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# **Towards a Multi-Level Community Administration?**

The Decentralization of EU Competition Policy

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## **Abstract**

In this chapter, focus is on new forms of administrative arrangements in the EU. Increasingly, national administrative institutions interact with counterparts at the EU level. At the same time, we see a trend of administrative decentralization at the national level, where more tasks and functions are delegated to quasi-autonomous agencies. Due to their relative independence from national ministries, these agencies may be well placed, organizationally speaking, to act as local agents of a Community administration. Such a development, indicating a possible transformation of national governments in Europe, can only be studied with a focus on the *interactions* between the European and the national levels. Here, the case of EU competition policy is explored to see whether a networked-administrative system is more than a theoretical construction.

# 1 Introduction

The very notion of a Community administration may be perceived as a contradiction in terms, given the strong linkage of public administration to the concept of the nation-state. Inspired by e.g. the American and the French Revolutions, principles of government reflecting the sovereignty of the people were firmly established in nation-states all over the Western world during the 19<sup>th</sup> century. As such, the foundation for national administrations was a hierarchically based political community, gaining its formal and social legitimacy through a majority in the populace. Subordination to decisions made by bureaucrats was thereby deemed acceptable. The impartial bureaucrat, administering state authority in the interest of the community, became a symbol of the nation-state (Nedergaard 2001: 30, quoting Weber 1971). Ulf Sverdrup (2003: 2) recognizes this heritage when stating that

Administrative policies have been targeted at resolving tasks and problems within the borders of the nation state and it has been steered and governed by national political and administrative leaders.

The divisions of tasks and responsibilities in the European Union (EU) have basically reflected this strong linkage between the nation-state and administration of policy. Although there are variations between different policy areas, the main principle of governance in the EU has been that the European level institutions shape and decide on policies and programs while implementation is regarded the domain of national administrations (Kadelbach 2002; Olsen 1997, 2002; Sverdrup 2003).

Developments at both the European and the national levels, especially since the 1980s, have changed both the character and the functions of public administrations. They have become less hierarchical, more fragmented and more decentralized (Christensen and Lægreid 2001). A quite distinctive feature at the national levels is the decentralization of tasks to independent, regulatory agencies, placed outside the central administrative hierarchy. We also witness the establishment of agencies at the European level, although with much more restricted tasks and less autonomy from the central institutions. Additionally, a trend towards developing networked administrative structures, in which national and European-level institutions create closer cooperative arrangements, is an

important one. These changes at the European level are attempts at finding workable solutions to a challenge of increasing importance in European governance; how to provide the EU with an administrative infrastructure without delegating direct administrative responsibilities to Community institutions, which is politically inconceivable because of Member State resistance (Dehousse 1997a, 2002; Kreher 1997; Egeberg 2004a; Sverdrup 2003)?

The ideal model of national administrations as coherent and unitary bodies does certainly not reflect the empirical realities in national politics, where studies have revealed that fragmentation may be a more accurate description (Tranøy and Østerud 2001). In a context of international politics, however, a more unilateral conflict structure organized by territorial criteria has suppressed other lines of conflict (Egeberg 2004b). In most policy fields, disagreements at national levels tend to be less visible in international politics. As such, the ideal model of unitary national administrations may be applicable in a context of European politics.

In this paper, I will present developments in EU competition policy, leading to the comprehensive reform process initiated by the Commission in 1999<sup>1</sup>, involving a substantial decentralization of the enforcement of EU competition policy to national competition authorities and courts. The purpose is twofold; first, to describe a case that illustrates new administrative arrangements in managing EU policy; second, to explain and seek to understand the rationale behind these arrangements. If this reform signals a development in how the EU is administered, it is truly an interesting change. Close cooperation in policy formulation and implementation between the EU executive and national agencies would indicate new patterns of cooperation and conflict that are quite unique in the field of international cooperation. Well aware of the particularities of the policy field in question, I will by this presentation give an interpretation of the development of a Community administration based on basic features of organizational theory.

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<sup>1</sup> White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, O.J. No C 132/1, May 12, 1999.

## 2 EU Competition Policy

The strong Treaty basis of competition policy is an indication of the importance with which the architects of the Treaty attached to it. Article 3 (f) of the Treaty of Rome sets the objective of ensuring that competition in a common market is not distorted, an objective that is pursued by the rules on competition contained in Articles 85 to 94 of the original Treaty (now 81 to 89 EC Treaty). Further, there are few areas of EU policy-making where the Commission is more central or more autonomous than in competition policy. The responsibility for administering the competition rules was granted to the Commission by the Council in a series of regulations, most importantly the implementing Regulation 17/1962 (McGowan 1999).<sup>2</sup> This regulation concerned Articles 81 and 82, regulating those activities that are usually regarded as the core of anti-trust policy; the range of private business practices which can be construed as anti-competitive. The prohibition of restrictive practices (cartels) through Article 81, and abuses of dominant positions (monopolies) through Article 82 will be the focus of this paper, as the major reforms mentioned above concern these particular aspects of EU competition policy.

It is necessary to describe Article 81 of the EC Treaty<sup>3</sup> in some detail in order to understand the development towards the recent reform initiatives. Article 81, paragraph 1 [81(1)], prohibits agreements which affect trade between Member States where they have as their objective or effect the prevention, restriction or distortion of competition within the common market. Further, paragraph 2 [81(2)] declares that all agreements listed in the previous paragraph are prohibited and thus automatically void. However, this prohibition principle is not absolute, as paragraph 3 [81(3)] declares that paragraph 1 may be inapplicable if the agreement in question benefits the EU as a whole and its advantages outweigh the disadvantages. Undertakings therefore notify the Commission of their planned agreements – referred to as the notification procedure – applying for exemptions from the general prohibition principle (Cini and McGowan 1998: 66). A very important feature of the system is that the right to grant exemptions under Article 81(3) is an exclusive prerogative of the Commission.

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<sup>2</sup> EEC Council: Regulation No. 17: First Regulation implementing Articles 85 and 86 of the Treaty. O.J. P 013, 21.02.1962.

<sup>3</sup> Consolidated version of the Treaty establishing the European Community, O.J. C 325/33, 24.12. 2002.

Why the Commission was given such a central role in the enforcement of EU competition policy is a matter of some debate. It may have been the outcome of a collusion amongst an ‘epistemic community’ of competition officials, a willing delegation of sovereignty by some member states to ensure effective regulation or a lapse by others, failing to predict how effectively the provisions would be employed (ibid.). Concerning the latter point, the rulings of the European Court of Justice have in general strengthened the role of the Commission (ibid: 55). Another aspect that was certainly important was the lack of national provisions for regulating competition policy in the late 1950s. Only Germany could be described as having an effective authority with both a full substantive law and the resources to enforce it. Thus, the limited role envisaged for national authorities in this field was seen as a necessity if an effective competition regime was to develop at the European level (Goyder 2003: 447).<sup>4</sup>

The highly centralized mode of enforcement, however, proved to be double-edged sword, as the Regulation (17/1962) soon became associated with administrative gridlock (Cini and McGowan 1998: 19). The notification system has grown to such an unmanageable extent that the need for reforms has become increasingly evident. Indeed, efforts to improve the situation have not been absent, but they have developed incrementally, as the Commission has introduced remedies to ease their workload, e.g. through block exemptions, notices on agreements of minor importance, as well as settling cases informally using administrative letters or ‘comfort letters’ (ibid: 111-113). All of these measures are ways of accepting agreements that are not seen as distorting competition seriously, or that have advantages outweighing the disadvantages involved. They did not, however, satisfy either business, Member State governments or the Commission itself, and when entering the 1990s, the time for more fundamental reforms ripened.

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<sup>4</sup> In fact, prior to the drafting of Regulation 17/62, national competition authorities were allowed to apply European competition rules. However, as few Member States had competition authorities, not to mention a substantive body of competition law, nothing was achieved in those early years (see also Cini and McGowan 1998).

It was never the case that the responsibility for enforcing Article 81 and 82 lay with the institutions of the Community alone. Some degree of assistance from Member State authorities and courts in ensuring that Community law was effectively and uniformly enforced was necessary from the outset. During the first decades, however, the absence of a common ‘competition culture’ made it too risky to share major responsibility with national authorities (Ehlermann 2000). Today, the situation is quite different:

at present a large number of member states have professional, competent, competition-oriented national authorities, structured to perform their functions with limited political interference – at least with respect to non-merger cases – and with a mandate to enforce the laws based on competition policy, relying on economic analysis, rather than protecting national champions (Laudati 1996: 248).

Certainly, this development is not merely a function of EU influence; rather, it is a more general trend in most OECD countries, often labeled New Public Management reforms (Christensen and Lægheid 2001). Although this label has been shown to be quite ambiguous, including highly heterogeneous means and aims, one central feature has been the effort to make a clearer distinction between politics and administration, popularly termed ‘let the managers manage’ (ibid: 96).

In recent years, the resources and abilities of national competition authorities have increased, and as the expansion and refinement of national competition laws substantially based on the principles and language of Articles 81 and 82 have occurred, so has the willingness and abilities of these authorities to work more closely with the Commission. During the 1990s, many of the national authorities have taken the necessary powers to apply both Article 81(1) and 82 of the EC Treaty within their national boundaries, a development encouraged by the Commission.<sup>5</sup> The degree to which they now cooperate with the Commission is reflected in the White Paper of 1999, where it is stated that they “...form part of a coherent whole with the Community system”.<sup>6</sup>

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<sup>5</sup> Today, the competition authorities of 10 Member States have the competence to apply Article 81(1) and 82 of the EC Treaty: Belgium, Germany, Denmark, Greece, Spain, France, Italy, the Netherlands, Sweden and Portugal (Konkurrencestyrelsen 2003).

<sup>6</sup> White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, O.J. No C 132/1, May 12, 1999, paragraph 4.

## 2.1 The Modernization Reform

Claus Ehlermann<sup>7</sup> (2000: 3) states that the *White Paper on Modernization of the Rules Implementing Articles 81 and 82 of the EC Treaty* of May 1999 is the most important policy paper the Commission has ever published in the more than 40 years of EU competition policy. Since its inception, this Commission program has been succeeded by a proposal for a Council Regulation, as well as the Regulation itself.<sup>8</sup> In the following, these key documents, in addition to information obtained through interviews with officials from both the Norwegian and Swedish competition authorities, form the background material for a short presentation of important features of the reform process and result.

The most important changes in EU competition policy, following the Council Regulation 1/2003, may be summarized in four points:<sup>9</sup>

### 2.1.1 *Harmonization and decentralization.*

As it is today, national competition authorities *may choose* whether to use national law or to apply Articles 81(1) and 82 of the EC Treaty when treating cases that might impinge upon trade between Member States. Further, some competition authorities, as mentioned above, do not have the jurisdiction to enforce EU competition laws at all. According to Article 3 in Regulation 1/2003, however, all national competition authorities *are obliged* to apply Articles 81 and 82 when the so-called trade criterion is met. It is interesting to note that this particular phrasing was subject to intense negotiations when drafting the Regulation. The wording used in the Commission proposal was:

Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply *to the exclusion* of national competition laws".<sup>10</sup>

The final text in the Council Regulation, however, reads quite differently. When national competition laws are applied to agreements within the meaning of Article 81 or 82 of the

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<sup>7</sup> Former Director-General of DG Competition.

<sup>8</sup> Respectively, COM (2000) 582 and Council Regulation (EC) 1/2003.

<sup>9</sup> Danish Competition Authority, "Competition report 2003", see <http://www.ks.dk/publikationer/konkurrenceredegoerelsen/>.

<sup>10</sup> COM (2000) 582, Article 3, my italics.

EC Treaty, “...*they shall also* apply Article 81/[82] of the Treaty”.<sup>11</sup> When talking to informants in the Swedish Competition Authority, it was emphasized that Member States were pushing hard for these changes in the Council, as the original phrasing was deemed to give the Commission too much leeway compared to the national authorities (interview 30.01.2004; see also Goyder 2003: 446). Still, national competition authorities that do not yet possess the jurisdiction to apply EC law in these matters have to make the necessary changes before the Regulation comes into force 1 May 2004 (Goyder 2003: 438). As such, all 25 competition authorities (after the enlargement) will work according to the same rules when trade between Member States is affected, notwithstanding the differing contents of their national competition legislation. An informant in the Swedish Competition Authority claimed that from 1 May, there will be 26 competition authorities in the EU (Member State authorities and the Commission), as opposed to one under the current system (interview 30.01.2004).

#### 2.1.2 *Termination of the notification system.*

The most dramatic change following the harmonization and decentralization of enforcing Article 81 and 82 EC Treaty, is that the Commission prerogative of granting exemptions to the prohibition principle in 81(1) and 81(2) is abandoned, giving the national authorities the right to enforce all of Article 81, including 81(3). A main motivation for this is surely to come to terms with the ever-increasing load of notifications or applications for exemptions directed at the Commission (Nicolaidis 2002). This is done by abolishing the notification system, creating a “directly applicable exception system” (ibid.), where no prior authorization by the Commission is necessary. It will be up to the undertakings themselves to evaluate whether agreements fall under the prohibition rules in 81(1) or whether they satisfy the requirements of 81(3). Thus, the system is changed from *ex ante* evaluation, performed by the Commission, to *ex post* control, performed by both the Commission and national competition authorities. If national authorities find that an agreement falls under 81(1), but at the same time satisfies the demands of 81(3), they will simply abstain from taking action.

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<sup>11</sup> Council Regulation 1/2003, Article 3, my italics.

### *2.1.3 Establishing a network of competition authorities.*

Considering the far-reaching changes inherent in the reform of enforcing Article 81 and 82 of the EC Treaty, there is obviously a need for closer co-operation between the different competition authorities. Therefore, a European Competition Network (ECN) has been established in order to secure a uniform and coherent application of the new rules. This network will be an arena for exchanging information between the national authorities, as well as allocating cases to the best placed authority. If an agreement between two or more undertakings charged with evoking Article 81(1) involves two jurisdictions, for instance those of Denmark and Sweden, the competition authorities of *one* of the countries may be given the responsibility for conducting the investigation.<sup>12</sup> The Commission itself, represented by DG Competition, is conceived to be the node in this network, with a main responsibility for coordinating the work.

### *2.1.4 Strengthening the control-mechanisms of the Commission.*

In order to avoid uneven enforcement of EU competition policy, the position of the Commission as the central regulator is kept in the new Regulation. If, for instance, an agreement is believed to affect three or more Member States, the Commission will be the authority in charge. In addition, the Commission may at any time initiate its own proceedings in all cases, thereby relieving the designated national authority of its duties. This is perceived to be an important mechanism to avoid a re-nationalization of Community policy (interview 30.01.2004). The Commission is also granted more extensive control-mechanisms than envisaged under Regulation 17/1962. This includes extended opportunities for controlling private homes, business facilities, as well as conducting interviews with individuals.

Thus, the administration of EU competition policy after 1 May 2004 matches the term “networked-administrative system” (Egeberg 2004a) quite neatly, in which autonomous national agencies interact directly with the Commission in preparing and enforcing EU policy, at the same time as they perform traditional tasks as agents of national ministries. This development in many ways challenges notions of the coherence of national

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<sup>12</sup> See Draft Commission Notice on cooperation within Network of Competition Authorities. See [http://europa.eu.int/comm/competition/antitrust/legislation/procedural\\_rules/cooperation\\_network\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/cooperation_network_en.pdf)

administrative systems, and illustrates potential centrifugal forces in processes of Europeanization.

### **3 Framing the Development in a Theoretical Context**

Having described some important features of the developments in EU competition policy and the background for recent reform initiatives by the Commission, a theoretical interpretation of the presentation is due.

#### 3.1 Classical Integration Theories

##### *3.1.1 Intergovernmentalism*

There is not one intergovernmentalist perspective; rather there are several, and conceptual heterogeneity prevails, making it difficult to present all the consequences these somewhat differing views imply when it comes to expectations for European integration. However, the aim of this paper is to identify a few basic assumptions that characterize a majority of intergovernmentalist perspectives. As such, they will be treated as one approach for matters of simplification.

In general, this perspective is a conceptual approach that emphasizes the centrality of nation states in the integration process. To say it with Nugent (2003: 482), the theory “...is centred on the view that nation states are the key actors in international affairs and the key political relations between states are channeled primarily via national governments”. Renaud Dehousse (1997b) also criticizes the intergovernmentalist tendency of personalizing the state, treating it as an individual, endowed with capacity for understanding, a will of its own and a concern to act consistently. According to Dehousse, such an understanding ignores the fact that behind the notion of ‘the state’ lies a range of institutions whose objectives and interests vary (ibid.). The work of Andrew Moravcsik (e.g. 1993, 1998), perhaps the academic most commonly referred to when discussing intergovernmental approaches, has taken this criticism into account in his outline of ‘liberal intergovernmentalism’. Nevertheless, this approach still corresponds closely to the above quote by Nugent, as he sees the EU Member States through the prisms of national governments alone (Bulmer and Lequesne 2002). Although he acknowledges the variety of interests present at the national political arenas, his claim is

that these are coordinated within the national political systems, presenting one national position at the international (EU) level, where negotiations between Member States are conducted on the basis of these exogenously determined national interests. Thus, intergovernmentalism basically argues that domestic governance institutions and EU institutions are separate levels of governance.

### *3.1.2 Neo-Functionalism*

Whereas intergovernmentalism stresses the autonomy of national leaders, neo-functionalism stresses the autonomy of supranational officials. States are not the only important actors in determining the integration process; in fact, initial delegation of authority to supranational institutions leads to a progressive strengthening of integrationist forces, by ways of spill-over and unintended consequences (Strøby Jensen 2003). A famous quote by Ernst Haas (1958: 16) is illustrative of the implicit pro-integrationist assumptions in neo-functional theories:

Political integration is the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result of a process of political integration is a new political community, superimposed over the pre-existing ones.

Somewhat parallel is the claim by Wolfgang Wessels (1998) that constant interaction between national officials at the European level has brought about a ‘fusion’ of national administrations, where national civil servants no longer consider EU policy making as foreign affairs in which they act as ‘guard dogs’ of national interests, but regards Brussels as an arena in which routine decisions are taken and the officials of other Member States as partners. Referring to Wessels work, Kassim (2003) terms this process as ‘post-national socialization’.

Quite obviously, it is not possible to do justice to the complexities of two of the most widespread theoretical approaches in EU studies within these few lines. Nevertheless, based merely on these few features of intergovernmentalism and neo-functionalism, I will suggest that they are not particularly well-suited to explain the above described novelties in arranging the EU administrative order.

A line of reasoning that is compatible with an intergovernmentalist approach, is to view the integration process as a ‘turf battle’ between Member States and the supranational institutions, above all the ‘guardian of the Treaties’ – the Commission (see e.g. Kassim and Menon 2003). Seen in this light, developments in EU competition policy would seem to strengthen the Member States to the detriment of the Commission. As competition policy is decentralized, enforcement is increasingly provided by national authorities, ‘bringing the Member States back in’ into EU policy. On the other hand, however, it is important to keep in mind that it was the nation-states themselves that created the Commission, as they acknowledged the need for strong supranational institutions in order to make the cooperation effective and efficient, enabling the Member States to achieve goals that would not otherwise be possible. Moravcsik (1993), for instance, claims that strong supranational institutions is perfectly compatible within an intergovernmental logic, as they are the result of conscious calculations by Member States to strike a balance between greater efficiency and domestic influence, on the one hand, and acceptable levels of political risk, on the other (ibid: 507). Possibilities for cooperation are enhanced when neutral procedures exist to monitor, interpret and enforce compliance. Neutral enforcement permits governments to extend credible commitments, thus helping to overcome the almost inevitable interstate prisoner’s dilemma of enforcement, whereby individual governments seek to evade inconvenient responsibilities and thereby undermining the integrity of the system (ibid: 512).

When examining the attitudes of national governments to the decentralization reform, it is interesting to see that they have been, at best, diverse. Big and powerful Member States, as Germany and Britain, have been particularly critical, due to fears of uneven practice of competition authorities in different Member States (Goldschmidt and Lanz 2001; Majone 2002; Boje and Kallestrup 2003). Majone (2002) holds that the opposition of Member States shows that the Commission is still perceived as the most appropriate institution for enforcing EU competition policy.

Francis McGowan (1998: 117) states that it is tempting to see competition policy as a prime example of neo-functionalism, as an instance of a supranational bureaucracy

expanding its responsibilities as well as playing a key role in creating spill-over in economic integration as a whole. However, as mentioned above, the idea of decentralizing enforcement may be seen as a weakening of the Commission and the supranational character of the policy area, and officials within DG Competition have also been highly skeptical of the idea:

In DG IV, the “natural” monopoly [over the enforcement of Article 81(3)] theory was an almost religious belief. It constituted for four decades DG IV’s main credo. Not to adhere to it was considered to be heresy and could lead to excommunication. A departure from this dogmatic position is the “cultural” side of the revolution initiated by the White Paper. It is, by the way, a convincing illustration that the widely held view according to which “Eurocrats” have only one main aim, i.e. to increase their own influence and power, is wrong (Ehlermann 2000: 4).

Majone (2002) explicitly argues that the development moves contrary to neo-functionalism expectations, as the Commission becomes increasingly dependent on national administrative systems.

Thus, developments in EU competition policy, involving a substantial increase in administrative cooperation between national competition authorities and the Commission, seem to need other explanatory tools, at least to complement insights provided by intergovernmentalism and neo-functionalism. This is also noted by Alexander Kreher (1997); when studying the increasing administrative interaction between national agencies and EU-level agencies, he questions the relevance of measuring the development in terms of the supranational-intergovernmental dichotomy. A possible explanation for this is provided by Markus Jachtenfuchs (2001), as he states that classical integration theory, like intergovernmentalism and neo-functionalism, predominantly treat the EU polity as the dependent variable, trying to explain the causes for its development. Therefore, in the next section, I will seek to add some value to the understanding of the decentralization of EU competition policy by applying an organizational perspective, treating the institutional configuration of the EU as independent variables.

### 3.2 Suggesting an Alternative Explanation

The complexity of the institutional configuration of the EU makes it quite distinct from all other forms of cooperation at the international arena (Laffan 1998). Classic international organization, e.g. the United Nations or WTO, are basically arranged

according to territory, in the sense that key decision makers are formally representing the constituent governments. In the EU, however, the division of tasks between the Council, the Commission, the Parliament and the Court of Justice mean that there are more channels for political representation and thereby a potential for inter-institutional conflict (Egeberg 2004b). In this presentation, focus will be on the Council and the Commission; as the administration of EU policy is the subject matter, it is important to scrutinize the two institutions that interact with national administrations on a routine basis. Two aspects will be paid particular attention to.

A feature of special interest is the division of tasks and responsibilities between the Council and the Commission. The Council is perceived as the most important EU institution, primarily due to its decisive role in decision-making processes. The Commission, on the other hand, plays an important role in preparing, proposing and monitoring policy and legislation.

The Council is primarily organized according to territory, similar to the classic intergovernmental organization (Egeberg 2004a; Hayes-Renshaw and Wallace 1997). Each Member State is represented in the different Council formations, acting primarily as 'guardians' of national interests (Kassim and Menon 2003). The Commission, on the other hand, is primarily organized according to non-territorial criteria. The structure of the directorate generals (DGs) is basically sectoral and functional, and Egeberg (2003, 2004a) shows how the Commission has continuously sought autonomy from Member State influence.

As these basic organizational features are presented, a pertinent question arises: How do they matter? Several studies have shown how national officials do not respond uniformly when interacting with different institutions at EU level; whether they are involved in the Council or the Commission structure have an impact on their behavior (Egeberg et al 2003; Trondal 2001; Trondal and Veggeland 2003). These studies are predominantly occupied with behavioral patterns of national officials attending different EU committees, and they show interesting differences between participation in comitology committees and Council working groups on the one hand, and Commission expert groups, on the

other. While attending comitology committees and Council working parties most clearly evoke role conceptions related to nationality, the picture is more mixed when it comes to participation on Commission committees. Here, functional and sectoral roles are more pronounced, although the role as national representative is still expressed as important. Also, these national officials display a high degree of trust in the independence of Commission officials from particular national interests. Further, these studies show that the behavior of national officials participating in the Commission structure are less coordinated nationally than their counterparts in the Council structure and in the comitology structure (Egeberg et al 2003). These findings illustrate that patterns of cooperation and conflict are, at least to some extent, a function of the organizational structure of the EU institutions. As such, institutions discriminate among conflicts, they systematically activate some latent cleavages while others are routinely ignored (Egeberg 2004a, Trondal 2001). Unlike the findings of e.g. Wolfgang Wessels (1998), the committee studies do not find that participation by national officials in EU committees lead to any 'fusion' of national administrations, neither that supranational allegiances replace national identities, which was, as mentioned above, expected by functionalist theories.

As EU competition policy has evolved, national competition authorities have gradually become more professionalized and gained more autonomy from political interference (Goyder 2003). This development has been driven by the increasingly tighter relationship between the Commission and the national authorities, and has indeed been a prerequisite for the decentralization project. Boje and Kallestrup (2003) refer to the reform of Danish competition law as driven by national bureaucrats and not by politicians. When speaking to both Norwegian and Swedish informants, it was also made quite clear that this was a trend that was expected to continue with the reform process (interview 9 December 2003; 30 January 2004). DG Competition was held to be a partner in the enforcement of EU competition policy, and Swedish political authorities had no role to play in the handling of individual cases.

It is interesting to note, however, that when legislative issues in EU competition policy are at stake, the competition authorities play a double role; when preparing legislation in Commission expert groups and when assisting the ministry in the Council structure. As the committee studies revealed, the work by national officials in Commission expert committees is less coordinated nationally than what is the case in the Council structure. Thus, a closer allegiance to the aims and means of the Commission and other national authorities is plausible in this setting. On the other hand, when deciding on legislative initiatives in the Council, the national authorities work closely with their national principals in the ministry, trying to diminish the strength of the Commission. This double role is reflected in Swedish participation in the EU structure; whereas it is the competition authority that attends Commission expert committees and the established European Competition Network, it merely accompanies the ministry in the Council structure when deciding on new legislation (interview 30 January 2004). A corresponding division of tasks is visible in the participation on the Advisory Committee on restrictive practices and monopolies, a Committee where representatives of Member States are entitled to comment both on proposed individual decisions as well as proposed Community legislation on competition issues. Here, the competition authority attends along with the ministry when legislation is discussed, while the ministry is absent when discussing individual decisions.

Observing more closely actual behavior in the decision making process, the division of tasks presented above seems to have quite significant practical consequences. The abovementioned issue of the phrasing of Article 3 in Regulation 1/2003 is a nice illustration; as one informant stated, Swedish authorities, represented by both the competition authority and the ministry, worked hard to change the initial proposal of the Commission, which gave a much clearer primacy to EU competition law over national law than what became the final result by the Council decision. Turning to the treatment of individual cases, the attempted merger of Volvo and Scania<sup>13</sup> shows the other role played by the competition authority:

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<sup>13</sup> Admittedly, this is a case that does not fall under Articles 81 or 82 as it is a merger case. However, the division of roles by national authorities is the same, and it is therefore used as an illustration.

Even though the Swedish government was supporting the merger and even lobbied for its acceptance in Brussels the Swedish competition authority advised against the merger in the advisory committee. I must therefore stress the importance of the national competition authorities applying EU competition law in close co-operation with the Commission and with each other. If the national competition authorities would continue to apply national competition law on agreements affecting trade between Member States the reform would be a failure, and set us a step back.<sup>14</sup>

Informants both in the Norwegian and the Swedish administrations further comment that there have been instances where a Member State have been represented in the Advisory Committee both by the ministry and the competition authority, presenting divergent views of the national position on a particular issue.

Taken together, these observations indicate that the institutional configuration at EU level, with a division of tasks between the Council and the Commission, as well as the different organizational logics in these institutions, have had an impact on the decentralization process of EU competition policy. This has also been facilitated by organizational reforms at national levels, where executive tasks have increasingly been decentralized to autonomous agencies. As such, interactions between the EU and the Member States in the field of competition policy seem to follow the institutional configuration at EU level, where officials situated in the national ministries are primarily engaged in the territorially organized Council structure, while officials in the competition authority interact with the functionally organized Commission structure. Thus, both an intergovernmental and a functionalist explanation have difficulties in explaining the dynamics in the reform process because of a lack of differentiation between different actors at the national level. In this way, the findings of this small study are similar to the findings of Trondal (2001: 15-16):

This study argues basically that we have to unpack the organizational structures of the EU system in order to determine which identity, role and mode of action being evoked by domestic officials attending EU committees. Additionally, we have to carve up the bureaucratic machinery of the nation-state in order to unravel the dual institutional affiliations embedding these domestic government officials, ultimately determining the relative primacy of different institutional dynamics penetrating them.

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<sup>14</sup> Speech by Charlotte Cederschiöld, Swedish MEP, at a conference of the EP and the Commission on the reform on European competition law, 9 and 10 November 2000 in Freiburg. See <http://europa.eu.int/comm/competition/conferences/2000/freiburg/>.

A networked-administrative structure, however, of which EU competition policy from 2004 may be a prime example, differs from a system where national officials sometimes attend committee meetings in Brussels. National competition authorities will, as of May 2004, participate in a much closer cooperation guided by the Commission, where they are key players in preparing and executing Community policy.

#### **4 Endnote: Pointing at Potential Transformative Consequences**

Institutional ‘turf battles’ between the Council and the Commission are quite common (Egeberg 2004b). However, the above quote by the Swedish MEP shows how these constellations stick deeper, resulting in the same kind of conflicts at the national levels. At any rate, it seems quite clear from the Swedish case that the government is very much aware of the need for stronger coordinating mechanisms to ensure that national agencies in general adhere to the interests of the government (interview 30 January 2004).<sup>15</sup> When it comes to competition policy, where the Commission has an extraordinary strong position, and national agencies have gained a high degree of autonomy from national political institutions, chances are that national officials working in competition authorities will see their position as one where they owe allegiance to two principals; their national superiors in the ministry, as well as the Commission. Their position will be what Egeberg (2004a) refers to as “double-hatted”, where they serve as part of the “community administration” as well as an integral part of the national bureaucracy. Stefan Kadelbach (2002: 176-177) perceives the situation similarly, albeit from a lawyer’s point of view:

National authorities are thus subject to two claims to obedience, stemming from two legal orders which are different in origin. They find themselves in a situation where they owe dual loyalty. On one hand, they are integrated in their respective institutional hierarchies. On the other hand, national agencies are responsible for the implementation of EU law and thus function as the substructure of the European institutions. That *dédoublement fonctionnel* may lead to conflicts if state officials receive diverging commands from the two orders.

The reform of EU competition policy may increase this challenge, as the setting up of a European Competition Network strengthens both the intensity and the amount of cooperation between national competition authorities and the Commission. This “double-hatted” position of national agencies may of course be problematic, as it challenges the

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<sup>15</sup> See also the report by Statskontoret/the Swedish Agency for Public Management – [www.statskontoret.se](http://www.statskontoret.se) – report no. 2003: 29.

traditional hierarchical notions of national bureaucracies. It is an illustration of an observation made by Sverdrup (2003: 5), of “the reduced symmetry or overlap between the jurisdictions of the public administration and its territorially based authority (...) where there is often ambiguity, and sometimes conflict, about whom the administration is accountable to and whom it works for”. At least when it comes to competition policy, the statement by the Swedish MEP shows that the reform itself depends on national competition authorities wearing the “Community-hat” when preparing and applying EU competition law. It is not an ambition of this paper to evaluate potential consequences for the nation-state, but it is clear that the ideal-picture of hierarchical and internally coherent national administrations may be increasingly problematic to sustain even at the European scene. At least, it does not provide an accurate description when it comes to the administration of EU competition policy as of 2004.

Although an emphasis on the particularities of the policy area in question is important to keep in mind, the more general picture is certainly interesting. Due to the unique institutional structure of the EU, as well as the fragmentation and decentralization of national administrations, conflicts and patterns of cooperation between different institutions at EU level may penetrate the nation-state and thereby increase the challenges for Member State governments in coordinating policy.

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