A. Introduction

Multi-jurisdictional polities consist of multiple sovereign units with potentially distinct cultures, political interests and administrative traditions. This diversity stands both as an advantage and a disadvantage for policy enforcement. On the one hand, the realisation of this diversity contributes to the innovation in policy enforcement, but on the other hand, it causes complexities in terms of consistency and uniformity. The puzzle becomes even more complicated when it comes to antitrust policy as, due to the ever-expanding integration between economies, most violations affect multiple markets and therefore engender action by multiple authorities. As a result, management of complex relations between multiple authorities establishes itself as the ultimate challenge for multi-jurisdictional antitrust enforcement in modern societies. In order to reach the ideal, such management should entertain—to a certain extent—conflicting goals of diversity and consistency at the same time.

From this perspective, the choices of design of the EC and the US distinguish themselves as highly appealing examples for a detailed analysis. First of all, these polities developed mature and strong antitrust policies, which set models for the newly emerging antitrust regimes all around the globe. Secondly, they both stand on multi-jurisdictional foundations, in which their antitrust policies are deeply

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1 For the purposes of this article the concept of “multi-jurisdictional polity” refers to a political system where more than one level of jurisdiction exists and where the legal acts of the upper level have direct applicability within the legal system of the lower level. Therefore, the US as a federal system and the EU as a supranational system both fall within the scope of this concept.
Last but not least, both polities initiated substantial revisions of their enforcement regimes recently. The modernisation movement in the EC decentralised the enforcement regime by delegation of the enforcement authority from the European Commission to the national competition authorities (NCAs). In the US, the Antitrust Modernization Commission (AMC) expressed the desire for a more systemised regime, although it did not propose any legislative amendment, and left the matter entirely to the mutual will of the state and federal authorities. Due to these tempting characteristics of the two polities, this article aims to analyse the multi-jurisdictional elements of the EC and the US antitrust enforcement regimes in a comparative perspective.

In one of his seminal articles, Daniel J Elazar identified the potential benefits of a comparative study as: better self-knowledge through looking at one’s significant other; better knowledge through the experiences of others who have been confronted with similar issues, and consequently inter-polity policy learning; the value and pleasure of sharing information for increased understanding; and lastly, common theory-building of the kind helpful to all scholars. This article aims to achieve these benefits. The first part of the article aims to accomplish the last of the benefits listed by proposing the model of “network management” as a common model for multi-jurisdictional policy enforcement. It argues that the model distinguishes itself as a suitable candidate for this task as it reflects successfully the complexity of policy enforcement in contemporary societies and proposes a logical framework for effective multi-jurisdictional policy enforcement. Part C analyses the antitrust enforcement regimes of the EC and the US under the model in order to raise the degree of self-knowledge and knowledge based on the experiences of others. Afterwards, turning to perhaps a more fundamental question, the article...

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5 DJ Elazar, “International and Comparative Federalism” (1993) 26 *Political Science and Politics* 190, 191.
attempts to explain the differences between the EC and the US enforcement regimes by their distinct traditions of regulatory federalism. Finally, the article raises the question of transatlantic policy learning and leaves it largely as an open one with preliminary observations and an emphasis on the desirability of more extensive work on this front in the future. As to the benefit of comparative study as a source of pleasure, it surely is a pleasure for the author to communicate her perspective through this article, but it is ultimately for the reader to decide whether the article satisfies the condition or not.

B. THE MODEL: NETWORK MANAGEMENT

Political science models are of significant assistance in the analysis of complex legal problems, as those models discern and shed light on otherwise imperceptible individual elements of complex problems and offer a much more straightforward vision of the real world. Accordingly, legal science literature has always been keen on borrowing political science models and incorporating those models at the core of the legal analysis. In terms of multi-jurisdictional antitrust enforcement, legal studies have devoted significant attention to the model of “regulatory competition” because of the close connection between the basic premises of antitrust policy and the model. More recent studies revealed substantial weaknesses of this model, such as the irrational assumptions on which it stands and its failure to predict policy outcomes. Perhaps more essentially, however, this model does not reflect the complexity of modern societies and oversimplifies the problem of multi-jurisdictional policy enforcement. In very brief terms, it perceives the problem as one of jurisdiction; and, based on the relative advantages and disadvantages of centralisation as
opposed to decentralisation, it attempts to predict which would be a better choice in any given polity.8

Nevertheless, the dilemma of policy enforcement of modern multi-jurisdictional polities goes beyond the matter of jurisdiction, and consequently the simplistic dichotomy of centralisation as opposed to decentralisation does not offer the solution. Due to the ever-expanding integration between local, national and global economies, rigid jurisdictional tests designed in abstract fail to designate the best placed authority to handle a policy issue. Even when enforcement of a policy is fully centralised or decentralised, multiple authorities get involved in the process through alternative channels when their economies or citizens are affected. To give just one example from the EC, although enforcement of the European merger policy is fully centralised as to the mergers of Community dimension, and the Commission enjoys exclusive jurisdiction in the scrutiny of such mergers,9 when high stakes are involved, national authorities utilise the national regulatory processes to block the mergers which appear detrimental from their perspectives.10 As in such situations different authorities utilise different policy channels, and consequently “talk” in different languages, the resolution of conflicts becomes even more complicated; compliance costs rise; and ultimately the future becomes unpredictable for the subjects of regulation.11

Hence, the ultimate challenge facing the modern multi-jurisdictional polities is the management of complex relations between multiple authorities which get involved into the enforcement process. In order to accomplish the ideal, such management should on the one hand provide channels through which the

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10 The conflict between Poland and the Commission in the analysis of a bank merger constitutes the most recent example of this kind of situations. In this case, Poland first attempted to block the merger through utilisation of the national privatisation regulations and imposed divestitures at the national level despite the Commission’s exclusive jurisdiction and its decision to clear the merger. See the Commission decision, 179/2005, OJ 2005 C179/2; “The Big Bank Job”, The Warsaw Voice News, 12 April 2006, available at http://www.warsawvoice.pl/view/11093/ (accessed on 8 August 2007).

11 For instance, the conflict mentioned in the above footnote resulted in two cases before the Community Courts whereby the Commission and the Republic of Poland sued each other on the grounds of violation of the Community rules of freedom of investment and the ECMR respectively. At the time of the writing of this article neither of these cases has reached to the final decision phase yet. See Case T–41/06 Republic of Poland v Commission of the European Communities; European Commission Press Release, “Mergers: Commission launches procedure against Poland for preventing Unicredit/HVB merger”, IP/06/277 (8 March 2006).
authorities can “voice” their perspectives, and on the other sustain consistent and coherent enforcement with the lowest possible cost for the subjects of regulation. In other words, it should accomplish diversity without harming consistency.

From this perspective, the model of network management developed by the Dutch tradition of policy networks approach appears a suitable model for multi-jurisdictional policy enforcement, as it reflects the complexity of modern multi-jurisdictional polities and offers a solution to the enforcement dilemma. Different authors offer plenty of different definitions of the concept of networks.\(^{12}\) Incorporating the common elements of all of these definitions into one simple sentence, networks can be defined as complex and dialectical relations between multiple and mutually dependent actors which take part in the formulation and enforcement of the policies. Actors form networks when they are interdependent on each other’s resources in order to accomplish a goal which they all desire.\(^{13}\) Such resources can be financial resources or human resources, as well as experience and expertise. The network management model perceives the modern societies as consisting of complex networks between multiple actors.\(^{14}\) Such vision strikingly overlaps with the structure of modern multi-jurisdictional polities which incorporate not only “maze of institutions”, but “matrix[es] of reciprocal power relations”.\(^{15}\)

Network relations are complex; and they have to be managed effectively in order to reach the ideal in the design and enforcement of the policies in modern societies. Effective network management requires on the one hand incorporation of all actors with the necessary resources or vested interests to the enforcement process, and on the other coherent and consistent enforcement through communication and dispute resolution in the short run and through mutual trust and comity building in the long run.\(^{16}\) In other words, network management

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aims to accomplish to some extent conflicting goals of diversity and consistency at the same time.

In brief terms, effective network management requires vigorous utilisation of three main instruments:\footnote{17}{Klijn et al., \textit{ibid}; Kickert, \textit{ibid}; Kickert et al, \textit{ibid}.}

1. \textit{Actor signalling mechanisms}. Through the signalling mechanisms, all actors with the necessary resources are called to participate in the enforcement process. To give an example from antitrust policy, all authorities whose markets are affected by the particular violation in question, and who are in a position to collect and bring substantial evidence or who have significant past experience in dealing with the kind of violation in question, should be called to take part in the enforcement process.

2. \textit{Information exchange and communication mechanisms}. Through the communication mechanisms all actors exchange the information in their possession as well as their individual perceptions and concerns regarding the particular issue in question. Communication mechanisms are of enormous importance for network management, as effective utilisation of these mechanisms prevents emergence of conflicts between the actors in the short run and contribute to the generation of mutual trust and comity in the long run.

3. \textit{Dispute resolution mechanisms}. Dispute resolution mechanisms are utilised in cases where the communication channels fail to generate a consensus among the actors regarding the best enforcement strategy. In such cases conflicts should be resolved immediately and swiftly before they give way to more complicated political disagreements or deadlock situations.

As a general rule, the model also emphasises the essential connection between the policy formulation and enforcement stages. If assistance of certain actors at the policy enforcement stage is desirable, those actors should also be given pass to the policy formulation stage, because if the policy in question does not reflect their perspectives, they would not have the incentives to take part in the enforcement process.\footnote{18}{Richardson and AG Jordan, \textit{Governing Under Pressure: the Policy Process in a Post-Parliamentary Democracy} (Oxford, Blackwell Publishing, 1985), 137; Marin and Maytz, \textit{supra} n 12, 16; Kenis and Schneider, \textit{supra} n 14, 30.}

Finally, the time dimension plays an essential role in network management. The model suggests that, as the game is repeated in time, actors come to realise the benefits of cooperative as opposed to individual enforcement efforts, commit to cooperation and build up a certain level of mutual trust, loyalty and comity.
Therefore, through vigorous utilisation of the management instruments, network management will become progressively more effective in time.  

C. NETWORK MANAGEMENT IN THE EC AND THE US: HOW ARE THEY DIFFERENT?

1. Network Management in the EC Antitrust Regime

From the network management perspective, the first characteristic of the EC network is its imposed nature. The European Competition Network (ECN) came into existence as a result of the modernisation movement, which transformed Article 81(3) EC to a legal exception rule and decentralised the enforcement of Community competition policy by giving NCAs and the courts the authority to enforce the Community competition rules in their entirety. The modernisation took place largely at the desire of the Commission. Although national authorities also significantly contributed to the discussion process and enthusiastically agreed to take part in the enforcement of the policy, it was the Commission that initiated the modernisation. Its docket was already overflowing with individual exemption applications and cases of a standard nature, and the then forthcoming enlargement would almost certainly have exacerbated the enforcement deadlock. Under those circumstances, decentralised enforcement appeared to be the most practical solution. In other words, in terms of the resource dependencies, it was the Commission that was in pressing need of utilising the national authorities’ resources.

Decentralised enforcement particularly in the aftermath of the enlargement was not only a promising choice, but also an equally risky one. It may very well have resulted in the destruction of consistency and uniformity of the policy. Possible parochial actions of the NCAs of the new Member States were a particular matter of concern, as at the time those authorities had little experience in the enforcement of the policy and shared a strong bond of loyalty with their national economies and political processes. The Commission aimed to address the risks of decentralisation through the formation of a network.

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20 Modernisation Regulation, supra n 3.


22 White Paper, supra n 3, 6–7, 10, 32.

among the competition authorities of Europe. In other words, the ECN came into existence largely as an imposed organisation through action at the Community level.

The ECN was expected to overcome the risks of decentralised policy enforcement in two ways. First, under the general dynamics of network management, the network would lead to effective and consistent policy enforcement through coordination and cooperation among its members in the short run, and through mutual trust and loyalty building in the long run.24 Secondly, the ECN as a network design incorporates a strong principal-agent dimension as a safeguard against the “shirking” of the NCAs—ie taking conflicting actions with the perception of the Commission or the general philosophy of competition law developed by the Community institutions. Therefore, as another striking characteristic, the ECN stands on a hierarchical structure.

First of all, the Commission enjoys a distinguished position within the network and in a sense it still retains its enforcement monopoly. According to the rules of the network, initiation of proceedings by the Commission relieves the NCAs from their competence to investigate the same case.25 This power is sure to be used only under extraordinary circumstances, as such a drastic action would bruise the mutual trust between the NCAs and the Commission, and could destroy the enthusiasm of the NCAs to participate in the enforcement process.26 Nevertheless it stands as the ultimate safeguard against shirking, as in such a case the NCAs in question will have to face a significant deterioration of their authority and prestige in the eyes of other members of the network, their citizens and their principals within the national political system.

Secondly, the Commission enjoys strong monitoring and oversight powers within the framework of the network. The network structure provides complex signalling and information exchange mechanisms both amongst the NCAs and between the Commission and the NCAs. For instance, both at the outset of their investigations and before they reach a final decision imposing remedies, the

24 Commission Notice on Cooperation within the Network of Competition Authorities (“Network Notice”), 2004/C 101/03, [2004] OJ C 101, 43–53, para 1: “Together the NCAs and the Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition. The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It provides a framework for the cooperation of European competition authorities in cases where Arts 81 and 82 of the Treaty are applied and is the basis for the creation and maintenance of a common competition culture in Europe” (emphasis added).

25 Modernisation Regulation, supra n 3, Art 11(6).

26 Through the Network Notice, the Commission committed to use this power only under certain circumstances and particularly where there is a danger that the NCAs might “shirk”; see Network Notice, ibid, para 54.
NCAs are required to inform the Commission.\(^{27}\) Besides being ordinary tools of network management, these mechanisms are also seen as oversight and control mechanisms, through which the Commission comes into full information regarding the facts before the NCAs, the enforcement strategy they follow and the decision they intend to take; and, consequently, it gains the ability to intervene before the NCAs take any action that runs counter to its perception.

The Commission’s position within the network is further distinguished by its near monopoly over the design of the policy.\(^ {28}\) The essential connection between the policy planning and enforcement stages suggested by the network management model is largely broken within the context of the Community competition policy. The Commission designs the policy largely free from outside interference, apart from the boundaries imposed by the jurisprudence of the European Court of Justice and the Court of First Instance. It enacts block exemption regulations and takes individual decisions, which are binding on the NCAs and the national courts in the decisions they take,\(^ {29}\) and soft-law measures such as guidelines and notices, which, although not having any legal binding power, are nevertheless of considerable influence for the NCAs and the courts as they state the Commission’s position on a specific matter. In general, NCAs enjoy only limited channels in terms of participation to these processes.\(^ {30}\) On the other hand, the potential contribution of the NCAs to the design of the Community competition policy through innovative use of the national competition laws is equally restricted under the strong supremacy standard. Under the general rule of the supremacy of the Community law and the special supremacy standard foreseen by the Modernisation Regulation, national laws may neither allow what the Community law prohibits\(^ {31}\) nor prohibit what the Community law allows with the exception of national laws on unilateral conduct, mergers or laws pursuing a different goal, such as unfair competition laws.\(^ {32}\)

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\(^{27}\) Modernisation Regulation, supra n 3, Arts 11, 16; Network Notice, ibid, paras 16, 26.

\(^{28}\) See Case C–344/98 Masterfoods Ltd v HB Ice Cream Ltd, [2000] ECR I–11369, declaring the Commission’s distinguished position as the designer of the EC antitrust policy.

\(^{29}\) Case C–63/75 Fonderies Roubaix v Fonderies Roux, [1976] ECR 111, 9–11; Case C–234/89 Delimitis v Henninger Brau [1991] ECR I–935, 946; Modernisation Regulation, supra n 3, Art 16(2); Network Notice, supra n 24, para 43; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 EC, 2004/C OJ 101/04, para 8.

\(^{30}\) In terms of the block exemption regulations and soft-law measures, NCAs may voice their perspectives through responding to Commission’s white and green papers. In terms of the individual decisions, they enjoy a stronger position and may contribute to the design of the policy through participation to the Advisory Committee on Restrictive Practices and Dominant Positions to the opinion of which the Commission is required to give “utmost account”, see Modernisation Regulation, ibid, Art 14(5).

\(^{31}\) Case C–14/68 Walt Wilhelm v Bundeskartellamt, [1969] ECR I.

As another characteristic from the network management perspective, the ECN incorporates largely compulsory mechanisms of cooperation. Cooperation between the NCAs and the Commission does not take place on a voluntary basis. First of all, when the NCAs investigate a violation under the national laws which fulfils the criterion of “trade between Member States”, they have no discretion but are required to open parallel proceedings under Community law. Secondly, the NCAs are required to respond positively to the Commission’s requests for cooperation when the Commission asks them to communicate the information in their possession regarding the violation in question or utilise their powers under national law to gather such information. In terms of the relations amongst the NCAs, the network seems to incorporate discretion-based cooperation mechanisms. In contrast to the cases where the request comes from the Commission, NCAs may refuse each other’s requests for cooperation. In other words, at first glance, the mechanisms of the network show differentiated deference to national procedural autonomy and agency discretion depending on whether the relations take place between the principal and the agents or amongst the agents which occupy equal positions within the network. However, under ordinary circumstances, NCAs are not expected to refuse each other’s requests for cooperation either. First of all, under the general dynamics of networks an NCA which refuses the request for cooperation without a reasonable cause may face the same type of retaliatory behaviour in the future games. Secondly, if lack of communication between the NCAs leads to conflicting analyses, the Commission may always initiate its own proceedings and thereby punish all of the NCAs involved. In other words, under the shadow of the Commission’s differentiated position, the mechanisms of cooperation largely work on an imposed basis.

As a further characteristic, the ECN stands on a juridified framework. Rather than letting the network find its equilibria in the relations between its members through consecutive games, its mechanisms of cooperation are predetermined by the detailed rules set forth in the Modernisation Regulation and the Network Notice. Again, such a characteristic of the network stands as a safeguard against the risks of decentralisation, and particularly the potential commitment problems which may emerge between the NCAs due to the lack of a former common tradition of inter-agency cooperation.

In terms of the practical aspects of network management, the ECN incorporates a case allocation regime which aims to minimise the number of the
authorities involved in each investigation.\textsuperscript{37} At the outset of their proceedings, the NCAs signal each other and the Commission to spot cases which are of interest to multiple authorities and, to the extent possible, allocate such cases to the single best-placed authority which stands closest to the heart of the violation and therefore has the ability to collect strategic information and bring the violation effectively to an end.\textsuperscript{38} If other NCAs do not give up their interest in the investigation, they may form an enforcement group and take coordinated action under the lead of a single authority.\textsuperscript{39} Although the case allocation regime formally works on a voluntary basis and the authorities enjoy discretion as to whether to follow these rules, again the network dynamics and the differentiated position of the Commission put certain pressure on the authorities to do so. Even when the investigation is carried out by a single NCA, other members may be asked to cooperate through communication of strategic information and utilisation of fact-finding powers in order to gather such information.\textsuperscript{40}

The ECN does not incorporate any strong dispute resolution mechanism. The only possible forum of dispute resolution appears to be the loose Advisory Committee mechanism. Commission decisions are discussed within the Advisory Committee and lead to a formal opinion to which the Commission is required to give utmost consideration.\textsuperscript{41} Decisions of the NCAs may also be brought to the Committee; however, in such cases discussions do not lead to a formal and binding opinion.\textsuperscript{42} Nevertheless, the lack of a strong dispute resolution mechanism does not appear to be a significant discrepancy within the context of the ECN, as the network design as a whole aims to minimise the conflicts between its members through its strong principal-agent dimension, juridified character and compulsory cooperation mechanisms.

In summary, rather than being voluntarily formed by its members, as suggested by the network management model, the ECN came into existence through action at the Community level as an imposed organisation. As a network design, it incorporates a strong principal-agent dimension whereby the Commission occupies a differentiated position over the other members of the network. The ECN rests on a predetermined juridified foundation; and its mechanisms of cooperation and coordination are largely of a compulsory nature, thus minimising the role of agency discretion. There are strong connections between such characteristics of the ECN, and its imposed nature

\textsuperscript{37} Network Notice, \textit{ibid}, para8.
\textsuperscript{38} Modernisation Regulation, \textit{infra} n 3, Art 11; Network Notice, \textit{ibid}, para 16. In connection with the motivation to allocate the cases to a single authority, the NCAs are given the authority to close their proceedings or reject complaints on the ground that another NCA has already initiated action against the same infringement; Modernisation Regulation, Art 13.
\textsuperscript{39} Modernisation Regulation, \textit{ibid}, Art 12; Network Notice, \textit{ibid}, 26.
\textsuperscript{40} Modernisation Regulation, \textit{ibid}, Arts 22(1), (2).
\textsuperscript{41} \textit{Ibid}, Art 14(1).
\textsuperscript{42} \textit{Ibid}, Art 14(7).
largely explains its hierarchical and juridified structure. Both the asymmetrical positions and the predetermined mechanisms of cooperation stand as safeguards against the risks of decentralised policy enforcement, particularly inconsistency, in the lack of a common tradition of cooperation amongst the members of the network. In other words, from the diversity-consistency perspective, the network seems to strategically value consistency over diversity. Such choice, at least partly, stems from the imposed nature of the network; and the balance may change in favour of diversity in the future, if the authorities manage the network successfully and develop mutual trust, loyalty and comity.

2. Network Management in the US Antitrust Regime

Federal antitrust policy in the US is enforced by the Antitrust Division of the Department of Justice and the Federal Trade Commission concurrently. On the other hand, State Attorneys General (State AGs) also get involved into the process through the actions for damages and injunctive remedies they bring on behalf of their citizens in their parens patriae capacity, and similar actions they bring on behalf of their states when the proprietary interests of the state as a purchaser of a product is harmed as a result of a violation. State AGs in very brief terms are the chief legal officers of the states, and in most of the states they are elected by the popular vote of citizens. In other words, they have a political identity. As opposed to the imposed and centrally planned nature of the networks in the EC antitrust regime, networks between the federal authorities and the State AGs emerged through voluntary collective action due to the resource interdependencies and developed as a result of a natural historical experiential learning process.

State enforcement of the federal antitrust laws was largely non-existent before the 1980s. In the 1980s, states began to assume an activist role in antitrust enforcement as a result of multiple developments. First of all, towards the end of the 1970s, influenced by the massive class actions of the time, State AGs began to bring actions for damages on behalf of their states. Through these actions,

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44 Georgia v Pennsylvania Railroad Co, 324 US 430 (1945); State of Georgia v Evans, 316 US 159 (1942).


they got acquainted with the basics of the federal antitrust policy and gained enforcement experience. Secondly, in 1976 the Congress enacted the Hart–Scott–Rodino Antitrust Improvements Act, which *inter alia* recognised the authority of the State AGs to bring actions for damages on behalf of their citizens in cases of Sherman Act violations.47 Thirdly, and perhaps most importantly, activism in state enforcement took place largely as a response to the enforcement strategy of the federal authorities under the Reagan administration.48 Under the economics and efficiency-based Chicago School approach, the federal authorities at the time focused more on horizontal violations and left mergers and vertical restraints largely uncovered.49 Since vertical restraints in particular generally have significant local effects, states attempted to fill what they perceived as an enforcement gap.

The 1980s were also the foundational period of the horizontal dimension of networks—in other words, networks amongst the State AGs. At the time, State AGs were enthusiastic about assuming an activist role in antitrust enforcement, but significantly constrained by their scarce resources. Networks came into existence as a natural and practical solution to this dilemma. At first, they began to coordinate their actions in individual cases, and then the network became institutionalised with the formation of the Multistate Antitrust Task Force under the framework of the National Association of Attorneys General (NAAG).50 In other words, in accordance with the general propositions of the network management model, State AGs voluntarily formed networks due to the resource interdependencies they experienced in search of a common goal.

As opposed to the emerging cooperation amongst the State AGs, relations between the federal and state authorities were largely confrontational during the 1980s due to the conflicting antitrust philosophies they pursued. In contrast to the economics and efficiency-based approach of the federal authorities at the time, states were pursuing a more conventional agenda with an aim to address not only the economic but also the social implications of anticompetitive

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47 The political rationale behind this recognition was twofold. *Parens patriae* actions were expected both to enhance the effectiveness of the federal antitrust regime by causing extra deterrence, and to provide a source of relief for the consumers who themselves had little incentives to bring individual actions due to the high litigation costs. See Report of the House Committee on the Judiciary, HR Rep No 499, 94th Cong., 1st Sess, 22 September 1975.


50 ABA Section of Antitrust Law, State Antitrust Enforcement Handbook (2003), 38.
behaviour.\textsuperscript{51} When the federal authorities enacted rather permissive guidelines on horizontal mergers\textsuperscript{52} and vertical restraints,\textsuperscript{53} states enacted rival guidelines reflecting their point of view under the framework of the NAAG.\textsuperscript{54} Likewise, when the federal administration proposed bills to Congress and filed amicus briefs to the courts for the restriction of the scope of per se analysis and treble damages,\textsuperscript{55} states proposed counter bills and filed counter amicus briefs.\textsuperscript{56} The issue of information exchange was another matter of controversy. Information before the federal authorities is of significant importance for the success of cases brought by the State AGs. In terms of horizontal violations, states generally bring follow-on cases after the Department of Justice presses criminal charges. In terms of mergers, State AGs are not a part of the federal premerger control programme; in other words, the merging parties are not required to submit premerger information to the State AGs; rather, the State AGs have to rely on conventional methods of information collection within the state law in order to gather such information. Therefore, both the grand jury material and premerger filings in the possession of the federal authorities constitute important sources of evidence for the cases brought by the State AGs. In order to gain access to these sources of evidence, State AGs fought long and unsuccessful battles before the federal courts.\textsuperscript{57} With their access to the evidence in possession of the federal authorities blocked, they became more interdependent and relied on alternative channels in order to gather strategic information. For instance, under the framework of the NAAG, they enacted a voluntary premerger disclosure compact, where they waived their authority to gather information under state laws in return for the voluntary submission of the premerger information by the merging parties.\textsuperscript{58} If the parties do not voluntarily submit the information, the

\textsuperscript{52} Department of Justice Guidelines on Horizontal Mergers, 42 Antitrust & Trade Reg Rep (BNA) 1251, 17 June 1982.
\textsuperscript{53} Department of Justice Guidelines on Vertical Restraints, 48 Antitrust & Trade Reg Rep (BNA), 193, 24 January 1985.
\textsuperscript{54} NAAG Guidelines on Horizontal Mergers, 49 Antitrust & Trade Reg Rep (BNA) 978, 5 December 1985; NAAG Guidelines on Vertical Restraints, 52 Antitrust & Trade Reg Rep (BNA) 746, 16 April 1987.
\textsuperscript{55} “Reagan Administration has developed a four-part legislative proposal that would eliminate recovery of damages in rule of reason cases and would expand protections for owners of intellectual property”, 44 Antitrust & Trade Reg Rep (BNA) 681, 31 March 1983.
\textsuperscript{56} “The NAAG proposes model legislation of nine titles as a rival to the proposed legislation by the administration”, 51 Antitrust & Trade Reg Rep (BNA) 893, 11 December 1986.
\textsuperscript{57} In Illinois v Abbott & Associates, Inc, 460 US 557 (1983) the Supreme Court ruled that the states have to show a “particularized need” in order to gain access to the grand jury materials. In Mattox v FTC, 759 F 2d 116 (1985) and in Lieberman et al v FTC, 771 F 2d 32 (1985) the Federal Courts of Appeals ruled that under the confidentiality provisions of the Clayton Act, federal authorities are not under an obligation to share the premerger filings with the states.
State AGs can utilise their powers under state law to gather information and share such information to the extent permitted by the state freedom of information acts.

During the 1980s states were very active both on the high policy front and on the practical enforcement front. On the high policy front, they enacted guidelines, filed amicus briefs to the courts and proposed bills to Congress. On the practical enforcement front, they pursued many cases of national dimension in a collective way. Although such activism came as a bottom-up development, not all actors within the network assumed equally influential roles. States with larger resources and stronger antitrust traditions, such as New York, Texas and California, took the lead both in the formulation of the NAAG’s position in high policy matters and in practical enforcement efforts.

With the beginning of the 1990s, the nature of federal–state relations began to change and a vertical federal-to-state dimension of the networks came into existence. Multiple factors contributed to this process. First of all, with an antitrust agenda loaded with issues of international dimension, federal authorities found the clearance of conflicts at home essential in order to be able to speak with one voice in the international arena. Secondly, influential outside actors, such as Congress and the American Bar Association, voiced concerns about the compliance costs raised by divergent actions at the state and federal levels, and urged the authorities to harmonise their efforts. Thirdly, during the 1990s antitrust gradually became a more technical and politically neutral policy and, as a result, consensus between the authorities became more achievable. Perhaps more fundamentally, however, federal–state cooperation developed as a result of a strategic learning process, as the authorities came to realise that in a confrontational style of relationship, where each impeded the other’s actions, eventually none of them would be able to realise their goals.

Cooperation first began at the high policy level with the harmonisation of the federal and NAAG guidelines, which then constituted a common foundation for joint enforcement efforts. In terms of the practical aspects of network

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59 For a list and discussion of those cases, see ABA Handbook, supra n 50, 29.
60 Particularly State AGs of small states with lower budgets such as New Mexico and Louisiana were sceptical of the potential value of state antitrust enforcement. See, eg 52 Antitrust & Trade Reg Rep (BNA) 969, 7 May 1987; for the statistics of state enforcement see NAAG’s Multistate Litigation Database at http://www.naag.org/antitrust/search/ (accessed on 8 August 2007).
61 Hearing before the Committee on the Judiciary, House of Representatives, “Antitrust Enforcement Agencies: The Bureau of Competition of the FTC and the Antitrust Division of the DOJ”, 106th Congress, 2nd Session, 12 April 2000, Serial No 104.
62 “Assistant Attorney General James F. Rill announced that, with the approval of the Department of Justice, the Antitrust Division is ready to join NAAG in establishing an Executive Working Group to formulate common enforcement objectives”, 57 Antitrust & Trade Reg Rep (BNA) 84, 20 July 1989.
63 Skitol, supra n 49, 253.
64 “Achieving federal harmonization, the Department of Justice and the Federal Trade Commission adopt the 1992 horizontal merger guidelines”, 62 Antitrust & Trade Reg Rep (BNA) 404, 2 April
management, the horizontal network experience of the 1980s significantly contributed to the process. As the states had already developed a tradition of interagency cooperation and best practices regarding the practical aspects of such cooperation, federal–state relations became less complicated to manage. The network as it stands today involves signalling mechanisms through which the state and federal authorities inform each other whenever they encounter a case which might be of interest to other authorities. In terms of information exchange amongst the State AGs, mechanisms developed by the Multistate Task Force in the 1980s are still being utilised. Federal authorities, on the other hand, developed mechanisms to share information with the State AGs without breaking the federal law. Upon the waiver of confidentiality by the parties under investigation, they share information in their possession and their economic analysis with the State AGs. They also developed cross-deputisation mechanisms whereby state officials take part in those federal investigations that are of interest to the state. In the past they also sent their economists to work with the State AGs in cases with a local dimension. When federal authorities and multiple State AGs investigate the same matter, they form joint enforcement groups where federal and state efforts are coordinated through liaison states and the state liaison officers of the federal authorities.

Although at times states also get involved in the cases of a national dimension, in general there is a certain understanding of work division between the federal and state authorities. Joint federal–state efforts generally take place in cases which are geographically of multistate dimension with a strong local segmentation, such as healthcare, supermarket chains, or oil and gas chains. In terms of the remedies, in most of the cases State AGs seek damages on behalf of the consumers or injunctive remedies of a local nature, such as local divestitures. Most cases end with consent decrees, in other words settlements with the defendants which are approved by the courts. If everything goes smoothly,
federal and state authorities enter into universal consent decrees with the parties which address both the state and federal claims.70

In contrast to the juridified nature of the ECN, these mechanisms are best practices developed through a case-by-case experiential learning process and work in very informal and flexible ways in practice. Again, in contrast to the compulsory cooperation mechanisms of the ECN, agency discretion prevails at each phase of network management in the US. Decisions as to whether to take action against a violation and whether to do so individually or in coordination with the others are taken by each member of the network on a case-by-case cost–benefit analysis. Members take action only if the violation in question raises concerns from their perspective, and cooperate with others only when they expect to be better off from the cooperation. As its most striking dissimilarity to the ECN, all actors within the US network enjoy equal positions. Even if some are more influential than others, it is because they entertain larger financial resources and stronger antitrust traditions, not because they enjoy differentiated authority.

As its only similarity to the ECN, the US network does not incorporate any strong dispute resolution mechanism. The only factors minimising the possibility of conflicts are mutual trust and comity between the authorities, and the only mechanisms of dispute resolution are informal contacts and discussions. In cases where these mechanisms fail and members cannot reach a consensus, all retain the authority to walk away and bring their individual actions. In general, the adversarial nature of the US antitrust regime gives incentives to the authorities to stay in cooperation. In order to be successful, authorities have to submit strong evidence and press convincing arguments before the courts or against the legal team of the defendants in the settlement negotiations. Therefore, federal authorities benefit from the cooperation with the State AGs particularly in terms of collecting local evidence, and the State AGs benefit from the superior expertise of the federal authorities particularly in terms of the economic analysis of the case. On the other hand, when time is pressing and the case in question involves technical and political complications which render the resolution of conflicts in due course highly unlikely, some members may become excluded from the process and bring duplicative actions.71 And in rare cases, the political identity of the State AGs complicates the coordination process when they act


71 The most notorious example of such conflicts is the Microsoft case, where nine states and the District of Columbia continued to the litigation of monopolisation in demand of stricter remedies despite the fact that 10 other states and Antitrust Division had reached a settlement with the defendant. See US v Microsoft, 231 F Supp 2d 144 (DDC 2002); New York v Microsoft Corp, 209 F Supp 2d 132 (DDC 2002); New York v Microsoft Corp, 224 F Supp 2d 76 (DDC 2002). As a result of this case, some commentators started a campaign against the state enforcement of federal antitrust laws; see, eg R Posner, “Antitrust in the New Economy” (2001) 68 Antitrust Law Journal 925.
with political motives to protect their local economies.\textsuperscript{72} When the authorities cannot manage to solve the conflicts amongst themselves, courts function as the last clearing houses of conflicts through their authority to review consent agreements and decide on the individual cases.\textsuperscript{73}

In contrast to the ECN, in terms of contribution to the design of the federal policy, federal and state authorities enjoy equally extensive channels, and may bring their perspectives into play through individual cases and soft-law measures such as guidelines, amicus briefs and legislative proposals. In addition, the states enjoy a choice of law, and under the flexible pre-emption doctrine of the Supreme Court—the functional equivalent of the principle of supremacy of the Community law—when they are dissatisfied with the stance of the federal policy on a particular issue they may strategically design and utilise the state antitrust laws instead of the federal law.\textsuperscript{74}

In comparison to the ECN, the US network appears as a strikingly different design in its every aspect. First of all, in contrast to the imposed nature of the ECN, the US network came into existence as a result of a collective action by its members due to their resource interdependencies in search of a common goal. In terms of network management, compared to the juridified nature of the ECN, the US network stands on mechanisms which are developed through a case-by-case experiential learning process. Such mechanisms work in a flexible manner and agency discretion prevails at every phase of the network management. In contrast to the compulsory cooperation mechanisms of the ECN, cooperation within the US network takes place on a voluntary basis. Perhaps more fundamentally, however, in contrast to the hierarchical structure of the ECN, all actors enjoy equal footing within the network. As its only similarity to the ECN, the US network does not incorporate any strong conflict resolution mechanism. Lack of a strong conflict resolution mechanism seems to be more detrimental to the consistency of the policy in the context of the US, as the ECN as a general design aspires to minimise the possibility of conflicts, whereas under the loose structure of the US network, mutual trust and comity appear the only

\textsuperscript{72} For instance, the State of Los Angeles, the place of incorporation of most of the Microsoft’s rivals, was the lead in the litigating states’ action in the Microsoft case, \textit{ibid}. The State of Washington, on the other hand, the state of incorporation of Microsoft, unsurprisingly did not participate to the litigation.

\textsuperscript{73} For instance, in the Microsoft case, the District Court paid particular attention to design parallel remedies in the cases brought by the Antitrust Division and the Litigating States, see \textit{US v Microsoft}, supra n 71; \textit{New York v Microsoft Corp}, 209 F Supp 2d, supra n 71.

\textsuperscript{74} For instance, when the Supreme Court decided that indirect purchasers were not entitled to treble damages under federal antitrust law in \textit{Illinois Brick Company et al v State of Illinois}, 431 US 720 (1977), the states, who themselves are in the position of indirect purchasers in most of the actions they bring, reacted collectively by adopting indirect purchaser statutes in their state laws. Those laws passed the preemption scrutiny of the Supreme Court in \textit{California v ARC America Corp}, 490 US 93 (1989). Now, as the indirect purchasers are entitled to treble damages almost all around the country, the Illinois Brick doctrine became practically redundant and the AMC has proposed the abolishment of this doctrine by legislative action. See AMC Final Report, supra n 4, 267.
factors capable of performing this function, even though on rare occasions they sometimes fail, particularly when the members act with political motivations. Under these characteristics, the US network seems to tolerate diversity more enthusiastically than the ECN, and, as will be shown in the next part of this article, such choice is a natural reflection of the partnership model of US federalism in the field of the antitrust policy.

D. Nature of Federalism in the EC and the US: Why Are They Different?

Each multi-jurisdictional polity stands on a unique federalist “equilibrium”; and such equilibrium is reflected in every aspect of inter-institutional relations which take place within its policy-making and enforcement processes. With the distinct designs and management styles of the networks in the EC and the US antitrust regimes identified, this article now turns to the connection between these distinct designs and the general federalist equilibria these polities incorporate in the enforcement of their policies.

Regulatory federalism in both the EC and the US stands on essentially cooperative traditions. The patterns of such cooperation, however, differ significantly from one to the other. The EC tradition incorporates mainly a “top-down” and unidirectional style of cooperation. Such cooperation takes place from the Member State to the Community level under the command of the principles developed by the Community institutions. The EU pursues the goal of an “ever evolving Union” between its constituent units,76 but its sui generis structure is significantly undersized for the accomplishment of this goal. Uniform and effective enforcement of the Community policies plays the key role in the integration between the constituent units77, and with a centralised general enforcement mechanism lacking, the Community heavily relies on the national political, administrative and judicial mechanisms. Its directives are implemented through the national political processes, and its policies are enforced through the national administrative and judicial mechanisms. Contribution of the national authorities to the enforcement of the Community policies does not take place on a voluntary basis, but failure to do so is deemed an infringement of the “duty of loyalty”78 of the Member

75 Elazar, supra n 5, 191.
76 Art 1(2) EU.
78 Art 10 EC.
States. In other words, cooperation within the federalist tradition of the EC is mainly of an imposed nature.

Due to the key role of the uniform and effective enforcement of the Community policies in the integration process, Community institutions utilise strong monitoring and command mechanisms in order to prevent the possibility of shirking at the national level. The Commission gets involved in the process through actions of infringement and the occasional informal directions it gives to the national authorities. The European Court of Justice, on the other hand, closely monitors the actions of the national courts through the preliminary rulings mechanism. The national courts act almost as a decentralised general court system under the command of the Community courts and the systematically expanded doctrines of supremacy and uniformity, which affect the procedural as well as substantive aspects of the national laws. Even the citizens take part in the process of monitoring through their right to bring actions for damages against the infringements of the Community law by the national institutions.

The horizontal dimension of the cooperation, ie cooperation between the Member States without the involvement of the Community institutions, on the other hand, is still embryonic in nature. National institutions do not share any substantial inter-agency cooperation tradition without the involvement of the centre. Although network-type organisations have begun to emerge particularly between the national regulatory institutions, the Commission takes the lead in the formation and design of such initiatives.

In summary, the European tradition of federalism rests on a top-down, unidirectional style of cooperation, where the national authorities contribute to the integration through the enforcement of Community policies under the command of the Community institutions. On the other hand, horizontal dimension of the cooperation is largely missing. The hierarchical dimension of the ECN and its imposed nature are reflections of the general principal-agent style of relations between the national and Community institutions in the field of competition policy.

80 Art 226 EC.
81 Art 234 EC.
seem to have arisen as safeguards against the potential commitment problems which may emerge amongst the national authorities in the lack of a spontaneous horizontal cooperation tradition.

The course of affairs is strikingly different on the other side of the Atlantic. In contrast to the relatively static nature of federalism in the EC, the US tradition experienced a significant transformation over time from a “dual federalism” to a cooperative one. The early US philosophy had strongly been affected by the unpleasant experience of the British rule of colonial times. As a precaution against the excessive concentration of political powers, it attempted to strictly distinguish between the federal and state regulatory powers and strongly disallowed intrusion by one level to the sphere of authority of the other. After the “New Deal”, a new and cooperative style of federalism emerged, as coordinated action at all levels of governance became vital for the effective and swift solution of the grave problems facing the nation. Consequently, the new US federal philosophy evolved along flexible mechanisms which value the ends more than the means, does not foresee any strict principle of jurisdictional delineation of regulatory responsibilities and allows a substantial overlapping of the federal and state powers. Naturally, under such an overlap, coordinated action at the state and federal levels is very desirable for the sake of consistency and effectiveness. However, neither the federal nor the state authorities can be forced to take such action, but they retain full discretion in their decisions of cooperation. In particular, the “anti-commandeering” doctrine of the Supreme Court places the federal and state levels on equal footing and strictly disallows federal intrusion into a state’s autonomy. Under this principle, state authorities cannot be forced to take part in the implementation or enforcement of federal policies but may be given incentives to so do. Additionally, the US federalism stands on a strong tradition of interstate cooperation without the involvement of the federal level which gave body to the concept of “federalism without Washington”. Since colonial times, the states have cooperated vigorously and taken coordinated actions against issues of common concern, developed


86 “New Deal” was the regulatory programme initiated by President FD Roosevelt to address the effects of the Great Depression. The programme was based on extensive federal economic regulation enforced by specialised agencies. See GW Walton and H Rockoff, History of the American Economy (Orlando, Dryden Press, 8th edn, 1988), 541.


89 G Sawer, Modern Federalism (Carlton, Pittman, 1976), 57; Elazar, supra n 87, 174.
interstate conflict resolution mechanisms such as compacts and voluntarily harmonised state laws through the adoption of uniform codes. 90

In summary, in contrast to the imposed and unidirectional style of cooperation in the EC, the US tradition foresees a flexible partnership model between the federal and state authorities, which enjoy equal positions. On the other hand, the US federalist tradition also incorporates a strong horizontal cooperation dimension. The flexible partnership characteristic of the US federal philosophy is reflected on the informal and discretion-based mechanisms of the US network, whereas the strong horizontal cooperation tradition explains the emergence of the network as a product of voluntary collective action at the state level and its evolution through an experiential learning process.

E. Transatlantic Policy Learning: What Can They Learn from Each Other?

As has been explained so far, the EC and the US networks appear as largely distinct models; what is more, such differences in the design and management style of the networks are only the reflections of more fundamental divergences in the federalist traditions of these polities. The dissimilar federalist equilibria of the US and the EU render the possibility of transatlantic policy learning highly controversial and questionable. As argued by Daniel J Elazar, when there are fundamental differences in the federal dynamics of polities, policy learning and implantation cannot be possible without substantial alterations. 91 Naturally, under such a brief comparison of the federalist dynamics of the two polities, addressing the possibility of transatlantic policy learning to the full extent is beyond the scope of this article. Therefore, this article confines itself to raising the question and emphasising the necessity and desirability of future work on this front. However, even if the question is hereby left largely as an open one, as a preliminary observation this article argues that the EC and the US may still turn to each other in order to draw lessons from their relative strengths in network management.

When it comes to Europe, the Union seems to be more overwhelmed than ever with the multiple ambitious projects it has initiated both in general and in the sphere of its competition policy. The enlargement and Constitution experiments, which are taking place at the same time, give the debate on the effectiveness, legitimacy and accountability of the European governance methods a new vigour. On the competition policy front, the reform process

91 Elazar, supra n 5.
initiated by the modernisation movement still continues with the assessments of substantive aspects of the policy, as well as the methods of its enforcement. Nevertheless, the reform of competition policy takes place on a highly technical level and largely in isolation of the debates on the future of the Union and its governance methods. Yet, analysis of potential implications of the general EU agenda on the administration of its competition policy is essential for the durable success of the reform process. In particular, the ECN deserves close attention in terms of the workability of its hierarchical structure and its rigid rule-driven mechanisms in a more deeply integrated Union. From this perspective, the US network experience may stand as a lesson that things would not necessarily get as chaotic and complicated as assumed under a more flexible and discretion-based set of relations when the authorities share a high level of mutual trust and loyalty.

When it comes to the US, as mentioned in the introduction, the AMC, which was founded in 2002 to study the substantive as well as enforcement aspects of federal antitrust policy, recommended a more systemised set of relationships between the federal and state authorities which particularly incorporates a better work division and does not burden businesses with multiple information requests and inconsistent federal and state proceedings. Nevertheless, the AMC did not propose any legislative amendment and left the matter to the mutual will of the federal and state authorities. The weakness of the US network appears to be the lack of a dispute resolution system coupled with loose discretion-based cooperation mechanisms which at times, albeit rarely, impede the consistency of enforcement, especially when the authorities act with political motivations. It is not certain yet whether the federal and state authorities will take action to address these weaknesses, but if they ever do decide to do so they may turn to the ECN in order to draw some general lessons on a more systemised style of cooperation, although the specific rigid and rule-driven mechanisms of the ECN would not work under the partnership-style US federalism.

F. Conclusions

Modern multi-jurisdictional polities face complex problems in the enforcement of their policies which go beyond the simplistic decentralisation–centralisation
dichotomy. Rigid jurisdictional tests designed in abstract fail to designate the best-placed authority, and multiple actors get involved in the process through alternative channels when they have vested interests. Under these circumstances, the design and management of complex relations among multiple authorities establishes itself as the ultimate challenge. In order to reach the ideal, such design should accomplish the somewhat contradictory goals of diversity and consistency at the same time. The network management model reflects the complexity of modern multi-jurisdictional polities and offers a sensible solution to the enforcement dilemma. Under effective network management, all interested actors are invited to take part in the process and voice their perspectives, whereas consistency is still maintained through vigorous utilisation of cooperation channels in the short run and mutual loyalty and comity building in the long run.

Analysis of the EC and the US antitrust enforcement regimes under the model reveals the distinct characteristics of the networks in these polities. In contrast to the imposed, hierarchical and juridified nature of the ECN, the US network appears to be a product of voluntary collective action and experiential learning which functions through discretion-based, flexible and informal mechanisms. In other words, as their relative strengths, the ECN enshrines consistency to the utmost extent, whereas the US network tolerates diversity better.

Different traditions of regulatory federalism in the EC and the US explain the divergences in the design and management style of the networks to a large extent. Consequently, the different federalist equilibria on which these polities stand render the possibility of transatlantic policy learning highly controversial and questionable. More comprehensive analyses regarding the characteristics of federalism in these polities need to be conducted before reaching any final conclusions on this front. Nevertheless, as a preliminary observation, this article argues that the EC and the US may still draw comparative lessons from each other’s strengths in network management. Specifically, the ECN may set an example of a more systemised style of cooperation for the US, whilst the US experience may be taken by the EC as a lesson that consistency may still be sustained under a more flexible framework when actors share a certain level of mutual trust and comity.