Multilevel competition policy in Europe

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Abstract

The paper addresses trade-offs and perspectives of multilevel competition policy in Europe. Recent streams of modernization of European competition policy have shaped what could be defined as a "multilevel competition policy". Accordingly, national competition authorities played a greater subsidiary role in the core activities of article 81/82, and to some extent in other areas of competition. However, harmonization of the nature of national competition authorities (degree of independence and rules of governance) is still in its infancy. The complex array of powers attributed to competition authorities has been recently enriched by the role attributed by the Commission White Paper to the complementarity between public and private enforcement of antitrust law.

1. Introduction

The notion of multilevel governance has gained wide currency both in Europe and elsewhere. It has been particularly applied to describe the nature of the interrelations among levels of government (supranational, national and subnational) within the EU space, with specific emphasis on fiscal and redistributive issues. Relatively scant attention (of course, with some exceptions) has been placed on the multilevel dimension of policy areas not involving budgetary issues but nonetheless requiring coordination among multiple players placed at different levels of the EU governance systems, such as it is the case for competition policy.

This lack of attention is unfortunate for at least two reasons. The first is that the economic analysis of multilevel governance cannot be directly applied, without modifications, to the competition policy domain. The economic underpinnings of the relationships among the multiple actors involved in competition policy differ to some extent from those underlying the policy areas traditionally analyzed through the multilevel governance framework. This implies a need for an analysis of the specificities of multilevel competition policy. The second reason is that the recent evolution of EU competition policy has reinforced the multilevel nature of the relationships among the relevant actors, calling for greater attention on the notion of multilevel governance.

In this paper, we make a threefold contribution to the literature on multilevel governance. First, we analyze the economics of multilevel competition policy, highlighting the aspects of the competition policy domain that require careful handling when applying categories derived from the economics of multilevel governance in general. Second, on the basis of the ensuing economic insights, we evaluate the most salient features of the current state of European multilevel governance of competition policy. Third, we provide a formal model that allows to capture the main trade-offs involved in the design of multilevel competition policy. Although our main focus is on the European context, the analysis has wider applicability. However, issues of global coordination of competition policy that are currently the object of heated debate are outside the scope of this paper, in so far as the paper focuses on existing systems of multilevel governance, rather than on the proposition of a novel (and global) system of multilevel competition policy (on this issue see, for instance, Budzinsky, 2009).

The structure of the paper is as follows. In section 2, we provide a brief overview of the economic analysis of multilevel governance that constitutes the necessary starting point to

highlight the specificities of multilevel competition policy. In section 3, an overview is presented of the European multilevel competition policy system arising from some recent policy developments, particularly from the so-called "modernization" of European antitrust enforcement that has brought about a more marked decentralization of enforcement (EC Regulation 1/2003, hereinafter REG). In section 4, the insights developed in the section 2 are used to evaluate the European system presented in section 3. Section 5 presents a model that allows to highlight a range of relevant trade-offs involved in multilevel competition policy. Section 6 concludes.

2. A capsule overview of the economics of multilevel governance

For the purposes of this paper, a multilevel governance system can be defined as the combination of: (a) a set of actors and (b) a set of rules governing the interaction among those actors (a mechanism of coordination) through the definition of vertical (across multiple *levels*) and horizontal relationships among those actors. The combination of (a) and (b) is meant to ensure the governance of a given community, namely the provision of a public good in the form of the collective "order" of the community. The provision of collective order, in turn, involves two relevant responsibilities to be attributed to the relevant actors, namely the definition of the formal and/or informal rules disciplining relationships within the community and the enforcement of such rules.

Two important aspects of this definition should be stressed. As for (a), the nature of the actors involved may be public or private. While the focus of the analysis of the European multilevel governance system often focuses on levels of government, and thus on public actors involved in the provision of collective order, the economic analysis of multilevel governance tends to be broader and to include private actors in the picture, as they may play a relevant role in many circumstances relevant for the governance of a community (Brousseau and Raynaud, 2006). This is the case, for instance, when a private association enacts initiatives of self-regulation or when standards are defined by private bodies.

As for (b), it should be emphasized that the rules governing the relationships among the various governance-relevant actors may be of a formal or an informal nature. The bulk of the rules disciplining the horizontal and vertical relationships among the actors involved in the provision of an order tends to be specified ex ante and codified. This is most evident if one

thinks about the rules defining the relationships among the various levels of government within the EU system, but holds true also for other sectors. However, in many instances, and particularly when the formal rules specified ex ante are akin to rather vague standards, a need emerges for additional tools of coordination that may be addressed through informal rules arising from repeated interactions. Moreover, it is worth specifying that the mechanism of coordination among the various actors may include a dispute resolution system.

The central issue addressed by the economic analysis of multilevel governance concerns the optimal degree of centralization in the provision of the collective order or, in other words, the definition of the appropriate level at which a given governance issue should be tackled. The literature has identified a number of relevant dimensions against which the relative performance of centralization and decentralization may be measured. In what follows, we review the principal dimensions that have been highlighted in the literature, starting from those tilting the balance in favour of decentralization.

Ability to meet citizens' preferences. The first relevant dimension of analysis derives from the fiscal federalism literature (Oates, 1972; Tiebout, 1956) and has been transposed to the analysis of more general coordination contexts, such as for instance to the analysis of the harmonization of legal rules in the EU (Faure, 2004; Van den Bergh, 1998) or to the analysis of the matching between governance levels and economic agents' coordination needs (Brousseau and Raynaud, 2006). The basic intuition behind this criterion is that decentralization allows a closer correspondence between the nature of the order provided and the preferences of the citizens/economic agents to which such order applies. The more centralized the provision of order, the greater the heterogeneity of preferences and needs of the population and the lower the ability of the governance level to adopt solutions tailored to local needs.

Ability to make effective use of dispersed information. This dimension refers to the existence of relevant informational asymmetries in the provision of collective order. These are apparent in at least two respects. First, they are apparent at the stage of rule definition: law and collective order are akin to public goods as they are non-rival and non-excludable and, as for any public good, their provision involves a problem of preference revelation. More generally, rule-making requires information that is not always possessed by those making the rules. Second, they are apparent at the stage of enforcement. Enforcement of rules presupposes the ability to identify rule-breakers by observing their behavior and sometimes to evaluate the lawful or unlawful nature of their behavior on the basis of sector- and context-specific

information. Both aspects suggest that decentralization may have an advantage over centralization with respect to this dimension.

Dynamic efficiency: ability of the system to evolve through innovation. The nature of the collective order defined at a given point of time should evolve with the evolution of citizens' or economic agents' needs. An important dimension of analysis of the optimal degree of centralization in order provision is therefore given by the ability of the system to evolve. The analogy often traced between a decentralized system of order provision and a market suggests that competition among decentralized actors may favour dynamic efficiency because it entails a learning process that, through the comparison of the costs and benefits of competing (legal) rules, leads to the emergence of the most efficient rules (Vand den Bergh and Camesasca, 2006; ch. 10). Centralization (or harmonization of legal rules), by contrast, would impede the emergence of processes of experimentation and mutual learning associated to regulatory competition.

Ability to ensure stability of expectations/ reduce legal uncertainty. The ability of the collective order to dynamically evolve might have some drawbacks in the form of legal uncertainty. Legal certainty is not only a legal category, in so far as uncertainty involves scarce stability of expectations and therefore imposes unnecessary transaction costs on citizens and economic agents. The optimal degree of dynamic evolution of the system should thus take the costs of legal uncertainty into account. In this regard, centralization is often seen as better able to ensure stability of expectations because centralized systems tend comparatively more than decentralized systems to resist to change. However, it is not easy to conclude in favour of one or the other with respect to this dimension.

Ability to internalize externalities. The principal feature of centralized systems is given by their ability to internalize externalities. In the present context, the presence of externalities refers to the effects of order provision that are not taken into account by the public and private actors of the multilevel system because the relative costs and benefits are borne by individuals outside of the communities to which order is provided. Thus, externalities are present in a decentralized system, while they are by definition perfectly internalized in a centralized system. Examples abound. For instance, some issues relevant to the provision of collective order have to do with public goods such as environmental quality whose benefits are enjoyed by a broader population that that associable to politically-defined states. In a decentralized system characterized by the presence of many nation-states, however, decisions having an

impact on the environment imply positive or negative externalities for polities different from those to which the decisions apply.

Ability to garner scale and scope economies. Centralization has an advantage over decentralization also by virtue of the economies of scale in rule-making and enforcement associated to it. In the production of public order a given actor incurs predominantly fixed costs, while marginal costs are minimal. This is most apparent for rule-making (consistently with the public good nature of rules), but it applies to a lesser extent also to enforcement (although marginal costs are likely to be higher in the latter case). Thus, centralization, by increasing the "scale of production" of order provision, allows efficiency gains. These benefits of centralization are more valuable, the less heterogeneous is the population to which order provision applies. In extreme cases, if the population is sufficiently heterogeneous, the cost benefits following from economies of scale may be completely offset by the efficiency loss due to the absence of correspondence of rules with community needs.

Ability to restrain the negative effects of rent seeking. A final aspect taken into account in the economics of multilevel governance is the ability of the system to minimize rent-seeking costs. These may have their origin in both the public and the private sphere. As for the former, rent-seeking activities may take the form of an attempt on the part of public officials to derive private benefits from their exercise of power or, more generally, from the pursuit of interests diverging from the public interest. Particularly in the case of bureaucracies, this tends to translate into productive inefficiencies, given that organizational choices tend to respond to bureaucrats' seek of reputation, prestige and power rather than on efficiency, absent the competitive constraints of the private sector. As for the latter, rent-seeking activities may take the form of attempts from private agents to influence the direction and content of law-making (so-called regulatory capture) or to escape the enforcement of the collective order through lobbying or outright corruption. Whether centralization or decentralization scores better in this regard it is not easy to evaluate. On one side, decentralization should increase accountability, as it allows closer monitoring from citizens. Moreover, to the extent that some competition is possible across decentralized units, this may serve to restrain inefficiencies. On the other side, however, decentralization may increase the number of interest groups that may participate to the regulatory capture game, increasing the overall costs due to rent-seeking. Indeed, centralization may make it more difficult to small interest groups to exert an influence in decision-making.

The issue at the heart of the economics of multilevel governance – that of the optimal degree of decentralization – has predominantly a vertical dimension. It concerns the allocation of competences and powers across different vertical levels of the overall governance system. However, a multi-level governance system also involves an horizontal dimension, which concerns the relationships among actors placed at the same level. At least three aspects of the horizontal dimension deserve attention. The first was implicit in the above description of a decentralized system. In presence of decentralization, the multiple actors in the system, each of which performs similar functions for distinct communities (different national political institutions, different national regulatory or competition authorities) may be in a relationship of competition (what has been previously called "regulatory competition").

Moreover, issues of coordination also arise. Indeed, the actions of the various decentralized actors may exert reciprocal externalities (Parisi et al., 2004). In circumstances in which the joint effort of more than one decentralized actor is necessary to ensure order provision, i.e. when the action of one actor generates positive externalities for the other, there tends to be under-provision of order. In circumstances in which order provision by one actor excludes order provision by the other, and therefore reduces the rents appropriable by the latter through order provision (under the assumption that actors in the system derive private benefits from actively participating to order provision), there tends to be over-provision. Note, however, that overprovision is not the only possibility in the latter case, as in the setting described the decision of an actor to provide order implies a private benefit, but also a cost that might be saved by free-riding on the other actor's effort. The structure of payoffs will thus vary from case to case.

A second aspect of the horizontal dimension that should be highlighted is the horizontal relationship linking different actors placed at the same level and providing order to the same community, such as for instance national competition authorities (hereinafter NCAs) and national regulatory authorities (hereinafter NRAs) operating in the same country and in the same industrial sector(s). These relationships tend to be particularly relevant in network industries, where regulatory authorities tend to exercise a more stringent oversight than it is the case in other industries.

Finally, the third relevant aspect of the horizontal dimension of multilevel governance is given by the horizontal relationship between public and private actors involved in enforcement. In a number of policy domains, and particularly in the competition policy domain, enforcement may be the outcome of an initiative taken by an administrative body,

such as for instance a National Competition Authority (hereinafter, NCA) or of an initiative taken by individuals or firms by bringing a case to court (the so-called private enforcement).

3. The EU system of multilevel competition policy

The "multilevel" nature of European competition policy has been recently strengthened by the so-called "modernization" of competition policy, whose main step has been the enactment of Regulation 1/2003 on May 1, 2004. By virtue of the "modernization", national competition authorities have acquired a greater subsidiary role in the enforcement of article 81 and article 82 of the Treaty, and to some extent in other areas of competition. Moreover, a 2008 Commission White Paper has emphasized the complementarity between public and private enforcement of antitrust law, further enriching the set of relevant actors in the multilevel competition policy system.

As a consequence of these recent development, the current system of EU multi-level competition policy can be described by reference to four characteristics: (1) a high degree of centralization of law-making, which does not exclude the existence of national laws that can be applied in specific circumstances; (2) a high degree of decentralization of enforcement, mitigated by a strong unifying role played by the European Commission; (3) the adoption of formal rules of coordination meant to smooth the vertical relationships among actors placed at different levels in the system (particularly the Commission and NCAs); (4) a very limited role for formal rules of coordination in the context of horizontal relationships among NCAs and among NCAs and national regulatory authorities.

3.1. High degree of centralization of law-making

As for the first characteristic, the centralized provision of substantive competition law was envisaged by the founders of the European Community as a key instrument to ensure the integrity of the common market and has therefore been a longstanding feature of the EU competition policy system. The EEC Treaty attributed, by consequence, far-reaching powers to Community institutions. Uniform laws therefore exist in the main areas of EU competition policy: unilateral practices (art. 82 of the Treaty), the interaction between independent firms

(art. 81 of the Treaty) and rules about structural changes to a market as mergers and acquisitions (i.e. concentrations, EC Merger Regulation).

As far as unilateral practices and agreements are concerned, European competition law (particularly art. 81 and 82 of the treaty establishing the European Community) applies only to behaviors affecting "trade between member states"[1]. Behaviors or practices that are not able to affect inter-state trade can therefore be scrutinized under national law and even the application of art. 81 and 82 does not exclude the application of national laws. In fact art. 3(1) of Regulation 1/2003[2] (hereinafter REG) prescribes to National Competition Authorities and national courts applying national competition law to illicit behaviours within the meaning of European competition law, that they shall also apply the latter to such behaviours. This norm clearly implies that there could be a simultaneous application of national competition laws and art.81 or 82 (the so called "*double-barrier*"[3]).

As far as concentrations are concerned, the relationship between European law and national competition laws is generally based on the "dimension" of the concentration in terms of turnovers of the involved undertakings (EC Merger Regulation 139/2004 - hereinafter R.MER). In particular, R.MER applies to those concentrations said to have "Community dimension", as art. 1(2) precisely establishes. This division is more relevant than in the case of art. 81 and 82 because European merger rules are applied exclusively by the Commission.

3.2. High degree of decentralization of enforcement

As for the second feature of the competition policy system – the high degree of decentralization of enforcement – art. 81 and 82 of the EC Treaty have been considered for a long time as having direct effects in the national law system. Their application could therefore be invoked before national courts and NCAs, with the only exception of the exemption of art.

[1] As a matter of fact, the European Court of Justice has always adopted a wide and fuzzy interpretation of this general concept, i.e ECJ, 13/07/66, *Consten and Grundig/Commission EC*, C-56 and 58/64. Recently the Commission has adopted a Communication aimed to clarify and delineate the concept. Communication 2004/C 101/07.

[2] Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[3] Italian antitrust law explicitly put European and national law as alternative. That is the European law's field of application delimits national law's field of application, too.

81(3), which could be enforced only by the Commission until REG[4]. REG has further strengthened the extent of decentralization of competition policy enforcement by attributing to NCAs and national courts the possibility to apply art. 81 in its entirety.

Indeed, art. 5 REG establishes that NCAs shall have the power to apply Articles 81 and 82 of the Treaty in their entirety (that is, art. 81(3) included) in individual cases.[5] NCAs' types of decisions (and powers) are designed to be very similar to those that the Commission can adopt.[6] That is, each NCA can a) require that an infringement be brought to an end, b) order interim measures, c) accept commitments, d) impose fines, periodic penalty payments or any other penalty provided for in their national law, e) and find no ground for action.

Moreover, art. 6 REG formally states that National courts have the power to apply Articles 81 and 82 of the Treaty (in their entirety, that is art. 81(3) included). In particular, national judges - besides requiring that an infringement be brought to an end - are competent in damages action for breaching art. 81 and 82 (so called private enforcement of European antitrust law). Besides, national Judges cover an important role in defining the rules, by the application of art. 234 of the Treaty[7].

3.3. Adoption of formal rules of vertical coordination

The European multilevel competition policy system has traditionally been relatively centralized, especially as compared to the US system. The move towards decentralization of enforcement, while motivated by the need to streamline enforcement and alleviate the Commission's workload allowing it to focus on the most serious infringements, has raised concerns over the risks of reduced efficiency through duplication and the risk of inconsistencies. Moreover, the existence of the "double barrier" has been perceived as a potential source of transaction costs, which reduces stability of expectations and may have adverse effects on efficiency.

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[4] i.e. ECJ, 30/01/74, *BRT/SABAN*, C-127/73. In Italy also the law 52/96, art.54(5) stated the AGCM (Italian NCA) power to apply art.81 and 82 of the Treaty.

[5] The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in order to effectively complied with the provisions of REG. (art. 35 REG)

[6] Commission powers are listed from art. 7 to 10 in REG.

[7] In particular each national Court can request the Court of Justice to give a ruling on the interpretation of the Treaty (art. 81 and 82) if a question is raised before it and it considers that a decision on the question is necessary to give judgment.

The regulatory response to these concerns has been the ex ante definition of formal rules specifying some important aspects of the vertical relationships within the multilevel system. Thus, a number of coordination mechanisms has been devised to reduce the possibility of inconsistencies and (partially) preserve the "*effet utile*" of EC law[8].

First of all, ex ante boundaries have been set to the extent to which national laws may diverge from European competition law. Art. 3 REG states that as far as agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty are concerned, application of national law may not lead to prohibition of behaviours which do not restrict competition within the meaning of Article 81(1) or which fulfill the conditions of the exemption at Article 81(3), while a stricter national law about unilateral practice is allowed.

Moreover, normative systems' conflicts, although still theoretically possible, are reduced by the fact that often the same body (a NCA or a national judge) will enforce at the same time both European and national competition law.

Vertical coordination is also favored by the "supremacy" of the European Commission. Despite the clear intent at decentralization, the European Commission keeps a leading role in the enforcement of European competition law. In this regard it is very important to underline that, even if NCAs can apply art. 81 and 82, the initiation by the Commission of proceedings for the adoption of a decision shall relieve NCAs of their competence to apply those articles. [art. 11(6) REG]. Moreover when NCAs rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission [art. 16(2) REG].

The Commission's preeminent role is softened by a necessary requirement of cooperation. The Commission and the NCAs form together a network of public authorities (European Competition Network – ENC) that is supposed to "apply the Community competition rules in close cooperation". For that purpose, art. 11 and 12 REG establish information exchange and coordination procedures. Moreover, further arrangements for information and consultation have been set up.

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[8] The "*effet util*" is a general principle of EC law, which tends to affirm the "*primuaté*" of European law over national law.

In this regard, if a NCA is already scrutinizing a case, the Commission has the obligation to consult with that NCA before initiating proceedings. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.

The Commission holds a leading role in the general enforcement of competition policy also with respect to the judicial application of antitrust law. In fact, art. 16(1) REG prescribes that when national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions that would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings[9].

Moreover, as it is the case for NCAs, the Commission and national courts have a reciprocal duty of cooperation, mainly in terms of information exchange, communication and consultation procedures stated by art. 15 REG. In this regard a specific but relevant information exchange issue is related to the interaction between leniency programmes and actions for damages. The Commission in the aforementioned white paper suggests that an adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant in order to avoid placing the applicant in a less favourable situation than the co-infringers. In particular, such protection should apply: (i) to all corporate statements submitted by all applicants for leniency in relation to a breach of Article 81 of the EC Treaty (also where national antitrust law is applied in parallel); (ii) regardless of whether the application for leniency is accepted, is rejected or leads to no decision by the competition authority.

Formal rules of vertical coordination have been devised also in the realm of concentrations. First, it is worth noting the possibility that a concentration not having "Community dimension", but which is capable of being reviewed at least by NCAs within their national legislations, could be examined by the Commission if undertakings decide to inform the Commission before any notification to NCAs (pre-notification). The Commission shall transmit this submission to NCAs without delay. Where no NCA has expressed its disagreement, the concentration shall be deemed to have a Community dimension and shall

[9] However this obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.

be formally notified to the Commission. In such situations, no Member State shall apply its national competition law to the concentration.

Second, undertakings could inform the Commission that a certain concentration having "Community dimension" may significantly affect competition in a market within a Member State that presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State. Unless that Member State disagrees, the Commission, where it considers that such a distinct market exists, and that competition in that market may be significantly affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national competition law (or it shall itself deal with the case in accordance with M.REG). This mechanism seems to give to a certain extent to undertakings the possibility to switch jurisdiction (so called "forum shopping").

Finally, and differently from the enforcement of art. 81 and 82, the Merger Regulation envisages the ex-ante application of merger rules. In fact art. 4(1 and 3) states that Concentrations with a Community dimension shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest jointly by the parties to the merger or by those acquiring joint control as the case may be.

3.4. Limited role of formal rules of horizontal coordination

Formal rules of coordination, although present to some extent, play a relatively more limited role with respect to horizontal relationships than to vertical relationships. As mentioned in section 2, horizontal relationships can be of at least 3 different types: (1) relationships among NCAs of different countries; (2) relationships between national courts and NCAs; (3) relationships between National Competition Authorities and National Regulatory Authorities in regulated sectors. The nature and the extent of the coordination mechanisms in place to govern these three different sorts of relationships differ greatly.

Relationships among NCAs are supposed to be characterized by cooperation. Art. 13 REG provides incentives for cooperation affirming that where NCAs of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the

fact that one authority is dealing with the case shall be sufficient ground for the others to suspend the proceedings before them or to reject the complaint. Besides, where a NCA or the Commission has received a complaint against an agreement, decision of an association or practice that has already been dealt with by another competition authority, it may reject it.

In the case of the horizontal relationship between national courts and NCAs there are no uniform (that is, centrally defined at the EU level) rules. The precise nature of this relationship depends on the specific national legislations. As a matter of fact, only in some member states, victims of the infringement of art. 81 or 82 can rely on NCA's decision as a binding proof in civil proceedings for damages. Indeed, this has led the Commission to suggest – in its "White Paper on Damages actions for breach of the EC antitrust rules"[10] – that the following rule be included in each national antitrust law: "*national courts that have to rule in actions for damages on practices under Article 81 or 82 on which an NCA in the ECN has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling*".

Finally, a further relevant horizontal dimension of multi-level relationships in European competition policy is related to the interaction between NCAs and NRAs, in sectors where regulators have specific and formal duties enhancement of competition within the sector. In this regard, very relevant are network industries, such as for instance electronic communications, where a very complex regulatory system has emerged in Europe, after the 2002 reform of electronic communication regulation.[11]

The European regulatory framework is based on NRAs whose main aims are supposed to be the promotion of competition and the enhancement of consumer benefit.[12] In this regard, it is first of all worth noting how regulation and antitrust enforcement in Europe are not characterized by a rigid division of application, as it is the case in US legal system[13]. Recent

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[10] COM(2008) 165 final

[11] It is mainly composed of 5 Directives: Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and services, Directive 2002/20/EC on the authorization of electronic communications networks and services; Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks; Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Directive (2002/77/EC) on competition in the markets for electronic communications services.

[12] Article 8 Directive 2002/21/EC.

[13] In this regard the notorious Supreme Court Decision, on the 13 January 2004, Verizon Communications Inc v. Law Offices of Curtis Trinko

ECJ's decisions have highlighted the possible application of antitrust rules to "regulated behaviors"[14].

A different but related issue is the antitrust competence assigned to regulators[15]. In this case, where sectoral regulation does not exclude enforcement of antitrust legislation, another fundamental issue about the effect of Authorities action into the market arises. Specifically, if regulator body and antitrust authority can produce the same "regulatory outcome" into the market, than their action is to a certain extent substitutable. A competition policy design characterized by substitutability of the Authorities' activity could be *prima facie* considered costly but it can have a relevant economic meaning depending on institutional and strategic interaction between the decisional process of the two authorities and its effect on the regulatory outcome. How one Authority can influence the decision of the other (that is if their decisions are independent or not) and what is the "market dynamic" between them (collaboration or competition)

Differently from how it is normally affirmed, it seems that antitrust enforcement and regulation in network industries - and above all electronic communications - are characterized by a certain level of substitutability. That is , given a certain state of the market, where competitive dynamics are modified, either regulator or antitrust Authorities' intervention, ex-ante or ex-post, can produce a new market state shaped by pro-competitive remedies.

As far as antitrust enforcement is concerned, public bodies (both at supranational or national level) can adopt decisions which can be classified as regulatory. Art. 7 REG gives the Commission, applying art. 81 and 82, the faculty to impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.[16] Moreover art. 9 REG gives the Commission the power to make commitments - offered by undertakings - binding on them.[17] Another clear

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[14] Commission decision of 04 July 2007, case COMP/38.784 – Wanadoo Espana vs. Telefonica; Court of first Istance decision of 10 April 2008, Deutsche Telekom vs. Commissione, confirming the appelled Commission decision 2003/707/CE of 21 May 2003

[15] That is the regulatory design adopted for istance in UK, where OFCOM, the NRA of Electronic communication, has competences to enforce also antitrust rules within the sector it oversees This institutional outcome could indicate a need of stronger coordination between the enforcement of the two normative bodies.

[16] Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

[17] Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

regulatory power is the exemption outlined at art. 81(3), prescribing that illicit agreement within art. 81(1) may be declared inapplicable if contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.

Similar regulatory powers are assigned to NCAs by art.5 REG within the application of European law and often by each national legislations[18]. Moreover it is important to underline how NCAs - when acting as European administrative body - can "disapply" national rules contrasting with art. 81(1) and art 82 of the Treaty, (in combination with art.10 and 86), thus being able not to consider national rules "covering" anticompetitive behaviours.[19]

As far as sectoral regulation is concerned, one of the main principles of the 2002 European Electronic Communication regulatory framework is the convergence between antitrust law and sectoral regulation, which implies that ex-ante obligations can be imposed only on operators found to have significant market power (SMP), a concept stated to be equivalent with a dominant position in antitrust analysis. In particular, within the Framework Directive (FD) and the Guide Lines (GL, 2002/C 165/03) are used the concept of relevant market (art. 15(1) FD), dominant position (art. 14 (2) FD), leveraging of market power (point 16 GL). Furthermore, besides basic interconnection and interoperability obligations[20], in order to regulate undertakings' market power, NRAs can impose on SPM undertakings obligations, which corrisponds to typical antitrust remedies to abuse of dominant position [Art 8(1) Access Directive (AD)]. In particular, obligation of transparency (art. 9 AD), obligation of non-discrimination (art. 10), obligation of accounting separation (art. 11), obligations of access to, and use of, specific network facilities (art.12), price control and cost accounting obligations (art.13)

As far as decisional activity of the two bodies is concerned, their activity is on a great extent independent, despite national legislations, as the Italian - prescribe obligation of reciprocal consultation (not binding) between them. Moreover consultation activity is often used

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[18] In this regard, Italiabn competition law (law 287/90) gives to Italan Competition Authority (AGCM) the power to allow illicit anti-copmpetitive agreement becasue of consumers' benefit (art. 4); to allow undertakings' concentration, imposing (art. 6 (2)); to make undertakings commitment binding on them. (art. 14-ter).

[19] For example AGCM decision CIF 8491/00. Besides Amministrative Tribual (TAR Lazio) which - within art. 234of the Treaty - requested the Court of Justice to give a ruling on the disapplication issue. The Court confirmed the duty of each national body enforcing European law to "disapply" contrasting national law, ECJ C-198/01

[20] Article 5 par. 1 Directive 2002/19/EC.

strategically, also because it is possible to detect element of competition between the Authorities, deriving from the empirical evidence.

4. An evaluation of the European system: law-making too centralized and enforcement too decentralized?

The current asset of European multi-level competition policy has been criticized from two complementary angles. On one side, the degree of centralization of law-making (or, equivalently, the degree of harmonization of competition law) has been criticized as being excessive on the basis of the scarce ability of a centralized system to meet the heterogeneous needs of the citizens of different national communities (Van den Bergh and Camesasca, 2006). On the other side, the extent of decentralization of enforcement has been deemed excessive on the basis of the observation that a centralized system would allow the internalization of the externalities otherwise existing among the parallel actions of different NCAs (Parisi and Deporter, 2006).

We submit that these conclusions derive from a straightforward application of some of the dimensions of analysis of multilevel governance introduced in section 2 that does not take into account the peculiarities of multilevel competition policy. In this section, we highlight some of the specific aspects of the competition policy domain that warrant attention when applying to the analysis of multi-level competition policy the categories developed for the broader notion of multi-level governance, limiting the exposition to those features that are relevant in relation to the two above allegations (excessive decentralization of enforcement and excessive centralization of law-making). In the next section, a model will be presented that allows to capture a broader range of trade-offs involved in the choice of the appropriate domain of order provision.

The insights developed in both sections suggest that (a) the design choices of the multilevel competition policy system involve a greater range of trade-offs that are usually considered in the basic economics of multilevel governance, so that interpretations based on single dimensions of analysis (such as, for instance, only on the ability of the system to internalize externalities, or the ability of the system to meet citizens' preferences) are necessarily incomplete; (2) when analyzing issues of multilevel governance the vertical dimension (the choice of centralization versus decentralization) should be considered jointly with the horizontal dimension: focusing on either one or the other does not allow to provide a useful

understanding of the many trade-offs at play; and (3) the nature of the mechanisms of coordination across both vertical and horizontal levels within the multilevel governance system exerts a crucial influence on the overall performance of the system: focusing only on the degree of decentralization of a multilevel system or on the number of actors interacting horizontally in the system may be misleading.

The first peculiarity that we think it is important to highlight relates to the fact that, with respect to other domains of order provision, the competition policy domain is characterized by a comparatively greater importance of enforcement over rule-making. This is for at least two reasons. The first is that substantive law has not changed much in the course of the past decades in developed economies' jurisdictions. This places at the center stage of the analysis the way in which this rather static substantive law is enforced. The second, and most important, is that competition law is principle-based, i.e. it is based on principles that are filled of practical content only upon application. Thus, competition policy enforcement constitutes a means through which a law that incompletely specifies property rights ex ante is dynamically "completed" through time (Nicita et al., 2005).

Second, the criterion of the ability of a given level of order provision to match citizens' preferences is not appropriate to analyze the competition policy domain. In most jurisdictions independence is a crucial feature of competition authorities. Independency is a requirement considered indispensable exactly to guarantee that competition authorities' decisions are insulated from people's preferences. Through independence, it is possible to guarantee the long-term commitment of competition authorities. Particularly, independent competition authorities are able to commit to pursue the long-term interest of consumers, which may diverge from their short-term interest (such as, for instance, in the case of predatory pricing). It follows that defining the appropriate degree of decentralization in law-making by reference to the ability of competition policy to meet consumers' preferences can be highly misleading.

Third, the notion of externalities among the actions of different NCAs (which is crucial to the conclusion that the degree of decentralization in enforcement is excessive in the EU system) should be handled with care. Existing analyses of the issue of the presence of externalities among the actions of different NCAs implicitly take into account the preferences of the NCAs in defining the optimal degree of enforcement. In other words, they conclude that decentralization results in under-provision or over-provision of antitrust enforcement on the basis of the straightforward application to the interaction of two NCAs of the sort of analysis usually applied to interactions among consumers or producers. Although the exercise is

appealing, it is worth asking whether taking into account NCAs preferences in defining the optimum is an appropriate assumption. Further, the issue of free-riding in antitrust enforcement in circumstances in which the efforts of two or more authorities are mutually exclusive should be more carefully be dealt with. Given the heterogeneity of the different NCAs, the interaction between the effects of externalities and the incentives to free-ride does not allow to conclude a priori whether over-provision or under-provision will result. Finally, centralization is only one of the possible solutions to the presence of externalities (as unified property is a solution in the case of externalities involving multiple owners). Another solution, pursued to some extent in the European multi-level policy context, is the adoption of formal mechanisms of coordination that allow to reduce the adverse effects of externalities. These mechanisms should be taken into account in the analysis.

Thus, a more refined understanding of multi-level competition policy requires to broaden the analytical perspective by taking into account the peculiarities of the competition policy domain. It is to such more refined analysis that we now turn.

5. A formal model of multilevel competition policy interaction

6. Concluding remarks