's application is important; yet, the various authorities' independence is valued too. Authorities decide cases alone and do not bind others. The Bundeskartellamt cannot relieve State authorities of cases, or give instructions to them. Network members must exchange case information. Inconsistency remains on the first appeal, to State courts; after that the Federal Supreme Court applies the law uniformly.

In the USA, the Federal Trade Commission (FTC) and the Department of Justice (DoJ) apply Federal antitrust statutes: including, in effect, section 1, Sherman Act 1890,[141] their equivalent of Article 101; and the Clayton Act 1914. The states enforce these provisions too, as do the courts. Multiple actors apply the same laws. Judge Brandeis called the US States '...laboratories of democracy.'

In part, to promote uniformity, the FTC and the DoJ issue joint written substantive guidance. Similarly, in 1983, the Multistate Antitrust Task Force of the National Association of Attorneys General (NAAG) was created to increase co-ordination of enforcement by the states. They produce guidance too. However, disagreements arise. One example, from the merger arena, concerns the issue of what constitutes a vertical restraint. There were joint FTC and DoJ Federal guidelines on point, now withdrawn. NAAG issued more aggressive guidelines.

Disagreements on both aims and methods are embraced in Germany and the USA.[142] These are networks of equals, all take substantive policy decisions, within the limits of the Federal

[140] Similarly, in Spain, Regional Governments can apply national competition law, but there are strict rules on case allocation, Martinez Lage in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), 27.

[141] At least insofar as is important for our discussion, see Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (Third edn, West Publishing Co. 2005), 592.

[142] For US law, Barry Hawk and Jeffrey Bayer, 'Lessons to Be Drawn from the Infra-National Network of Competition Authorities in the Us: The National Association of Attorneys General (Naag) as a Case Study' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), 17, 99, 102-10 and William Kovacic, 'Competition Policy in the

Supreme Court's judgments and the law. Both countries allow difference for similar reasons. First, the constitutional relationship between the States and the Federal authorities. Secondly, central enforcement may lack state enforcement's sensitivity to local concerns. Finally, the great benefit of '...surfacing hard issues for debate and creating dialogue as to what the law is and should be...ultimately to be resolved by the US Supreme Court...'[143]

Note that, in the USA, for example, the states also have their own competition rules, which they can enforce in addition to the Federal law. There can be conflicts between these different norms. In the EU, if there is an affect on trade between Member States, the national rules are normally constrained by the answer in EU law.[144] It may be thought sufficient to allow diversity in the national competition rules as long as there is no affect on trade between Member States. However, this is unlikely to generate much experimentation. Member States are unlikely to adopt two different tests in their national law, one where there is an affect on trade and another where there is not.

G. Conclusion

The Member States delegated competence in limited fields to the EU. Responses to legal diversity affecting areas outside of these fields often requires co-ordination of different semi-autonomous modes of governance.[145]

> "In an uncertain post-national political setting...the ability of the European market administration and its law to respond to the social will largely determine its long-term success or otherwise: in the absence of on-going political direction, the 'technocratic' needs must be administratively balanced against the 'ethical', whilst the 'economically rational' must be weighed against social demands within the administrative process."[146]

The Commission is trying to consolidate substantive policy-making power in relation to Article 101. It wants one uniform application of Article 101. It wants to be the one providing that interpretation. There is a competition network that includes the NCAs; but the Commission jealously guards its power from them. The debate about where power should lie within the network is political, the process of network creation and delimitation:

> "...is in itself an acutely political process in which arguments about efficiency, effectiveness, value for money, equity and legal certainty are almost certainly

European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms?' Competition Law International (although note the Supreme Court judgment in *Credit Suisse Securities v Billing* 551 U.S. 264 (2007), Justice Breyer, 16); for German competition law, Ulf Böge, 'The Bundeskartellamt and the Competition Authorities of the German Länder' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), 115. Diversity occurs in many areas of German Federal law.

[143] For the US, Eleanor Fox, 'The Elusive Promise of Modernisation: Europe and the World' 28 Legal Issues of Economic Integration, 144 and Ian Forrester, 'Diversity and Consistency: Can They Cohabit?' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), 341. As many competition issues must be litigated, rather than being made through administrative decision, the analogy with the Commission and the NCAs is not perfect. As regards Germany, Ulf Böge, 'The Bundeskartellamt and the Competition Authorities of the German Länder' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), 20 and 111.

[144] See article 3, Regulation 1/2003.

[145] Christian Joerges, ''Deliberative Political Processes' Revisited: What Have We Learnt About the Legitimacy of Supranational Decision-Making' 44 Journal of Common Market Studies, 792.

[146] Michelle Everson, 'The Crisis of Indeterminacy: An 'Equitable' Law of 'Deliberative' European Market Administration?' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002), 231.

> masking deeper seated concerns about protecting and extending the interests of the protagonists."[147]

The paper argues that both disagreement on methods and aims should be celebrated in Article 101. This provides scope for respecting diverse substantive views; it also generates multiple strings of policy experimentation, particularly important in areas of business and economic uncertainty. Germany and the USA both embrace some diversity in their competition laws for these reasons.

Yet, this is not a plea for unbridled diversity. Competition and market integration are important EU values. Article 101 needs a strong common core: given the importance of trust; the fear of beggar-thy-neighbour attitudes; and the efficiency of the whole system. So, I argue for co-ordinated diversity. The idea is that the EU Courts lay down the law. However, the Commission and the NCAs can experiment in the gaps. This has repercussions for the EU Courts, as well as review of the NCAs by the Member States' courts. In an experimentalist model, their role may principally involve checking that boundaries have not been crossed, rather than defining the actual content of the balance; at least until the experimental music has stopped.

By ensuring that no one dominates substantive discussions in the ECN, and by respecting difference, we encourage experimentation and better protect local preferences. By ensuring that these experiments are regularly reported to the ECN itself; and by pushing members to adopt better solutions on their competition journey, diversity will be better co-ordinated too.

Greater freedom impacts upon network members' power. They often deny this. The Commission will not relish losing power and may resist my proposals. The NCAs and Member State courts relish more independence on substantive policy issues from the Commission and their Member States. They are not only motivated by power, but it is important. They gain independence here from the Commission; yet, the NCAs may not favour co-ordinated diversity, they generally accept the system as it is. Diversity highlights the many value judgments involved, even within consumer welfare assessments. This undermines their claims for independence from their Member States. Many NCAs give consumer welfare disproportionate weight, compared to other institutions in their Member States. Competition experts must pay more respect to the will of their peoples.

[147] Stephen Wilks, 'Understanding Competition Policy Networks in Europe: A Political Science Perspective' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the Eu Network of Competition Authorities* (Hart 2002), 79.