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EU network antitrust enforcement and experimentalist governance: short review of an essay by Yane Svetiev

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We live in a world of *network antitrust enforcement*, to borrow the expression introduced by H. First a decade ago (here) to refer to the loose arrangements among the federal agencies and/or State Attorneys General offices presiding over the enforcement of federal and state antitrust laws in the US. This is increasingly the case on a global scale with the multiplication of bilateral cooperation agreements, supported by the establishment of connecting points or network nods such as annual bilateral or multilateral meetings of enforcers (including the ICN). Since the entry into force of Regulation 1/2003, antitrust enforcement in the European Union also operates according to a very structured and highly juridified network model managed by the European Competition Network (ECN). Yet the ECN is very much a faceless organisation that consists in a secure IT platform and database systematically fed by national and EU officials, who work together on a case by case basis, peer review each other and meet occasionally to discuss systemic and policy issues.

In the EU, the move toward a network enforcement model was mainly aimed to accommodate two interrelated constraints: (i) the enlargement of the EU, the corollary increase in "diversity" and, incidentally, the additional pressure on the Commission's resources; and (ii) the completion of the EU single market and the resulting transformation of EU competition law, so thoughtfully explained by D. Gerber (1994), who also neatly encapsulated the relationship between the ensuing procedural and substantive modernization processes (2008). Concretely, it was achieved by means of the so-called "decentralization" of antitrust enforcement, i.e., the empowerment of national competition authorities (NCAs) to apply "in full" Articles 101 and 102 TFEU (former Articles 81 and 82 EC). The idea of enlisting NCAs to join in the enforcement effort was floated in the mid-1990s already, notably by former DG COMP's C.-D. Ehlermann, and was subsequently elaborated upon in the famous Modernization White Paper, which was then subjected to a broad consultation process and tense political negotiations leading eventually to the adoption of Regulation 1/2003 and the accompanying "Modernization Package".

In retrospect, the debate that followed the publication of the Modernization White Paper and led to the adoption of Regulation 1/2003 displayed various (and not unusual) symptoms of cognitive dissonance, in the sense of an inability to perceive and/or acknowledge upfront the nature and scope of the changes associated with the switch to a network structure, i.e., to fully appreciate the shifting rationality at stake. This was apparent from, e.g., the Commission unwillingness to acknowledge the extent of the impact of some of its propositions on due process rights and the inability of some commentators to depart from a pre-conceived idea of legal certainty understood as uniformity and primacy. Those dissonances continued to be voiced during the first years of

operation of the ECN, notably because little information filtered at the time as to the performance of its internal processes, except through the authorized voice of Commission officials.

The publication in 2009 of the first Commission report on the functioning of Regulation 1/2003 and its accompanying staff working paper (available here) provided a first comprehensive assessment of the ECN successes and failures. Around the same time, a number of independent researches endeavoured to delve into the operation of the ECN and to reassess the promises made and concerns expressed originally, as well as to formulate proposals for reform. Readers of the blog will be familiar with the proceeds of the XXIII FIDE Congress, the monograph of S. Brammer, the network management approach developed by F. Cengiz (see, e.g., here), the edited volume of the Global Competition Law Center, and others interesting contemporary works in that area.

However, they might have missed one of the most refreshing and convincing accounts of the dynamics of network antitrust enforcement in the EU as recently published by a young scholar by the name of Yane Svetiev (currently in residence at the EUI) in the form of a contribution (available here) to a cutting-edge volume edited by Ch. Sabel and J. Zeitlin and entitled "Experimentalist Governance in the European Union". The density of that contribution makes it an unlikely candidate for a short review posting. Still, in broad strokes, Svetiev endeavours to apply creatively Sabel and Zeitlin's experimentalist governance theories to the field of antitrust enforcement. Thus, he portrays enforcement as a deliberative process and the ECN as a shared learning mechanism involving: (i) the setting of framework goals and mechanisms for their evaluation; (ii) the freedom of NCAs to achieve those goals autonomously, while contributing to the design of implementation tools; (iii) the regular reporting of implementation activities and results, and the peer review of local outcomes; and (iv), eventually, the revision of framework goals and evaluation rules. In doing so, Svetiev addresses some (but not all) of the cognitive dissonances that have often accompanied the turn to network enforcement. Thus, he praises the heterogeneity of approaches, welcomes the space left to NCAs to experiment with new solutions, emphasizes the mutual and continuous peer review process put in place by Regulation 1/2003 and allowing for the dissemination of experiences and the "*disciplined comparison of measures and results*", debunks the alleged consolidation of the Commission hegemony over EU competition policy, questions the ability of economics to provide for a unified enforcement language, etc.

Svetiev's analysis is informed by a fine overview of the transformations that have led to the remarkable choice of networked enforcement as a "*preferred regulatory architecture*" in the EU. Among those, he puts particular emphasis on the increased complexity and dynamism of production relationships brought about by the EU integration process and, broadly speaking, the globalization of trade, notably as they have strengthened the need for businesses to focus on innovation and made markets more volatile as a result. In turn, in Svetiev's view, the changing production environment forced antitrust decision-making to rely on increasingly nuanced and kaleidoscopic analyses, thereby leading to the emergence of learning (and especially access to multiple sources of learning) as a key regulatory element allowing for permanent adjustments in the interpretation of framework antitrust principles. Importantly, Svetiev's experimentalist account is not one-sided, as he completes his study by discussing some of the risks and concerns associated with network enforcement (even though not necessarily the ones that you would have picked in the first place). Looming in the background of his arguments are also a number of obvious tensions between network enforcement and notions of legal certainty, effectiveness and due process, which constitute recurrent themes in the recent EU antitrust enforcement literature and call precisely for limits to the informality of experimentalist arrangements.

Overall, the essay of Yane Svetiev contributes usefully to a better understanding of the emerging contours (i.e., promises and constraints) of network antitrust enforcement, while leaving to others the freedom to address some aspects in greater depth. Personally, it made for one of the most stimulating and enjoyable (professional!) read of the past few months and hence I thought I should share it with you…

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