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Competence Allocation in the EU Competition Policy System as an Interest-Driven Process[1]

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ABSTRACT

This paper provides a positive analysis of the evolution of competence allocation within the EU Competition Policy System. In the EU, competition policy competences are ascribed both to the European level and to each Member State. In regard to securing a sound antitrust system, the allocation and delimitation of these competences plays a major role. Accordingly, competence allocation has been a major issue in the recent reforms of cartel policy enforcement and merger control. Instead of normatively analysing the characteristics of optimal competence allocation, we positively identify the self-interest of the interacting groups of agents – European Commission and Courts, national authorities, business associations – as a major-driving force of the reform process. We show that, as a consequence, the interest-driven outcomes of this process are largely ineffective and deficient – even if evaluated against the background of the publicly announced reform goals. This stands in accordance with longer-term patterns in competence allocation evolution in the EU Competition Policy System.

Introduction

Competition policy in the EU is practised both on the Community level and by the individual Member States, which together form the EU Competition Policy System, making the definition of the boundaries between these two jurisdictional levels an important task. The year 2004 arguably saw the most significant reforms in EU Competition Policy since the Treaty of Rome. Simultaneously with the enlargement of the EU, two important reform acts took effect: Cartel policy moved from 40 years of centralised enforcement by the Commission to a decentralised system with increased participation by the member states and the reform of EU merger control led to the introduction of the merging parties' right to

choose the competent agency and the streamlining of the referral mechanisms between the European and the national level. The issue of competence allocation within the EU Competition Policy System is a major part of both reforms. We analyse these two developments within a common analytical framework. Our specific focus is on the actors who shape the process of competence allocation, and their special interests, strategic moves, coalitions, etc.

The EU competition policy system

The problem: delimiting competences between levels

Within the EU jurisdiction for competition policy is split between the Community level and the individual Member States. The European Union as well as each Member State dispose of their competition policy regime, which comprises substantive legislation, enforcement agencies and provisions for judicial review. The resulting multitude of provisions and competent bodies including their patterns of interactions constitutes the EU Competition Policy System. One way of inquiring into this system is to ask for the boundaries between the EU's jurisdiction and that of the Member States, the so-called competence allocation between the two levels. Two issues need to be addressed. First of all, under which conditions is substantive Community law respectively national law applicable and what happens in case of conflict? Secondly, which institutions (and on which level) are competent to enforce the rules? Possible configurations range from complete centralisation with the EU level being competent to the full exclusion of national activity up to complete decentralisation with no supranational competences in regard to legislation and enforcement at all. Far from being minor technical or legal points, these issues are of great importance for the outcome of the competitive assessment. 'The decision to allocate a case may well have consequences for how the case is investigated, appraised and ultimately dealt with' (Fingleton 2005: 12).

Before looking at the most recent reforms, the status quo ante of competence allocation is outlined. In cartel policy, well established substantive provisions of the EU and the individual Member States co-existed without a clear-cut demarcation (Burnley 2002a; Gerber 1998; Maher 1996). The relevant Community norm is the general cartel prohibition with exemptions of Art. 81 EC, which is applicable to 'all agreements between undertakings, decisions by associations of undertakings and concerted practices *which may affect trade between Member States* [. . .]' (emphasis added). This principle of competence demarcation is called *effect on trade concept* or *interstate trade criterion*. As a

general trend, the specific interpretation of this principle of competence demarcation together with the growing economic integration of the Member States led to a steady expansion of the scope of the Community regulation while at the same time marginalising national laws. Community rules were for the most part directly applicable throughout the EU. However, this was not on an exclusive basis so that Member States could keep their own cartel policies that also covered purely 'domestic' practices. Regarding enforcement it was not the Rome Treaty but the later Regulation 17/62,[2] which centralised powers on the EU level (Ehlermann 2000: 540–546; Gerber 1998: 348–351). Under the so-called *system of centralised ex ante authorisation* firms were obliged to notify their agreements to the Commission, which alone was empowered to grant exemptions from the general cartel prohibition according to Art. 81 (3) EC. Being directly applicable throughout the EU, however, Art. 81 (1) EC was also binding for the Member State level. Again as a general trend, this resulted in increasing decentralised enforcement by national courts and authorities in line with the expanding scope of the Community rules (Gerber 1998: 394–401; Maher 1996). This centralised system remained unchanged for more than 40 years prior to the recent reform.

In the area of merger control the delimitation of competences was an equally pressing problem (Burnley 2002b; Goyder 2003: 340–342). In contrast to cartel policy, the delimitation of competences in the European Community Merger Regulation (ECMR) of 1989 followed the so-called 'one-stop shop principle'. Overlapping competences and parallel proceedings on different levels should explicitly be avoided (Brittan 1990). Technically, the ECMR applied to all mergers with a 'Community dimension' defined by an aggregate turnover of the undertakings concerned exceeding 5 billion Euros worldwide and 250 million Euros within the EU. A set of (lower) thresholds applies to concentrations with significant turnover in at least three Member States. National law is, however, applicable if more than two-thirds of turnover fall within the respective territory and, of course, if turnover figures fail to meet the thresholds. Cases may also be referred after notification between the Community and the national level on discretion of the respective competition authorities. Compared to cartel policy, the quantitative turnover thresholds constitute a relatively clear-cut delimitation between the Community and the Member State level. Moreover, there is no discrepancy between enforcement and substantive rules. With some sort of merger control regime in place in all Member States, however, several national rules regularly applied to one and the same transaction in case it fell below the aforementioned thresholds. This is referred to as the problem of multiple notification.

Self-interested actors within the EU competition policy system

A theoretical analysis of competence allocation can refer to two principal lines of argument. Firstly, it can be analysed how the allocation and delimitation of competences within the EU competition policy system should look like. This refers to a normative theory of competence allocation. For instance, such a theory, which is based on the economics of federalism, is currently developing.[3] Secondly, a positive approach towards competence allocation can be employed. The central question is what drives competence allocation in the EU competition policy system and its evolution. Our contribution belongs to this second line of thought. More specifically, we attempt to trace the influence of the relevant actors in EU competition policy in regard to the state and development of competence allocation and delimitation. In the language of multilevel systems, we are looking at the co-evolution of the relevant elements and their interrelations.

We start from the basic premise that it is the self-interested actors, who shape the evolution of competence allocation. Our basic idea is to group actors together on the two (interrelated) levels (Figure 1). The considerable complexity of this system as well as its acting elements with their interrelations can potentially produce a large variety of interests. Decisions about competence allocation are viewed to be an outcome of a complex decision-making process, involving interested actors and actor groups on the European and on the national level (Cohen 1997). In order to keep our analysis compact, we only include the European Commission and Courts, the Member States and leading business groups.[4] For similar reasons, we refer to somewhat stylised interests of the selected actors and actor groups. More precisely, we base our analysis on the rather simple assumption that each actor attempts to defend its prevailing competences

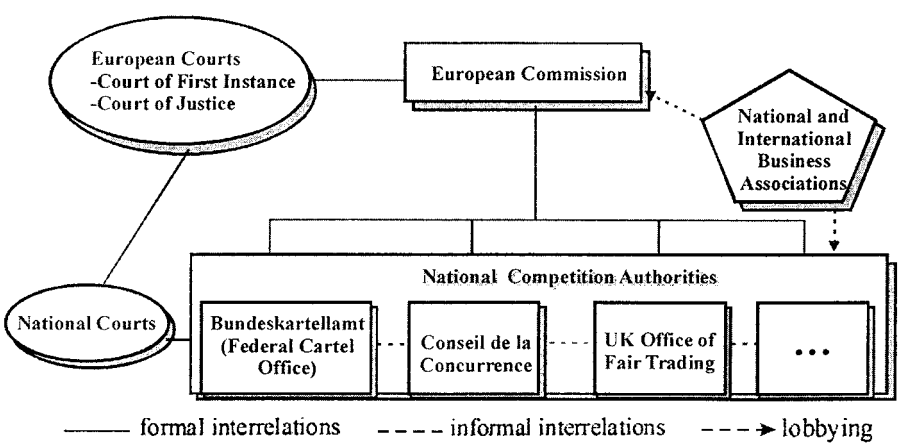

FIGURE 1: *The enforcement of the EU Competition Policy System*

and/or to acquire additional competences.[5] This self-interest focused line of argument is fairly well rooted in the theory of rational administrations.[6] Business associations as private actors represent a specific case as they neither possess, nor are able to acquire formal competences. They are, however, directly affected by the competence allocation and therefore try to influence its evolution. We assume the minimisation of compliance costs caused inter alia by lengthy proceedings, multiple filing requirements and unpredictable decisions to be their dominant objective (Gerber 2001: 126; Rodger 2000).

On the EU level the executive body of the Community, the European Commission and its Competition Directorate-General in particular, occupies the central position. Although created by the Member States' governments, they dispose of considerable autonomy and executive discretion (Dimitrakopoulos 2001). Above all, they are directly responsible for the enforcement of EU competition rules (Schmidt 2000). Moreover, the Commission enjoys the right of initiative in the legislative process, which confers agenda-setting power to it (Peters 1994; Pollack 1997). The Commission, however, acts under judicial supervision. Hence, the European Courts of First Instance and of Justice (CFI, ECJ) are relevant from an actor-centred perspective as well (Garret, Kelemen and Schulz 1998; Voigt 2003). Together with the Commission they repeatedly used competition law as a tool for integration and as a source of status and power (Gerber 2001: 126). Hence, as a general tendency the actors on the EU level share an interest in the centralisation of competences.

The Member States form the second level of the EU Competition Policy System. More specifically, we look at three large states that have been most actively involved in competition policy matters, namely Germany, France and the UK. They all have developed their own sophisticated competition policy regimes including both substantive rules and the creation of enforcement agencies (Gerber 1998; Maher 1996: 231–234). From an actor-centred perspective, however, the two levels are highly interdependent (Wilks and McGowan 1996: 232–241). Firstly, the Member States governments are also active on the Community level. They dispose of great formal power because any piece of legislation must be approved by them via the Council of the European Union. Secondly, their national competition authorities (NCAs) and courts have become increasingly involved in the enforcement of Community law. In spite of this interdependence, the national systems have retained certain peculiarities and continue to pursue partly different goals. Hence, the large Member States typically show a high interest in preserving their competences, which makes them the natural opponents of centralisation in competition policy matters. The same applies to the NCAs, which is why we treat them together with their respective governments.

We include organised business as a third group of actors since they influence legislation and administration both on the European and on the national level, although generally to a lesser extent than the political actors (Grossman 2004). Especially the Commission is generally held to be very sensitive to their views (Wilks and McGowan 1996: 241). We selected one European and one national cross-sectoral business association for deeper analysis.[7] The first one is the Union of Industrial and Employers' Confederations of Europe (UNICE), one of the largest interest groups in Brussels (Greenwood 2003: 85–91; Tenbrücken 2002: 114). The second one is the leading German business association called Federal Association of German Industry (Bundesverband der Deutschen Industrie, BDI).[8] The BDI has not only a long track record of influencing competition legislation in Germany, but it also engages in lobbying activities in Brussels (Eyre and Lodge 2000: 72–76; Gerber 1998: 271–276; Tenbrücken 2002: 116). Taken together UNICE and BDI represent a broad consensus among business regarding competence allocation. Both consistently argue for centralisation and/or harmonisation effectively supporting the Community institutions.

Recent reforms in EU competition policy

The reform of cartel policy enforcement

At the end of 2002, the Member States approved the new Regulation No 1/2003 for the implementation of cartel policy.[9] In terms of competence allocation, the reform brought a rather complicated mixture of explicit decentralisation (of enforcement) and more implicit centralisation (of substantial rules). Most importantly, centralised ex ante authorisation was replaced by a *decentralised ex post control system* (Böge 2005; Lenaerts 2002; Schaub 2005). Self-assessment of interfirm arrangements by the firms themselves coupled with subsequent administrative control became the rule instead of notification to and approval by the Commission prior to practising collaborative arrangements, which are legal under Art. 81 (3) EC. Moreover, the whole Art. 81 EC is now directly applicable throughout the EU so that NCAs and national courts can also grant exemptions from the general cartel prohibition. When opening a case, they must inform the Commission and the other NCAs. In case of parallel proceedings, they may suspend or close their investigations but are not obliged to do so. At the same time, national bodies are now obliged to apply EC rules when dealing with practices affecting interstate trade under national competition law. This amounts to a significant expansion of substantial EU jurisdiction.

In the public reform debate, the system change is predominantly discussed against the background of consistency. Critical commentators fear inconsistent treatments of similar cases in individual Member States due to differences in competition policy traditions and procedural rules between the Member States and their agencies (Gerber 2001: 123–125; Kingston 2001; Lenaerts 2002: 36–37). As a result, a loss of legal certainty caused by firms' forum shopping and an overall lowering of the competitive standards was expected. Moreover, the capacity of the national agencies and courts to decide complex cases encountered significant doubt, especially in regard to the new EU Member States in Eastern Europe (Nicolaides 2002: 49). The Commission, however, intended to secure a consistent application of anti-cartel rules by the aforementioned expanded application of Community law coupled with increased rights to overrule national proceedings (Pijetlovic 2004: 357–360; Riley 2003a: 606–607; Schaub 2005). More specifically, it can always pre-empt national actions by opening its own formal proceedings. NCAs are also obliged to inform the Commission before adopting any relevant decision. In addition, their decisions may not run counter to Commission rulings. In fact, all this amounts to a significant extension of the Commission's powers (Riley 2003b: 671–672; Forrester 2004). By contrast, inconsistency does not seem to be a major problem.

However, the recent reform (and the discussions preceding it) largely ignored the highly problematic vagueness of competence delimitation between the European and the national level in terms of substantive law.[10] Consequently, the interstate trade criterion contained in Art. 81 EC was not systematically reviewed during the reform process. Only following the adoption of new Regulation 1/2003, the Commission issued a draft and subsequent formal Notice on the effect on trade concept.[11] The Notice discusses the interpretation of the concept as developed by the Community Courts. As a novelty, it contains the so-called 'non-appreciable affection of trade rule' (NAAT-rule), which is meant as a rebuttable presumption for the absence of EU jurisdiction (paras 50–57). The rule is effectively a combination of market share and turnover figures. It does, however, fall short of a precise quantitative threshold. Apart from the fact that it entails the complex task of market definition, the rule shares with the whole Notice the principal deficiency of not being binding on the European Courts or national authorities (paras 3, 5) and, in fact, not even on the Commission itself since a case-by-case analysis is repeatedly declared to be necessary (e.g. paras 12, 32, 51). Hence, the Notice is insufficient to remedy the vagueness of competence allocation in cartel policy.

Still, the reform brought significant changes in jurisdiction insofar as national laws are further marginalised and will probably lose their

autonomy completely (e.g. Lenaerts 2002: 25; Lever 2002: 322; Smits 2005: 191–192). However, this is not the consequence of a thorough discussion about the adequacy of cartel treatment on different jurisdictional levels. Instead, the decentralisation of enforcement has been propagated mainly because of the Commission's strained resources (Lenaerts 2002: 13–16). The subsequent dismissal of national laws then (ostensibly) comes as a by-product of the pursuit of consistent rule application. Typically enough, even enforcement decentralisation was not favoured because of principle matters of decentralisation and diversity (local knowledge, preference orientation, cultural diversity, advantages of experimentation, etc.). Instead, the work-overload within the Commission was emphasised. If, however, this was the main problem for an effective enforcement, then an increase in the Commission's resources would have been the first-best solution (Nicolaides 2002: 44). Decentralising responsibilities instead makes more coordination necessary and causes the respective costs to rise significantly. Moreover, it only solves the original problem if excess capacity is available on the national level. That does not seem to be the case especially concerning the smaller NCAs (Riley 2003b: 658) but again this issue has rarely been examined.

The reform of the referral system in merger control

In comparison, the new EC Merger Regulation[12] of 20 January 2004 brought only minor change in regard to competence allocation (Böge 2004: 139–143; Díaz 2004: 179–184; Drauz 2003).[13] The Commission also published a Notice on Case Referral,[14] which again is not binding but 'is intended to provide no more than general guidance' (para. 7). The focus being on multiple notifications, a system of 'streamlined referrals' was introduced in order to reinforce the 'one-stop shop principle'. Firstly, the already existent provisions for post-notification reallocation of cases between the Commission and NCAs were amended. In particular, the formal requirements for such requests were alleviated. However, referrals from the Commission to NCAs remain at the discretion of the Commission,[15] whereas referrals to it from the national level can only be initiated by the NCAs. In addition, there is no obligation to follow a joint referral if more than one NCA is affected. As a result, the new rules on post-notification referrals may lead to a certain increase in importance, but only if the Commission and the NCAs are willing to cooperate.

Secondly and arguably more importantly, merging firms were granted the exclusive right to request referrals prior to notification. If the usual ECMR thresholds are met, both the Commission and the concerned NCAs must consent that the case be referred to Member State level.

Below the thresholds, a referral to the Commission is possible if the merger rules of three or more Member States are applicable to the transaction in question. Any one of the NCAs concerned may then veto any such a request. In the aforementioned Notice, the Commission repeatedly stresses the importance of the case specificities and therefore declares 'a considerable margin of discretion' on the agencies' part to be necessary (paras 21, 30). Moreover, pre-notification referrals are said to be limited to clear-cut cases (para. 14). Due to these restrictions the effect of the reform on case allocation remains unclear, at best. It is not clear a priori whether it will lead to centralisation or decentralisation.

All this must be seen against the background that the delimitation of competences between the European and the national level has always been comparatively clear-cut due to the ECMR's turnover thresholds. Nevertheless, the old system suffered from certain deficiencies. If merger cases did not meet the thresholds but affected several national markets within the EU, then they had to be notified in more than one Member State, leading to the problem of multiple reviews. This was a violation of the 'one-stop-shop principle'. However, the reform process yielded only minor improvements in this regard. Post-notification referrals remain a matter of discretion without unambiguous criteria for mandatory referrals. The same is true for pre-notification referrals at the request of merging firms. Respectively both NCAs and the Commission can exercise veto rights if they want to retain jurisdiction over the merger. Typically enough, no binding standards for mandatory explanations of the reasons for vetoing have been implemented, which could serve as a hurdle to an arbitrary refusal of pre-notification requests. This is particularly grave in the case of a multiple filing case being referred to the Commission. Even if all other NCAs involved agree on an upward referral, the veto of one NCA is enough to block the referral entirely (recital 16 ECMR, Art. 4 (5) ECMR). In the face of an enlarged Union with 25 Member States, an increased probability of multiple procedures with the possibility of contradictory outcomes is a likely consequence.

Altogether, the reform fails to improve competence allocation in EU merger control by introducing clear and unambiguous criteria for (mandatory) referrals. On the contrary, it further enhances the complexity of the referral rules by involving the merging parties (Díaz 2004: 184). No convincing substantial reason is given why the companies should decide about competence allocation, particularly against the background that this may facilitate forum-shopping (Stockmann 2003: 41). Therefore, a simple reduction of the turnover thresholds or the introduction of some kind of an 'X+ rule'[16] is widely preferred (Díaz 2004: 184; Burnley 2002b: 272–273). Against other available solutions, the introduction of a right of merging enterprises to request pre-notification referrals must be

viewed as a suboptimal and largely ineffective way of circumventing the missing willingness/ability of the competition agencies on both levels to abstract from their self-interest and implement simple and efficient rules for case allocation.

The European competition network – a soft guide to efficient competence allocation?

Even the participating actors themselves seem to have been aware of the deficiencies and ambiguities in regard to the formal allocation of cases within the EU Competition Policy System. Accordingly, the establishment of a 'Network of Competition Authorities' was envisaged as part of the reforms. The term 'Network' appears in both new Regulations. In addition, the Member States (via the European Council) and the Commission issued a Joint Statement on that topic,[17] which stated as one of the general principles: 'All competition authorities within the Network are independent from one another. Cooperation between NCAs and with the Commission takes place on the basis of equality, respect and solidarity' (para. 7). Thus, the 'Network' was meant to put even greater emphasis on cooperation within the EU Competition Policy System than was the case before. The Statement also laid down the division of work and the consistent application of competition rules across the EU as the two main tasks. In addition, the Commission issued a Notice entirely devoted to the cooperation within the 'Network'[18] again described as 'a forum for discussion and cooperation' (para. 1). Given the deficiencies of the original as well as of the reformed allocation of competences within the EU Competition Policy System, this must be seen as the introduction of an additional, more informal mechanism to alleviate and overcome the most obvious shortcomings and conflicts. In the absence of a mutual consent on a clear-cut delimitation of competences, however, this only represents a makeshift/emergency solution.

Regarding cartel policy, that task is performed by the European Competition Network (ECN), which was already established in 2002 (Pijetlovic 2004: 360–366; Riley 2003a: 610–612; Schaub 2005; Smits 2005). It shall firstly secure that decentralised enforcement does not lead to an inconsistent application of the Treaty rules. As presented above, the EU rules were therefore made binding for Member State institutions and the Commission was granted far-reaching procedural powers. Accordingly, the aforementioned Notice makes clear that the Commission 'has the ultimate but not the sole responsibility for developing policy and safeguarding consistency' (para. 43). However, too clear a dominance by the Commission would threaten the proper working of the ECN since it would no longer be a cooperation forum with equal rights but a soft

instrument to limit decentralisation (and promote further centralisation). The same might happen as a result of the great differences in resources between the NCAs themselves (Wilks 2005: 444–445). This contradicts the general idea of network governance, which demands some balance of powers between the members as a precondition. More in line with that idea are, however, the far-reaching provisions for the exchange of information and in particular case-specific evidence (Dekeyser and De Smiijter 2005).

Secondly, the ECN shall arrange for an efficient division of work. This point relates to the enforcement dimension of competence allocation. The relevant Art. 13 of Regulation No 1/2003 relating to the allocation of case competence is considered unclear, which, according to critics from the NCAs, again threatens the sound functioning of the ECN (e.g. Böge 2005: 2–4; Fingleton 2005: 12–13). The Notice states explicitly that 'network members will endeavour to re-allocate cases to a single well-placed competition authority as often as possible' (para. 7).[19] Conditions are then set out to define what is meant by 'well-placed' (paras 8–15, also Schaub 2005; Smits 2005: 175–180). As a general rule, NCAs are so considered if the infringement has effects mainly on their territory, whereas the Commission is so considered if there are competitive effects in more than three Member States. All this, however, is not binding (Pijetlovic 2004: 361). On one hand, the Commission can withdraw competence from the national level on the grounds that inter alia a case is particularly important for the overall development of EU competition policy. On the other hand, NCAs are never obliged to dispense with their investigations in case of parallel proceedings in several Member States. Hence the effectiveness of the ECN was threatened in several respects and therefore not certain ex ante. Instead, the actual behaviour of the agencies was seen as the crucial factor (Wilks 2005: 440–445).

Also in regard to merger policy, a network[20] shall enhance efficiency and effectiveness of the referral process in order to achieve a 'more streamlined system of referrals' (Drauz 2003: 22). In doing so, the deficiencies of the reformed competence allocation rules shall be alleviated. As presented above, the new referral system (pre-notification plus post-notification system) suffers from the lack of binding rules and from excessive veto rights. Through enhanced and deepened cooperation, consensual arrangements shall secure that 'a case is dealt with by the most appropriate authority, (. . .) with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible (. . .)' (Recital 14 ECMR). Again, however, the network could be instrumentalized to be a soft path towards centralisation. For instance, a Commission official proposed as a guiding principle for the use of the new

referral mechanism that only 'cases involving local markets or distinct national markets in *not more than two Member States* should, as a general rule, be reviewed by the national competition authorities' (Drauz 2003: 25, emphasis added). This would in practice centralise merger control to a significant extent. Together with the fact that the network cannot produce binding and mandatory outcomes, doubt arose whether the deficiencies of the referral rules can be effectively alleviated.

Therefore, in both areas much depends on how the agencies actually behave in the Network. On one hand, the interests of the NCAs to stop their creeping competence transfer to the European level could lead to sustained resistance to an informal re-allocation of competencies at their expense. Their weak formal position in cartel policy should further erode their willingness to reduce their powers in merger control. On the other hand, considerable scope for bargaining processes between the two levels could arise. However, these would be interest-driven and, thus, cannot be expected to produce an efficient outcome. This is especially true against the background that neither the Commission nor the NCA have an interest in an unambiguous competence allocation because this would reduce their discretionary powers. Therefore, the network(s) cannot be expected to cure the fundamental deficiencies of the post-reform competence allocation in the EU Competition Policy System. Still, there is scope for improved cooperation between the two levels but also horizontally among the NCAs. The latter has always been a considerable problem of the 'old' system and, thus, the creation of the ECN could be beneficial in this regard.

Although at present it is too early to draw firm conclusions on the performance of the new rules, some preliminary inferences can be drawn from the material published so far. For instance, regarding cartel policy, quite a few public statements are available. Commission officials have repeatedly declared the new system of enforcement to be a clear improvement because of 'an unprecedented degree of co-operation and exchange' (Kroes 2005: 3, see also Lowe 2005, Paulis and De Smijter 2005). This enthusiasm does not come as a surprise given that the Commission could realise the desired concentration of its efforts on serious infringements and was able to initiate extensive sector inquiries. The NCAs also seem to be pleased with the working of the ECN so far. The Director General of the Netherlands CA for example appreciated the intensified exchange among the agencies and praised the Commission in particular for its 'active and constructive role' when cooperating in specific cases (Kalbfleisch 2005: 4). Even the President of the German FCO reportedly stated that the ECN 'heralds a new era in the fight against cross-border restraints of competition' with information sharing and mutual assistance between the authorities being especially successful

(Bundeskartellamt 2004). From these statements we can infer that to date the Commission could avoid the impression of a too obvious dominance so that mutual cooperation and exchange appears to be possible. The positive comments by the NCAs could, however, also be motivated by the perceived avoidance of more sweeping centralisation along the lines originally envisaged by the Commission. Given their weakened bargaining position the NCAs might view the informal allocation mechanism of the ECN to be the consensually available alternative, which serves their interests to the largest extent. It is, however, at best unclear if this compensates for the lack of a clear delimitation of competences.

The publicly available information is more limited with regard to merger control. Then Commissioner Monti called the new referral system a 'significant success' with nine requests being made in just four months' time (Monti 2004a: 5–6). Interestingly, all nine requests concerned upward referral to the Commission with two of them being vetoed by Member States. One of these cases appears to be the acquisition of Italian scooter producer Aprilia by its domestic competitor Piaggio. According to a Commission official, the parties requested centralised treatment by the Commission in order to avoid parallel proceedings in seven countries, the relevant markets of which were all affected (Todino 2005: 79). Limited as these pieces of empirical material are they do conform extremely well with our analysis. Bluntly stated, business seems to use the new provisions to effect centralisation, which in turn is welcomed by the Commission but met with (partial) resistance by the NCAs.

The actor-centred perspective

The influence of the actors in the reform process

After reviewing the results of the recent reforms, we now analyse to which extent the self-interest of the relevant actors serves to explain the evolution of competence allocation. In cartel policy, it was the Commission that took the initiative to modernisation. The reform was limited to enforcement, however. Remarkably, the Commission did not initiate a discussion of the jurisdictional criterion contained in Art. 81 EC. As early as the mid-1990s, its representatives announced the intent to eliminate the routine ex ante notification process and foresaw a greater role of national courts and NCAs in the application of the Community rules (Rodger 1994: 252). This met with almost uniform opposition in the public consultation process. Some of the Member States, most notably Germany, put forward the risk of inconsistent application of Community law and of an overall lowering of the competitive standards as the main

counterarguments (Lever 2002). From an actor-centred perspective, however, the fear that national laws would be crowded out was arguably most relevant. That is precisely what the Commission originally aimed at and what business groups called for (BDI 2003; UNICE 2003). In its submission, UNICE simply put forward the exclusion of national laws if interstate trade was affected, while the BDI proposed to expand exclusive Commission jurisdiction to all cases in which more than three Member States were concerned (so-called '3+ rule'). Both associations further supported the abolition of ex ante authorisation although they opted for the companies' right to get informal guidance by the Commission.[21] They opposed, however, the Commission's proposals for increased decentralised enforcement since they expected both administrative burden and legal uncertainty to rise.

In fact, the abolition of its monopoly in application of Art. 81 (3) EC seems to be at odds with the Commission's assumed preference for keeping its competences. At a further glance, however, the arguments in the modernisation debate must be taken into account (Lenaerts 2002: 13–16; Nicolaides 2002: 42–44; Wilks 2005: 435–436). The Commission cited the ineffectiveness of the notification system to catch hard-core cartels, the strain on its resources, the undue administrative burden imposed on business and, finally, the lack of (political) legitimacy often claimed to result from centralisation as the main reasons for change. Moreover, the decentralisation in enforcement offered as a kind of compensation to the Member States is by no means new but continues to follow the trend since the mid-1980s, which had already brought in the national authorities and courts to a growing extent. Most importantly, the new Regulation actually augments the Commission's position in several respects. It gains even tighter control over decentralised enforcement. Moreover, national laws are further marginalised although the Commission was not able to realise its original intention to exclude national laws altogether if interstate trade is affected. Bluntly stated, the Commission only delegated the cumbersome fieldwork to the national level while reserving the important powers for itself (Fingleton 2005, Kingston 2001). Some analysts go even further speaking of a 'political masterstroke' (Riley 2003b: 672) that led to an 'increased dominance' by the Commission (Wilks 2005: 438). Hence, at a second look, the recent reform in cartel policy fits much better into the pattern of interest-driven competence allocation. At the same time, this very result might cause resistance by the big Member States and hence lead to pressures for further reform.

In the area of merger control, things conform much more obviously with the expectations following from our actor-centred perspective. Again it was the Commission that started the reform process pushing for

centralisation. It put forward the so-called '3+ rule' according to which it would be automatically competent in case a merger must be notified in three or more Member States (Levy 2003: 210–211). Business was again supportive of centralisation (BDI 2001, UNICE 2002). The BDI even argued for a '2+ system' together with the abolition of the two-thirds rule and downward referrals to Member States. UNICE supported the '2+ system'. Moreover, instead of abolishing referrals, it argued in favour of harmonisation of the national procedures. Thus, Commission and business effectively formed a coalition in favour of centralisation. This met with fierce opposition from the Member States with Germany again playing a leading role. The Federal Cartel Office (FCO) stressed the NCAs' greater 'market proximity' and, hence, argued for the expansion of their competences in cases with main effects in one Member State (Bundeskartellamt 2002). It also highlighted the increased cooperation between the NCAs as a means to lower the administrative burden on business and urged to simplify the provisions for upward and, in particular, downward referrals.

In spite of the clear support from business, the Commission was less successful in putting through its original proposals than in the area of cartel policy. Apparently as a result of the large Member States' resistance, the new ECMR only gradually expands the Commission's jurisdiction, while for the first time giving the merging firms the right to request pre-notification referral. Consequently, these amendments were welcomed by the German FCO (*Böge* 2004: 140–143). Given the Commission's original intention to become automatically competent in case of multiple filings and the clear support from business for that proposal, further attempts in that direction can safely be predicted. It is also obvious that, in merger control, competence transfer is more heavily opposed by Member States. Hence, the borderline between Community and national merger control is bound to remain a field of controversy.[22]

The long-term perspective: history of competition policy in Europe

Competence allocation has always been a controversial issue between the Commission, the European Court(s), the Member States and business groups, whose influence became especially virulent more recently. The earliest precursor of today's EU Competition Policy is the *European Coal and Steel Community* (ECSC) founded by France, Italy, the Benelux countries and Germany in 1951 (Gerber 1998: 335–342; Goyder 2003: 16–22). In substantive terms, the *Treaty of Paris* contained a general prohibition of anticompetitive agreements as well as provisions on mergers and abuse of economic power. In terms of competence

allocation, the Treaty for the first time appointed sole jurisdiction to a supranational executive body, the *ECSC High Authority*, under the judicial review of the ECSC Court of Justice, which later turned into the European Commission and the ECJ, respectively.

In 1956, the same six states drew up the Treaty of Rome founding the European Economic Community (EEC), which has now become the European Union (Gerber 1998: 342–358; Goyder 2003: 22–54; Wilks and Bartle 2002: 164–165). After controversial discussions mainly between French and German officials a cartel prohibition with exceptions and an abuse prohibition for market-dominant firms were agreed upon and are both still in force at present (Art. 81/82 EC). Concerning competence delimitation the interstate trade criterion was meant to emphasise the importance of free trade within the Community as well as the integration goal. Regulation No 17 of 1962 contained the details of implementation, which remained in force until the recent reforms. In the negotiations only France tried to subject the Commission to a tight control by national representatives but was unsuccessful. Instead, the system of centralised ex ante authorisation was established, which gave the Commission the most important position coupled with a high degree of autonomy. The willingness of the Member States to accept this supranational delegation of powers leading to such a high degree of centralisation requires explanation. One reason was that most of them simply lacked the administrative structures to apply the rules themselves at the time. In addition, national actors apparently expected competition policy to play a minor role in the Community and, in case of conflict, to bow to their interests. The subsequent stringent enforcement of the Treaty rules by the Commission constituted an unintended consequence from their viewpoint (Dimitrakopoulos 2001).

This expectation was true only in the early days of European integration when the Member States enjoyed a high degree of autonomy in competition policy matters. Since the European Treaties did not limit national legislation a considerable variety of provisions developed with respect to comprehensiveness and basic orientation (Gerber 1998; Dumez and Jeunemaître 1996; Eyre and Lodge 2000; Wilks and Bartle 2002: 158–165; Zahariadis 2004). By the time of the Rome Treaty, such policies existed only in France, Germany and the United Kingdom (which of course only entered the EC in 1973). The German *Act against Restraints of Competition* (Gesetz gegen Wettbewerbsbeschränkungen, GWB) of 1958 was for a long time the most prominent national law. The drafting was subject to heavy lobbying especially by the business organization BDI, which led to the cartel prohibition being watered down by considerable exemptions and the temporary elimination of merger control rules. Enforcement was assigned to the independent Federal Cartel Office

under judicial supervision. Only in exceptional cases the federal Economics Minister can overrule prohibition decisions. By contrast, French and British competition policy for a long time remained under tight government control. At first glance, the United Kingdom appears to have a substantial competition policy tradition since the first provisions were enacted as early as 1948. It also was the first European country to pass merger control rules in 1965. The competent Monopolies Commission, however, had only limited investigative powers and could only act on formal request from the government. This weakness was amplified by lacking cohesion of the system and particularly the vagueness of the applied 'public interest'-standard. In France, the first antitrust legislation in 1953 was subdued to the predominant policy of price controls. More effective provisions containing merger rules and equipping the then competent *Commission de la Concurrence* with adequate resources were not enacted until 1977.

In later years certain developments drastically reduced the degree of Member State autonomy. The first was the expansion of the scope of application of EU cartel rules. Firstly, the notion of 'effect on interstate trade' contained in Art. 81 EC was interpreted in an increasingly broad manner by the ECJ (Burnley 2002a: 217–220). Secondly, the ECJ also explicitly affirmed the precedence of Community law over national rules in cases of conflict (Goyder 2003: 440–444, 462–463). Thirdly, the significance of cross-border activity was greatly magnified by the deepening economic integration and the building up of the Common Market. Together these points fuelled the creeping centralisation of cartel policy. This was accompanied by the increasing alignment of national laws with the EU rules, which had the twofold effect of making competition rules more uniform across Europe and of increasing the significance of the Community law as the role model (Gerber 1998: 401–413; Maher 1996; Vedder 2004). At the same time, national diversity steadily decreased. This is all the more remarkable given that the European Treaties foresaw no compulsory harmonisation. In many cases such as Greece, Spain and the new Eastern European Member States, the accession to the Community was the main reason of this apparently 'spontaneous' harmonisation. However, the expansion of the Community jurisdiction and the growing application of EU rules by national bodies also played their role. Even the 'old' Member States harmonised their laws with the French reform of 1986 being a major step. Even the long-time reluctant UK and Germany eventually moved in that direction (Eyre and Lodge 2000; Zahariadis 2004).

The second was the expansion of the Commission's powers to the area of merger control, which had not been included in the European Treaties (Bulmer 1994: 428–439; Goyder 2003: 335–342; McGowan and Cini

1999: 178–183).[23] In the Continental Can case of 1972, therefore, it had to rely on the abuse prohibition of Article 86 but won the support of the ECJ. This was, however, insufficient to compensate the lack of explicit merger rules since Article 86 only referred to existing dominant positions and also gave no possibility of establishing formal procedures. Shortly after the judgement, the Commission then made a legislative proposal to the Council, which evoked the opposition primarily of Germany and the UK with their domestic merger provisions. Several further drafts in the 1980s were dismissed as well. Looking for another means to establish control of concentrations the Commission argued that they were covered by Article 85 if resulting from an interfirm agreement. In its 1987 Philip Morris ruling the ECJ again supported this view. The resulting legal uncertainty together with the projected completion of the internal market in 1992 led business and their interest groups such as UNICE to back the Commission's initiative for explicit merger rules. The Member States gradually gave up their opposition effectively bowing to a coalition between the Community institutions and business.

The following debate centred on the jurisdictional thresholds. In its 1988 draft, the Commission recommended a world-wide turnover of one billion ECU with a minimum of 50 million ECU for the target company. The larger Member States generally favoured much higher thresholds, whereas the smaller states and Italy supported the Commission's proposals. After lengthy Council debates, 5 billion ECU world-wide and 250 million ECU Community turnover were agreed upon in the original EC Merger Regulation (ECMR)[24] with exclusive competence for the Commission. Although watered down to a certain extent the 'one stop shop-principle', i.e. the prevention of parallel proceedings, was largely preserved (Brittan 1990: 355–357). This meant a further step towards centralisation (Gerber 1998: 380–381). The Commission was able to affirm its newly acquired powers with the first prohibition decision in 1991 when it resisted the French and Italian governments' heavy lobbying in favour of the proposed Aerospatiale/de Havilland merger (Levy 2003: 204–205). The Commission argued also from the outset for the reduction of the thresholds (Brittan 1990). The scheduled review of the thresholds in 1993 was, however, blocked by Britain, France and especially Germany after the Commission had rejected four out of five requests by its Federal Cartel Office for downward referral (Wilks and McGowan 1996: 253–254). In 1996, the Commission took a new initiative by pointing to the costs to business and imminent conflicting decisions because of multiple national proceedings. As a result, the amended ECMR[25] contained additional (lower) thresholds, which were meant to cover cases involving at least three national merger control regimes (Goyder 2003: 341–342; Levy 2003: 205). This, however, still fell short of

the Commission's more ambitious goals that eventually led to the move towards the recent reforms.

Compared to cartel policy, the allocation of merger control competences has always been more heavily debated (Rodger 1994: 253). The historical experience from merger control, thus, shows even more clearly that self-interest in regard to competences has been a permanent feature in the debates about competence allocation. One factor behind this self-interest is the diversity of existing national policies, which makes an agreement on Community-wide standards rather difficult. Things are further complicated by the fact that in virtually all states governments retain discretionary competences in merger control. The UK government until recently had considerable discretion to approve mergers (Eyre and Lodge 2000: 66; Wilks and Bartle 2002: 160–161; Zahariadis 2004: 54–56). The French Economics ministry retained comprehensive decision-making power on merger issues even after the radical 1986 reform (Dumez and Jeunemaître 1996: 226). Even in Germany, the controversial e.on/Ruhrgas merger of 2001 demonstrated that industrial policy considerations can still be injected into merger control by means of a special ministerial authorisation (Basedow 2003).

Conclusions and prospects for further research

In this paper, we analysed the recent major reforms of the EU Competition Policy System regarding (the evolution of) competence allocation. By doing so, our principal aim was a positive one, namely to emphasise the role of interest-driven actors in shaping competence allocation evolution. Neither did we attempt to derive a normative theory of competence allocation, nor to discuss which competences *shall* be allocated to which level. The result from our positive analysis is threefold:

(1) The May 2004–reforms of the EU Competition Policy System did not significantly improve the allocation and delimitation of competences between the Member State level and the EU level. This is true for the reforms of both cartel policy enforcement and merger control. The latter in particular has even been worsened in terms of becoming more complex and less clear-cut. The reason for the insufficient reform results lies in the interest-driven reform process – a pattern, which has dominated the evolution of competence allocation ever since the establishment of European competition policy.

(2) The heavy emphasis and high hopes that the participating agencies and actors put on the European Competition Network as a soft path towards a better competence allocation, thereby healing the deficiencies of the substantial reforms, further supports this result.

Even the participating agents themselves seem to not have faith in the reform results and argue in favour of additional, informal correcting mechanisms instead. The first experiences with the network have confirmed this.

(3) Because of the insufficient reform results, we predict that competence allocation will remain a field of controversy within the EU Competition Policy System. Further reform pressure and discussions are imminent.

The high probability of an ongoing reform debate points towards the importance of confronting predominantly interest-driven arguments with a normative theory of competence allocation in complex institutional systems like the two-level and multi-actor EU Competition Policy System. An antitrust-focused theory along these lines, which is complementary to our analysis, does not yet exist in an elaborate and full blown fashion, although important steps into this direction are currently being undertaken.[26] The combination of scientific knowledge about (i) the identification of interest-driven deficiencies in actual competence allocation evolution and (ii) superior, welfare-enhancing competence allocation and delimitation solutions represents an important academic input into the predictably upcoming next reform debate. Therefore, further research is necessary.

NOTES

1. Earlier versions of this paper have been presented at the 20th Hohenheimer Oberseminar at the DIW Berlin (9th–10th May 2003) and the International Conference on Economic Policies in the New Millennium at the Faculty of Economics, University of Coímbra, Portugal (16th–17th April 2004). We thank Reinald Krüger, Stephen Wilks, two anonymous referees as well as the participants of the two conferences for their valuable comments. Furthermore, we thank Daniela Budzinksii, Marina Grusevaja, Barbara Majireck and Julia Wolkenhauer for editorial assistance. All remaining errors are ours.

2. EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, Official Journal P 013, 21/02/1962 P. 0204–0211.

3. See regarding competition policy Van den Bergh (1996), Budzinski (2003, 2004) and Kerber (2003). A full blown theory of competence allocation in multilevel systems along these lines is presented by Budzinski (2005). In this approach, optimal competence allocation is explained by externalities (relevant markets), cost efficiencies (transaction, administration and production costs), preferences, agency problems (including information asymmetries) and systems adaptability (including institutional learning).

4. Thus, we exclude the European Parliament and consumer groups because their influence on the evolution of competition policy competences is rather negligible.

5. This applies as long as the competences in question are considered by the actors to be 'goods', i.e. the perceived benefits exceed the perceived costs. On the other hand, competences can be voluntarily delegated (or declined to be accepted) if they are considered to be 'bads' (Scott 2000,Voigt and Salzberger 2002). However, since competition policy competences entail a significant importance for economic policy making they predominantly seem to be viewed as 'goods'.

6. In order to promptly proceed to the analysis of competence allocation evolution within the EU competition policy system, we waive an elaborate review of these (standard) theories. The interested reader is referred to the landmark contribution of Niskanen (1971) and the comprehensive overview by Mueller (2003).

7. This allows us to ignore the special interests of individual sectors. We are also able to exclude such deviating interests among enterprises from our analysis that result from their differing roles within competition policy procedures (regulated enterprises versus competitors of the regulated parties).
8. Another obvious candidate would have been the Confederation of British Industry (CBI), which is also known for its involvement in competition policy matters (Eyre and Lodge 2000: 76, Wilks and Bartle 2002: 161, Zahariadis 2004).
9. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, pages 1–25.
10. Notable exceptions represent Burnley (2002a, b) and Mavroidis and Neven (2001).
11. Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, Official Journal C 101, 27.04.2004, pages 81–96.
12. Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24, 29.01.2004, pages 1–22.
13. The major reform elements are changes in substantial law like the introduction of the new prohibition criterion (Significant Impediment of Competition/SIEC-Test) and procedural issues. The general focus was on improving the microeconomic foundations of European Merger Control. See exemplary for the elaborate literature on those reform objects Díaz (2004), Lyons (2004) and Schmidt and Voigt (2004).
14. Commission Notice on Case Referral in respect of concentrations, available at http://europa.eu.int/comm/competition/mergers/legislation/consultation/case_allocation_tru.pdf, to be published in the Official Journal.
15. The only exceptions are referral requests by Member States according to Art. 9 (2) b ECMR under which the Commission has no administrative discretion.
16. According to an 'X+ rule' a merger would fall within the exclusive competence of the Commission whenever it has to be reviewed by X or more Member States. Hence, the number of (would-be) reviews is simply meant as another proxy for 'Community dimension' in the meaning of Art. 1 ECMR.
17. Joint Statement of the European Council and the European Commission on the Functioning of the Network of Competition Authorities, Brussels, 10 December 2002, Document No. 15435/02 ADD 1, available at http://register.consilium.eu.int/.
18. Commission Notice on cooperation within the Network of Competition Authorities, Official Journal C 101, 27.04.2004, pages 43–53.
19. Monti (2004b, p. 496) called this the *centre of gravity principle*.
20. The Regulations do not make it clear whether one comprehensive network or separate entities for cartel policy and merger control shall be created.
21. Furthermore, certain types of business may individually profit from abolition of pre-notification. For instance, Wigger (2004, pp. 15–18) suspects that particularly the law and economics experts industry (providing consulting and advocacy services) will profit from an increased importance of private assessment of competitive effects of interfirm arrangements and, subsequently, of private litigation.
22. Typically enough, the new ECMR explicitly foresees the possibility of revising the pre-notification referral rules in Art. 4 (6).
23. The ECSC Treaty is an exception. Therein, the inclusion of merger rules was mainly driven by the French desire to control German heavy industries after the war and facilitated by the absence of any such national regulation (Bulmer 1994: 427–428).
24. Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, Official Journal L 395 , 30/12/1989, p. 1 – 12.
25. Council Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, Official Journal L 180, 09/07/1997, p. 1 – 6.
26. For first approaches towards a normative theory of competence allocation in regard to competition policy see the references in supra note 3.

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