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How to Modernise the European Competition Network (ECN)

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Abstract**—**This paper argues that networks, such as the ECN and the American network, are affected by certain small events which are inherent to path dependence and preclude the full evolution towards efficiency. It is advocated that the American network is superior to the ECN in many respects due to its greater flexibility and longer history. This stems in particular from the creation of the American network, which was based on a small number of cases. Such a structure encourages further changes and modifications which are not necessarily radical. The ECN, by contrast, was established by legislative action, which explains its rigid structure and resistance to change. This paper is an attempt to transpose the superiority of the American network on to the ECN. It looks at concepts such as judicial cooperation, harmonisation of procedure, peer review and regulatory impact assessments (RIAs), and dispute resolution procedures.

Keywords**—**Antitrust, Competition, Networks, Path Dependence.

I. Introduction

WE need to strive for perfection to achieve anything, [1] but history is key to many aspects of this. [2] In order to modernise the ECN, the two leading network would be examineds, the ECN and the American network, and consider which aspects have contributed to the success of the better of the two and whether any of these elements could be transposed to the less successful one. Similar to earlier studies, this research adopts the functionalist approach, i.e. one that assumes that only similar systems can be compared, in the sense that they perform a similar function. There are, however, material differences. The earlier studies could be considered as examples of a 'weak form' of comparison, as they do not consider many epistemological contexts. This study differs from these as it aims to adopt the 'strong form' of comparison. It combines microcomparison with macrocomparison. [3] However, this form of comparison, by its definition, stresses the inherent deficiencies of the existing comparative literature, which Siems described as 'positivistic, superficial and providing a mere illusion of understanding of other legal systems.'[4] This form of comparison adopts a well-founded, interdisciplinary, critical and, to some extent, post-modern approach. This study primarily borrows from the historical context, but it is well-founded in other contexts as well. The aim of this study is to compare deep ontological variations between two systems, like comparing different 'word versions'. This study is of pivotal importance as networks, in contrast with different institutional designs such as corporate governance, are not subjected to global competition with cheap telecommunications and conferences. [5] Therefore, any changes that can be implemented could only be achieved theoretically. However, it is noted that such a well-founded approach may be impossible. [6] Therefore, for the purpose of this research, certain points of view would be adopted. As far as Gerber's reference points are concerned, [7] this study adopts two references points when comparing these networks – internationalisation and the search for an overarching economic theory.

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II. Overall Findings as Far as Networks Are Concerned

Both models have developed a similar structure, i.e. a network, but are materially different. The ECN is an example of a supranational network and the American model is a form of federal network. This difference and the different lengths of their histories have a pivotal impact on their functioning. Throughout this paper, the flexibility of the American model will be discussed, but what does this mean? Roe gave a theoretical basis for this flexibility in the following context. He wrote that legal and institutional evolution is more likely to occur in a system that allows the possibility of radical changes. He claimed that if a system lacks this quality, even small-scale evolution might be precluded. The logic behind this is simple: when the players know that great upheavals are conceivable, they might create several mutations, many of which are likely to fail, in the situation where the system does not decline into disorder. However, some of them will succeed, survive and function. [8] If we can apply these findings to our networks we can conclude that the US model is superior. It is based on more flexible foundations and it can be changed easily; because it was created via a few pivotal cases, there is a vast discretion for states to make radical changes easily. [9] The EU model, by contrast, was created in a legislative process, making it more rigid and resistant to any change. [10] It might be the case that no changes are necessary, but the US model is more prepared for them. It is argued that such analysis is correct; however, it is not certain whether the EU model can be subjected to path dependence or past dependence analysis in any case. When discussing these concepts, it is meant a process that is ergodic, i.e. one which the initial conditions have no impact on its development and eventual outcomes. [11] Past dependence, by contrast, occurs where 'irreversibility plays a role together with the initial conditions of a process.' In the former situation, history is of importance; in the latter, it is not. In my view the EU network is very much like the latter, as only the initial elements are of importance, while events along the path are not that crucial to

the analysis. This analysis is crucial as in the past dependence situation, a static neo-classical analysis might be more appropriate. However, it is not certain whether this type of analysis precludes the use of dynamic efficiency; as summarised by Antonelli, the current economic trends negate any conflict between a neoclassical analysis and dynamic efficiency, [13] as is often assumed. [12] Considering the short history of the EU network it is difficult to speculate at this stage. It might be the case that certain states would evolve more in this process so that their laws could have more aggressive extra-territorial reach. Lagerholm and Malmberg called this 'a path of consolidation', meaning the process of taking leading roles. When we discuss institutions, we need to consider social and cultural elements as well and these ones may take longer to develop. [14] Roe and Bebchuk wrote about issues such as internal rent-seeking, which might be of importance in developing countries, and there are also issues such as globalisation. [15] The only thing that could be said with certainty is that past dependence was very true of the predecessor of the EU network.

III. Judicial Cooperation

Having outlined the overall structure, this section discusses the constituent aspects of the ECN network that could be modified, largely by reference to the American network. The American network developed a sophisticated system of judicial cooperation that takes various forms.

This section focuses on the initiative taken in the EU, which are not considered sufficient. It is also stressed that, as argued by Jefferson, cooperation might be an important impediment to forum shopping or to avoidance of the legal authority of a state. [16]

Judicial cooperation in the EU has completely different nature to that in the US and is largely associated with procedure. It has a shorter history, as it originated from the Treaty of Amsterdam that came into force in 1999. This piece of legislation incorporated judicial cooperation in civil matters as a new specific policy area. Its new legal basis stems from Articles 61 and 65 of the EC Treaty. [17] Storskrubb noted that measures such as the 'Service Regulation', [18] the 'Evidence Regulation' [19] and the 'Brussels Regulation'[20] are designed to depart from "the previous intergovernmental style of judicial cooperation with central authorities towards a decentralised model with direct contact between the lowest courts."[21]

As outlined above, we can see progress in this area, but we have not quite reached the ideal. There are certain constitutional and political questions that need to be answered first. Is it possible for judicial cooperation to be compatible with judicial independence and procedural autonomy and can it achieve consistent application of the rule of law? It is argued in a similar vein to Wright, that greater transparency would boost legitimacy and legal certainty and thereby promote convergent application of EU anti-trust law among national judges. Current proposals to enhance these aspects are misplaced and this could be better achieved by publication of opinions [22] and possibly national judgments. It is also discuss whether the duty of loyal cooperation under Article 4(3) TEU could be extended to national courts.

IV. Haromnisation of Procedure

This section discusses harmonisation procedure which is a great American achievement. Transnational harmonisation can take two forms – certain planned changes and spontaneous ones, known as 'osmotic' harmonisation. [23] Examples of the former are legislative acts such as the European Enforcement Order of 2004 that recognises different enforcement decisions alongside minimum requirements for the service of documents. Certain measures are more diplomatic than others. A good example is the 2010 Stockholm Action Plan that stressed understanding of various legal traditions and methods. [24] Examples of the latter are cases like the ECJ's (now CJ) ruling in *Janecek.* [25]

First, the rationale for harmonization will be discussed, as the lack of harmonisation can only lead to the operation of more than one network. Differences in procedure cause legal conflicts and the other negative consequences, such as costs and distress related to working within various procedural systems, [26] which are referred by Kramer as "high costs, delays, complexities, ... and language issues inherent to international litigation." [27]

There are certain tendencies that can be identified when we look at harmonisation. Storskrubb wrote that these changes lead to the uniform goal of efficiency but, arguably, this concept is very elusive. Alongside efficiency, she talked about issues such as simplification, decentralisation and modernisation with an "emphasis on practical and new technology, as well as attempted increased information, cooperation and accessibility." The other topics she mentioned are: uniform practical implementation, general mutual trust and widespread participation. These aims would be achieved "through streamlined standard forms, deadlines, use of information technology and limited opportunities or [sic] and grounds for rejection or appeal." These measures would not only achieve efficacy, but would also be a curb on costs. In addition, the incorporation of apparently simplified procedures may encourage certain litigants to bring proceedings without counsel. There are certain focal elements to these measures which we can describe as minimum standards and mutual recognition. An example of the former is the Service Regulation concerning the service of documents by post, which recognises a means of service by registered letter and the acknowledgement of receipts. An example of the latter is the Evidence Regulation that limits circumstances in which other forms and methods of taking evidence can be refused. These measures, in particular decentralisation, are not free from problems; they carry a danger of diversity or fragmentation in application may result in greater complexity and can also hinder legal certainty. [28]

This article focuses also on the transitional form of law that was created to bridge the gap between substantive and procedural law – private international law - as this law is a first step towards harmonisation. It is difficult to judge the nature of this law, whether it is substantive or procedural. It is

nevertheless clear that its purpose is to coordinate the different legal systems in international cases rather than to simply harmonise the law. In my opinion, harmonisation of the procedure should be key; but, as noted by Kramer, a comprehensive harmonisation of substantive law would make any sort of rules of procedural or private international law redundant. The significance of this process encourages me to dwell on possible solutions in this respect in the next chapter. The contrary is not true, as a full harmonisation of procedure would still require the existence of some form of rules of conflict. However, this is less likely.[29]

Having clarified the background to harmonisation, let us concentrate on possible solutions. In substantive harmonisation we can observe some progress, with good effects being especially apparent on a sectoral basis, but with fewer successes on a uniform level. Del Duca only mentioned issues like disappearance of the jury in the English system and the emphasis put on the written elements of procedure in the US. He also noted recent common law reforms which "grant the judge greater directional and management power, which decreases the adversarial nature of the proceeding." [30] It is argued that considering various problems related to substantive law; procedure might prove even trickier due to its prevailing and wide nature that it will be discussed in the following sections.

Now, procedural rules will be discussed, as "law in action, and not (only) law in books, has to be studied and evaluated." [31] As noted by Uzelac, these rules are dependent largely on the procedural structures that they are comprised of. This article focuses on this matter, as it is unfortunately largely neglected. As noted by Churchill, and mentioned by Uzelac, this is predominately a parochial matter, but according to Uzlac people should be able to sue regardless of their location. Considering the lack of harmonisation of procedural law, harmonisation of matters of secondary importance has little value. He referred here to "a hallucinating number of European legislative acts and instruments (regulations, directives, decisions, resolutions, et cetera.)"[32]

Budget issues should not be underestimated as well. There are certain minimum requirements related to the running costs of the operation of justice which need to be met, that are the ability "to pay postal costs, maintenance of the court buildings or advances on costs of proceedings borne by the courts." Similar to other elements of the legal system, there is no uniform definition of the professional status of judges, which can be professional, substitute or lay. These issues can have a significant impact on the procedure, with the detailed, unequivocally elaborated technical rules of civil procedure being reserved for professional justices and lay magistrates being allowed to avail of a less technical approach with the emphasis being on "broad principles, legal standards, fairness and substantive justice." Considering all of these differences in relation to the judiciary, Uzelac came to the following conclusion: harmonisation can be lost or won.[33] This may vary according to the courts being subjected to the harmonisation. For an outsized "Southern European judiciary, a harmonization based on the filtration of cases, pre-trial techniques of dispute settlement, effectiveness and substantive justice could result in a massive loss of jobs (or at least of its own *ratio vivendi*)" [34]; for the modest, but effective northern European judiciary, the excessive "formalisation, the extension of jurisdiction to 'non judicial tasks' and the focus on bureaucratic efficiency would mean a loss of dignity and social esteem. Thus, professional resistance to any far-reaching project of harmonization would seem to be almost inevitable."

Having stated this, the question that is left open is whether or not the results of civil justice can be monitored and compared in an effective manner. Uzelac proposed measures like "the developed checklists for the national justice systems, such as the Time Management Checklists." Uzelac also noted that procedures in the EU are still very self-centred and he proposed the following amendments to make them more user-oriented: "foreseeable timeframes, clear procedural calendars, transparent time and case management, easily accessible information about the available options in the pursuit of individual and collective rights, user-friendly procedures, clearly defined fee and costs arrangements and fair legal aid system for those who cannot afford the full costs of legal protection." Uzelac explained that the differences in these respects highlights the need for harmonisation.[35]

Storskrubb summarised the current endeavours in the area of procedure and judicial cooperation by citing the Study on Service Regulation: "...currently [there is] little harmonisation and optimisation in its application... [and] there are notable lacunae or inefficiencies in the Regulation's harmonising objective..." [36] However, she also she also acknowledged the impossibility of collecting a complete set of empirical data on their application, which could be used to assess things holistically. [37] Nevertheless, in terms of procedural structures we can see slow improvement. Uzelac noted that extremes slowly disappear as budgets rise and the number of lawyers and judges increases as well, alongside their revenue and remuneration. [38]

There are a few solutions which we need to consider. There is the supranational regulator, but, in my opinion, this could outweigh the possible benefits associated with uniformity. The other contentious area is so-called international cooperation. These measures, although very laudable in their aims, are often restricted only to cross-border situations and do not create specific national procedures. Storskrubb warned against piecemeal and random reforms that impede true harmonisation and as a result create a dangerous double standard. It is argued that multiple regulatory standards do not carry such dangers and these fears are largely overestimated. It is argued argue that such tools could create a mutual dialogue and have certain spill-over effects on domestic cases. It is also argued that, especially in countries without equivalent domestic procedures certain reforms might be incentivised. The other potential benefit of such a measure is that it may have a harmonising effect on countries outside the EU. Recently, the EU joined the Hague Convention on Private International Law which could have an impact on a global scale. [39]

V. Peer Review and RIAs

In the US, there are political Attorneys General. There is no need to replicate this in the EU, but a certain level of democratic standing could be incorporated into technocratic decision making by peer reviews and RIAs.

In discussing this issue, it is worth considering some sort of peer review or regulatory body of experts to overview regulation or some form of RIA. Especially in the US, "[t]raditional concerns with the discretionary activities of regulatory bodies, prominent since the early twentieth century in the United States, have encouraged the search for procedural evaluation devices, such as cost-benefit analysis, regulatory impact assessments and standard cost models' to allow for a greater questioning of administrative decisions". Baldwin, Cave and Lodge cited Stephen Breyer who called for an 'oversight' panel to deal with problems associated with 'knee-jerk' political and regulatory responses to crises. [40] Nevertheless, this may not be an ideal solution. As noted by Sokol, antitrust agencies may be less politically powerful than other interest groups that shape regulation. Competition and antitrust law do not have a strong and well-organised constituency with which to push for procompetitive change. [41] Contrary to specific policies which are targeted towards benefitting a certain industry or interest, such as labour, the benefits of competition and antitrust law are defuse. Furthermore, such an organ may in some way maximise net social benefits, but it is unlikely to provide clear-cut answers to regulatory problems. Instead of better regulation, it may come up with not better regulation, it may bring burdens and delays for regulators. [42] In addition, there are problems of duplication, rising cost and weight of government bureaucracy. In the US, the average cost of an analysis was $100,000 over two and a half decades ago. Furthermore, ex post evaluations are often focused on the direct and closely related outcomes of the project, such as the change in traffic flow due to the building of a new road, and compare these with the expected outcome were the project not to take place. This can be described as 'the counterfactual'. Stern has argued that selecting the counterfactual is hard and the resulting artefact is often controversial. It also may prove virtually impossible to select credible counterfactual for a regulatory agency. For example, how could prices and outputs for telecommunication products be anticipated if Ofcom and Oftel did not exist? [43]

With respect to RIA, this regulatory initiative can facilitate de-regulation and hinder the regulatory endeavours of fervent executive agencies. Centralised reviews of rule-making can also generate action, conquer bureaucratic inactivity of 'ossified' agencies, and change the direction of policy towards a pro-regulatory stance, as evidenced by the Clinton and, to some extent, the Obama administrations.[44] RIA can also improve legitimacy as opposed to efficiency. It can build a foundation for reflexive social learning. The questions over control of regulatory agencies are centred around the centralised presidential review of rulemaking rather than the functioning of RIA. First, it is necessary to establish whether they are in control of rulemaking. Secondary, we need to evaluate this rulemaking. Rational choice theorists correctly indicate that RIA is not a politically neutral measure for the provision of more rational decision-making.

Nevertheless, in adopting RIAs, it is important to warn against legal transplants. The formal incorporation of very similar RIA models in Europe did not entail the same pattern of implementation. Economics and law tell us that transplantation may be a source of inefficiency regarding institutional choice. This is why transplantation of RIAs to a political environment that is not the functional equivalent of that in the US may entail very different results. We also need to look at the political and administrative costs and benefits when examining the diverse implementation models of similar policy innovation. It is adventurous for politicians to assess costs and benefits of RIA and to draw up guidelines, even when they are flawed.

VI. Dispute Resultion Procedure

This section would now like to touch upon one initiative that is lacking in both systems but which has received some acknowledgment. As already mentioned, the US network developed over time through various judicial pronouncements, in a case-by-case experimental learning process. Formation of the network through bottom-up collective action at the state level and equal authority spread among by network members justifies to a great extent the informal nature of the network and the flexible cooperation mechanisms it is based on. Furthermore, there is a great incentive for the parties to stay in cooperation due to the adversarial nature of the US antirust regime. By contrast, the EU network is largely a creation of the Treaty and, as noted by Cengiz, the Treaty did not foresee any mechanism regulating relations between the Member States *inter se*, apart from a dispute resolution mechanism. [45] The US model should not in any respect be considered as an ideal one. The major problems in this model are chaos and forum shopping in antirust litigation. The divergence between federal and state standards of antitrust standing precipitated this process. Therefore, the adoption of the dispute resolution procedure in the EU is worth considering.

VII. Conclusions

In this paper a 'strong form' of comparison has been adopted, but it is noted that such a well-founded approach may be impossible, as we cannot truly compare two legal systems. However, the aims of this paper are clear. We can only adopt a functionalist approach and try to come up with the best solution possible, bearing in mind the ideal, which is largely associated with efficiency. As noted by Milhaupt, '[s]uccessful economies do not abandon their institutions for foreign models; they adopt features of other systems that offer the potential to address emergent shortcomings in their own systems" [46]. In this paper, the successful elements of the American system have been incorporated without interfering with the spirit of the European network, hoping to avoid legal transplantation. Nevertheless, as already mentioned, the rigid structure of the ECN might prove to be resistant to any

changes. The flexibility of the American network is not only apparent in its constituent parts but in its very flexible foundations and long history. Nevertheless, the ECN is a very new network which can hopefully adopt some of these successful elements without major upheavals. This would make it more efficient and more easily internationalised in the future.

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