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Pannel – What’s in a Network? Effectiveness and Accountability in EU Competition Law and Governance

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You can access some of my papers and references to academic / research activities in connection with my Jean Monnet Chair at:

Pannel – What’s in a Network? Effectiveness and Accountability in EU Competition Law and Governance

- Starting with Prof Imelda Maher Paper and considering the general theme/leit motif of this Panel – it is necessary to select a key/structuring topic for the discussion – EU Multilevel Governance in various economic spheres and its current challenges (1)

- Having as a sub-theme - the emergence of the post-2003 European Competition Network, its effectiveness and accountability as possible paradigm for EU economic governance (2)
What’s in a Network? - I - The particular case of competition law

- As focused in the Prof Maher PAPER there are historic reasons for the especially important role of SOFT LAW in the field of EU competition law.

- I would add that in this field the legal relevance and effective legal implications of SOFT LAW have been particularly elaborated at a broader level than in other domains - The rulings of the CJEU “Dansk Rorindustri”, of 2005 (Case C-189/02P et al) and “JCB Service v. Commission”, of 2006 (Case. C-167/04P) – esp pars. 207 to 211 in the first case and pars. 207 to 209 in the second ruling.
What’s in a Network? - I - cont - The particular case of competition law

- **Legal effects arising from SOFT LAW** – Protection of legitimate expectations/limit on the exercise of discretion/safeguard of the principle of equal treatment - according to the “*Dansk Rorindustri*” and “*JCB Service v. Commission*” Jurisprudence of the CJEU.

- **SOFT LAW allegedly adopted without prejudice to case law of the European Courts** – but problems arise when in the field of competition law (as it may happen in other fields of economic regulation and governance) the Commission departs from more established jurisprudence at a given moment – as it the case with so called ‘economic effects approach’ and with a paradigmatic example in the *Commission 2009 Guidelines on Exclusionary abuse of dominant position* (OJ – C 45/7, 24.2.2009).
What’s in a Network? - I - cont  - The particular case of competition law

- The limits of an hybrid approach of interaction between traditional hard law, jurisprudence (case law) and soft law (potential problems arising from gaps between soft law and jurisprudence, that has a pivotal role in the development of EU law).

- Possible functional classification of soft law instruments – (Linda Senden – Soft Law in European Community Law) – (a) Pre-law functions; (b) Post-law functions; (c) Para-law functions: soft law paving the way to future EU legislation; soft law facilitating the correct and uniform interpretation of EU legislation; soft law as temporary or permanent alternative to legislation.
Possible indirect legal effects of soft law in relation to EU national jurisdictional bodies— to what extent? - The “Grimaldi” and “Deutsches Shell” cases (Case C-322/88 and Case C-188/91) – “the national courts are bound to take recommendations [of the Commission] into consideration in order to decide disputes submitted to them” (an approach to ponder with due restraint)

On the whole, while acknowledging various advantages of different categories of soft law instruments (going here beyond competition law) certain limits to the proliferation of these instruments have be considered
The rationale underlying the creation in 2003 of the European Competition Network (ECN) – Decentralization in enforcement of competition law combined with safeguard of its uniform application and consistency at EU level – based on cooperation between National Authorities and a coordinating role of the Commission (acting as a ‘safety valve’ – Mario Monti – Florence Competition Workshop 2002) – Although, curiously the suggestive concept of “network antitrust enforcement” was coined by an American – Harry First (in the context of US antitrust system with State and Federal levels of enforcement).

Hybrid or ‘sui generis’ nature of the ECN – scarcely supported at normative level in Regulation 1/2003 and mainly supported on a SOFT LAW basis (Notice on Cooperation between National Authorities and a Joint Statement of the Council and Commission on ECN) – although ECN is atypical at another level because it resulted from a centralized initiative.
The particular case of competition law

- A balance of the ECN functioning (?) – Probably an excessively optimistic perspective has been developed – reflected in the Report of the Commission on the functioning of Regulation 1/2003 (quoted by Prof Maher) – Communication to the European Parliament and the Council (COM (2009) 206 final – (in my view a rather disappointing document on many accounts)

- It is true that initial concerns about ECN were nor confirmed in practice: (a) jurisdictional issues have been scarcely discussed within ECN; (b) issues with reallocation of cases very rare (c) paralell proceedings almost virtually non existent
However, to describe the ECN as entirely “unproblematic” and “having surpassed expections” (as the 2009 Report does) is an exaggeration.

There are (still) pending issues or shortcomings of the system to be addressed as regards ECN – (i) access to information within ECN, cross-border exchange of evidence and articulation between leniency programs; (ii) diversity of national procedural frameworks [although some argue there is a “silent revolution” of some procedural convergence (Lemaire/Gslater)] raising problems of due process (admissible information in a given Member State obtained in another State under different investigation powers or procedural rules?); (iii) issues related with relative opacity of the system generating potential accountability problems– e.g. an issue with observations exchanged ‘ex vi” article 11 of Regulation 1/2003 – influencing the decision of the case but not to be disclosed.
Issues concerning access to information within ECN and articulation between leniency programs (referred supra) – FOCUSING ON A PARADIGMATIC CASE - the landmark “Pfleiderer” ruling (CJEU ruling of 14 June 2011 – Case C-360/09) and the limits on an informal/hybrid approach (the potential need for a normative intervention in certain domains) – “Pfleiderer” - Member State Courts to rule in casuistic terms on the admissibility of private plaintiffs obtaining CONFIDENCIAL leniency applications (corollary - information obtained from leniency application in one jurisdiction could be used in damages actions in other jurisdiction, thus affecting the consistency and effectiveness of LENIENCY PROGRAMS) – issue to be addressed on normative basis to safeguard LENIENCY PROGRAMS (and protection of legitimated expectations of leniency applicants)
What’s in a Network? - II - The ECN Model and EU Multilevel Governance in various economic spheres

• There is also an exaggeration in the 2009 Commission Report when it enthusiastically considers ECN as a “general model for multi-level policy networks in Europe”.

• The system still lacks maturity to be transposed to other policy areas (although it is an important reference).

• That insufficiency is all the more significative when multilevel governance at the EU is nowadays at a critical crossroad.
• Multilevel governance at the EU is at a critical crossroad due to contradictory forces at play (particularly as regards the crucial financial sector in the Euro Area – Banking Union?) requiring, on the one hand, more integration and, on the other hand, its compatibility with more democratic accountability.

• That, in turn, may lead to innovative – intermediate – approaches to NETWORK MODELS OF GOVERNANCE – Networks of National regulators with a much more vigorous central coordination (EU level) having at the centre new Supranational Supervisory Authorities – not entirely replacing National Supervisors but having some of its powers transferred to such Supranational Authorities and coordinating (to what extent?) the work and interplay of those National Authorities...(the experimentalism of ECN has still to be further developed to provide a general model in terms of EU governance...)