

The European Commission as a Constraint on its own Antitrust Policy

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[Work in progress]

Abstract

Although the legal and the political-scientific literatures on European competition policy ('ECP') are vast, there is no work that goes beyond the rationalization of stylized historical and/or legal facts. This approach may be justified on grounds of the political complexity of ECP and/or the heterogeneity of units of analysis. Nevertheless, the failure to come up with a positive device that identifies conditions under which specific policy decisions may or may not be possible has limited our assessments of the policy to value judgments rather than to true explanations. This paper attempts to remedy this situation by offering a logically complete and internally consistent model of ECP decision-making procedures. I show how the dependence of the European antitrust regulator (DG COMP) on a heterogeneous, multi-task and collegial organization (the Commission) severely constrains the feasible policy options of the former, and I argue that the nature and the goals of ECP are a function of (a) the ability of DG COMP to rely on national authorities, and (b) the distance between the ideal policy points of, on the one hand, the pivotal Directorate General in the Commission and, on the other hand, DG COMP and its internal opponents. Empirical work should follow.

Keywords: European antitrust, market integration, Commission politics, DG COMP autonomy.

Introduction

Throughout the late 1960s and most of the 1970s, whisky producer Distillers was desperately attempting to break into continental markets. The whole plan of making a very British product as popular as wine or ouzo was far more difficult than it may sound today, as continental consumers turned out to be rather risk averse at the moment of admitting British superiority in foods and beverages. For that reason, Distillers' continental distributors had to engage in expensive advertising and marketing campaigns, often without the certainty that such expenses would eventually pay off. Noting that these distributors would not exert all possible effort unless they received a credible commitment to the effect that their British counterparts would not free-ride on their investment, Distillers decided to charge the latter different prices for whisky aimed at home-based retailers and whisky aimed at export to the rest of the EEC.

In 1978, the European Commission (hereafter, 'Com') decided to prohibit these agreements between Distillers and its UK distributors. The reasoning behind the Com's decision was that quoting different prices for exports than for domestically-consumed goods amounted to unlawful territorial division of the Common Market. The prohibition thus strengthened the political and legal "common market integration dogma" (Van Bael 1980). By the same token, it downgraded the economic argument that the whole scheme was aimed at inciting Distillers' sole distributors in other EEC countries to make efforts to promote whisky on Continental markets. It also ignored the view that, as long as Distillers' products faced competition from other whisky manufacturers (or other spirits manufacturers), it did not matter how the company developed its commercial strategy. Further, the story did not simply end with the prohibition of Distillers' agreements, nor with the ECJ's endorsement of it. Quite expectedly, the European authorities' decision led Distillers to (a) completely separate its British and its Continental operations, (b) sell altogether different brands in each market, and (c) charge considerably higher prices in the UK, for over a decade. Hence, what was intended as a market integration-preserving decision ended up producing the exact opposite effect.¹

¹ For a full account of the Distillers' case, see the subsequent decision of the European Court of Justice (hereafter, 'ECJ'), Case 30/78, *Distillers v. Commission*. See also Korah 1978.

At roughly the same time as the Com and ECJ were struggling to ignore such basic economic concepts as (a) the distinction between inter-brand and intra-brand competition, and (b) the role of the elasticity of demand and supply in the definition of the relevant product market, the U.S. authorities were moving towards ever-greater economic sophistication. Under the leadership of the Nixon appointees in the Supreme Court, antitrust policy entered a period of radical policy change. It moved away from the “progressive” antitrust policy of the Warren Court, the Celler and Kefauver committees, and the Federal Trade Commission (‘FTC’) and the Department of Justice (‘DoJ’), and closer to the laissez-faire principles of the Chicago School of economics and antitrust thought. The case that has come to symbolize the victory Chicago over structuralism was ‘*Sylvania*’.²

Sylvania (1977) shared four important characteristics with *Distillers* (1978). First, this too was a case about the prohibition of territorial restrictions in distribution agreements. Second, this too was a case decided by a federal authority whose mandate consisted in preserving competition in inter-state trade. Third, this too was a case conditioned by important and well-established case law that pointed to a dogma-like prohibition.³ And finally, here too the defendant made an economic argument, claiming that certain types of vertical agreement foster inter-brand competition and enhance consumer welfare, and should therefore not be prohibited per se. Yet, the outcome was very different from *Distillers*: the Supreme Court privileged economics over law, and consumer welfare over other possible policy goals despite the case, and thus ruled in favour of a rule of reason (i.e. an analysis of the case on its merits).

Significantly, the U.S. Supreme Court was not the only influential antitrust policy-maker that made substantial inroads into economics in the late 1970s and early 80s. In the U.S., the FTC and the DoJ soon followed suit (Kovacic and Shapiro 2000). In Europe, the German authorities – also in charge of a federal market – were eventually

² *Continental T.V., Inc. et al. v. GTE Sylvania Inc.* 433 U.S. 36.

³ *United States v. Arnold, Schwinn et Co.*, 388 U.S. 365. In the EEC, the relevant precedent was Case 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community*. According to two of the leading legal scholars in EEC antitrust, “Grundig stands for a virtual per se prohibition of what in EEC antitrust parlance is known as absolute territorial protection” (Van Bael 1980: 45), and “the Commission has evolved a per se-type approach toward some of the hard-core restraints, just as the United States courts have done.” (Hawk 1979: 502)

forced to refine their ordo-liberal position and to move towards a refined concept of workable competition (Kantzenbach 1990, Dumez and Jeunemaître 1991: 119). Even in France, a centralised and traditionally non-liberal political economy, the government headed by Raymond Barre passed Law 77-806 of July 19, 1977, which was heavily informed by research in industrial organization economics, and which privileged universalistic goals such as consumer welfare rather than particularistic claims (Jenny 1990: 150-51).⁴

On the one hand, we have the Com and the ECJ sticking to the same one goal of market integration (at the expense of consumer welfare) to the point of making it self-defeating. On the other hand, we have a series of very different competition decision-makers who nevertheless flexibly adapt their policy goals to new economic learning and to changing political and economic conditions. This difference is somewhat surprising, as it contradicts the standard view that the Com is a technocratic powerhouse which receives delegated powers in order to promote knowledgeable in a politically efficient way (e.g. Haas 1964, Lindberg 1963, Pollack 2003).⁵ With this article I seek to further this debate and to shed some light on the decision-making calculus of the Com in antitrust policy. I address three questions: (1) What explains the observed variation in the policy goals of the Com as opposed to those of other leading antitrust authorities? (2) Why was to Com so dogmatic about market integration for so long? And (3) what made it evolve away from that dogma from the late 1990s onwards? In short, I seek to build a theory of European antitrust policy-making.

I show that, while the Com may under certain circumstances develop a coherent antitrust policy, that policy will be fundamentally shaped by an institutional factor that

⁴ For a more sceptical view regarding the extent to which economics motivated the 1977 law, see Dumez and Jeunemaître 1991: 77-79.

⁵ Franchino claims the opposite, i.e. that the Commission lacks a “marked professional specialization”, that “delegation to national administrations is guided by the fact that they have far greater resources and technical expertise than the Commission”, and that “national expertise is more valuable to the legislators than supranational generalist skills” (Franchino 2007: 143-44). Thus, “the limited technical expertise of supranational bureaucrats, compared to that of national officials, advises against extensive reliance on the Commission in highly complex and technical policy areas.” (op. cit. 293) Interestingly, he also claims – but offers not evidence to that effect – that “competition rules (both general and specific to the transport sector) ... are relatively simple measures” (op cit. 165-66) while, for example, consumer protection or the regulation of the professions are not. Second, Franchino assumes that the Commission may impose agency losses to the national governments, but that national administrations cannot (because they are perfect agents of their political masters). I suspect that most competition policy specialists hold a different view on both issues (see Amato 1997, Vickers 2001).

has been largely ignored in the literature, namely the multi-task and collegial character of the Com. Multi-task collegiality means that, unlike its counterparts in the U.S., Germany, or France, Europe's antitrust regulator (DG COMP) is nested in a much broader organisation (the Com), all of whose members have an equal saying in antitrust matters. If, as I suggest, this creates an important constraint on DG COMP policy options, then cases such as *Distillers* may be interpreted as an attempt by DG COMP to signal its commitment to cooperation with other DGs. Indeed, under certain circumstances, such "absurd" policies are a second-best solution, falling short only of complete DG COMP autonomy through the creation of a true European Cartel Office. The theory predicts that the goals of European antitrust depend on two factors: (1) the relative distance between the ideal policy points of the pivotal DG and those of the competing alternatives, and (2) the possibility for DG COMP to rely not on Com decisions, but on national authorities.

To explore this assertion, I first return to the research question and I review the main arguments in the existing literature regarding European competition policy-making, its structure and its goals. The next section describes a redistribution model of Com decision-making in competition policy, where DGs with mixed motives battle over the reach of their respective policies. It is followed, in the conclusion, by a short plausibility probe which, although falling well short of an empirical test, lends support to the main insights gained from the theoretical model. In addition, the conclusion discusses certain weak links in the theoretical model as well as possible empirical implications.

The choice of antitrust goals: existing explanations

How is European antitrust policy decided, and what are the consequences of that process in terms of the policy's goals and of its economic sophistication? What determines the smooth operation of the policy, and what triggers turf wars among the most relevant political actors, and what are the preferences of these actors? Finally, under what conditions can we expect the European Union to have a world-class competition policy and to avoid fiascos such as *Distillers*?

Answering these questions is crucial for at least three reasons. First, it will increase our political-scientific understanding of European antitrust politics (and EU politics in general), thereby enhancing our ability to give sound advice to interested actors. Second, it will throw light on several important and long-standing legal debates, such as the issue of the participation (and the specific role) of national competition authorities in EU policy. Third, and more importantly, such understanding is needed for actual policy purposes. What is at stake here may be nothing less than the way Europe builds institutions that define its political economy through the regulation of private and public market power.

Options for antitrust policy

It must be stressed that an economy-wide (as opposed to sectoral) regulatory policy such as antitrust can serve a number of purposes, many of which have been forcefully proposed in the course of European integration. According to Barry Hawk, for example, a non-exhaustive list of potential policy goals for includes, “1. Consumer welfare/allocative efficiency in the static sense; 2. Production efficiency in the static sense; 3. Efficiency in dynamic sense (e.g. innovation, etc); 4. Income distribution or wealth transfer effects; 5. Deconcentration/dispersal of economic power and preservation of democratic government; 6. Protection of small and medium sized enterprises; 7. Protection of individual traders/entrepreneurs; 8. Employment effects; 9. Market integration; 10. Environmental, health and safety, and other considerations; 11. “Industrial policy”; 12. “Competitiveness”; 13. Promotion of national champions; 14. Promotion of exports and international trading conditions; 15. Fairness/equity; 16. Promotion of opportunity; 17. Protection of consumers from exploitation; 18. “Public interest”; 19. Macroeconomic effects (e.g. combat inflation); 20. Others.” (Hawk 1998: 351-52) ⁶

⁶ Of course, most antitrust specialists in 2009 would agree that some of these goals are not suitable for antitrust policies. In addition, certain items in the list seem very similar or overlapping (e.g. “protection of individual traders” and “promotion of opportunity”, or “protection of SMEs” and “income distribution and wealth transfer effects”). Furthermore, lists like this one are not underpinned by a systematic theory of political action and/or public policy. [For example, “wealth transfers”, a standard component of all political action in the economic realm, is not a goal that can be compared to, say, “production efficiency”. While the former is the *motivation* for competition policy, the latter is a *possibility* that opens up only once the first issue has been decided (or at least provisionally accepted as a basis on which additional details may be built).] On the other hand, if leading specialists list these goals as different, this may mean that lawyers perceive them as such. And indeed, it seems reasonable to distinguish between even closely

This list serves to highlight the vast number of permutations in which these goals can be chosen, and by implication the curious option taken by the Com to always privilege market integration for over three decades. Mathematically, the formula for the ways these goals can be combined is $C_{n,r} = n! / (n-r)!r!$ if the order of goals does not matter, or $P_{n,r} = n! / (n-r)!$ if the order matters, where “n” is the total number of possible goals, and “r” is the number of goals chosen for implementation. Allowing for the selection of 5 out of 19 possible goals, the formulae yield 11,628 combinations and 1,395,360 permutations. Even assuming that wealth transfer effects is a goal that is relevant to each and every public policy action, the other 18 goal still yield 612 combinations and 73,440 permutations. Finally, given that a policy that aims at goals 15, 16, 17, 18, and 19 (in that order) surely differs from one that aims at 19, 18, 17, 16, and 15 (in that order), we should be counting permutations, not combinations. This means that if a new antitrust authority can (or must) choose 5 among 18 possible goals, it will face an amazing choice between 73,440 possible policies. Consequently, an important question concerns the determinants of that choice: what makes the antitrust authority pick its goals in some way and not in another? And, why did DG COMP systematically choose to rank market integration first, when it had so many other alternatives?

Existing explanations of the Com’s policy choices

To find how and why the Com orders its goals, a large empirical literature has developed since the early 1990s. Various political scientists and legal scholars have analysed policy choices, making one (or more) of the four following arguments:

(1) Policy goals are set by legal and/or political contracts. Bureaucrats receive a mandate from their political principals; upon accepting it, they are liable for their actions before the ECJ; hence, as long as the latter does not collude with them,

related goals. For example, while employment effects are similar to macroeconomic effects, their relevance may be purely regional (as opposed to national), and their taking on board may lead to different policy outcomes than inflation-related concerns. It is therefore possible to argue that, despite their similarities, these goals are not identical. The upshot is that a competition authority faces a choice between any two or more of them (i.e. for two goals it may either adopt the first and not the second, or adopt the second and not the first, or adopt both, or reject both, etc).

bureaucrats are confined to the implementation of the policy goals chosen by their principals. On the legal side of the literature, Valentine Korah (1982), a leading European antitrust lawyer, offers a typical example of this approach. Although she acknowledges that “the Treaty of Rome contains many provisions which require subordinate legislation” (1982: 196), she argues that “the introductory principles [set out in Article 2 and in the Preamble to the Treaty] are vital in the construction and application of Community law. The more specific provisions of the treaty are construed in the light of the objectives of the Community...” (op. cit. at 193). Gerber (1998), a legal historian, makes a less constitutional claim, and argues that DG COMP received its mandate from the German government, and in particular from the *ordo-liberal* faction therein (see also Moravcsik 1998). On the political-scientific side, Wilks and McGowan argue that “European competition policy could be expected to be serving the interests of some coalition of member states, and, indeed, suggestions about an Anglo-German alliance have plausibility” (1996: 226). Pollack (2003) offers another good political-scientific example of the same approach, although he acknowledges both that principals do communicate with their agents, and that the agents can benefit from incomplete contracts and an imperfect judiciary (in contradiction to the basic assumptions of principal-agent theory).

(2) Policy goals depend on ideational (i.e. epistemic or ideological) factors. Bureaucrats are expert professionals who may have a mandate, but who are also in search for the best policy; they belong to a vaster epistemic community, from which they gain inspiration and specific policy ideas. On the legal side of the literature, Joerges (2006) argues that European antitrust has traditionally constituted a substantial part of the European Economic Constitution, that this was achieved through the influence of mainly German *ordo-liberal* ideas, and that new economics-based concepts of antitrust are now winning over. (See also Hildebrand 2002: 160-61 and Gerber 1998.) On the political-scientific side, Wilks and McGowan claim that “in the field of competition policy a policy network is apparent among inter-governmental actors” (1996: 241). They add that, although “it is far less easy to identify a policy network that stretches outside government”, “the great exception to this argument is the lawyers. The dominance of lawyers over European competition policy is remarkable... It produces some very distinctive policy dynamics.” (op. cit. 242-44) Finally, a related argument is often made regarding the influence of macro-ideological factors, such as the dominance

of Keynesianism in the 1960s and 70s, or the neo-liberal turn in the 1980s (op. cit. 245; see also Cini and McGowan 1998: 16).

(3) Policy goals depend on individual leadership. Much of the political-scientific literature cites the talents of individual commissioners as a crucial explanatory factor in the waxing and waning of European antitrust. For example, Wilks and McGowan attribute significant policy changes in the 1980s to “political leadership. The significance of leadership from the Commissioner was established by Peter Sutherland, whose success was built upon by Leon Brittan. [Sutherland] was a dynamic, charismatic character portrayed as a young, tough Irishman, who combined the legal flair of the barrister with the aggression of the rugby captain. ... Living up to the reputation he acquired at the DTI, Brittan proved to be a sophisticated operator on the Brussels scene. Although notorious for intellectual arrogance, he became a decisive and determined administrator able to inspire loyalty, to impose priorities, and to provide strategic leadership.” (Wilks and McGowan 1996: 246; see also McGowan and Wilks 1995, and Cini and McGowan 1998: 38)

(4) Policy goals depend on the goals of runaway bureaucrats. A political-scientific spin-off of the economic theory of principal-agent holds that contracts may be incomplete, and that the agents may end up imposing unforeseen (and therefore non-factored for) agency losses on principals. Accordingly, many scholars argue that European antitrust is now beyond the control of nationally elected politicians, that it is discretionarily managed by an autonomous group of EU-level bureaucrats (DG COMP), and that the policy serves whatever goals these bureaucrats may privilege. European antitrust is thus seen as “the first supranational policy” (McGowan and Wilks 1995: 141), governed by a “federal agency” (Wilks and McGowan 1996: 225), which, by and large, acts independently from the legislative and executive branches of government, according to its “self-defined mission” (Wilks and McGowan 1996: 246. See also Budzinski and Christiansen 2005, McGowan 2000, McGowan and Cini 1999, Wilks and Bartle 2002).

What emerges from that literature review is that (a) DG COMP is thought to enjoy considerable autonomy from national governments, and (b) DG COMP sets policy according to its own epistemic considerations, subject to the constraints imposed on it by the Treaty (or the ECJ). From an analytical perspective, it is interesting to note that

the literature does not draw a clear distinction between the Com (i.e. the whole multi-task collegial organization) and DG COMP (i.e. a small part of the Com), and the two terms are often used inter-changeably. Even those authors who do note the potential for conflict between DGs do not derive any hypothesis regarding the effect that such conflict may have on European antitrust policy.⁷ Of course, that it has been instructive to view the Com as a unitary actor for some purposes is evident from the numerous insights that this literature has generated. Thus, the point here is not that the unitary actor assumption for the Com is by definition useless for all research purposes; rather, it is that such an assumption impedes progress in the more specific policy-oriented literature. To regard the Com as a unitary actor, or to talk about “Commission preferences” misses much of what is truly distinctive about European antitrust politics. That difference is shown in Figure 1 below.

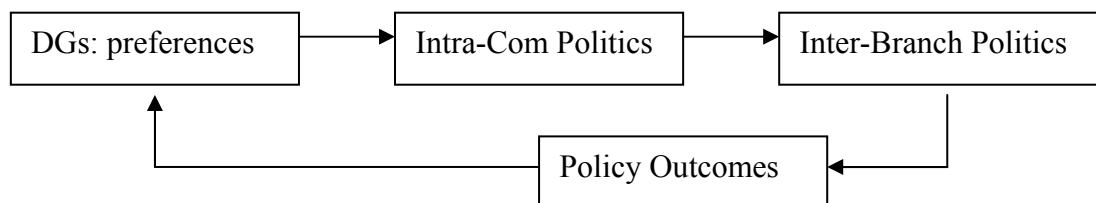
FIGURE 1: The politics of EU antitrust, with and without a unitary actor assumption for the Commission

UNITARY ACTOR ASSUMPTION



NB. In most models the policy space is one-dimensional “Com preference” is usually imputed to be “more federalism”

NON-UNITARY ACTOR ASSUMPTION



⁷ The explanation for this may be that the vast majority of political scientists who write on European antitrust take a distinctively legal, as opposed to political-scientific (i.e. social choice-theoretic and/or game-theoretic) perspective. Yet what may be reasonable for lawyers may be misleading for political scientists. As I will show below, the fact that the ECJ forbears before matters of internal organization may be enough to support legal scholars’ neglect of the presence of different DGs with potentially conflicting preferences, but it is not enough to warrant a similar approach in political science.

Quite beyond the question of actorness, in my view all existing arguments suffer from one or more of the following problems:

- 1) The attribution of variable outcomes to a constant cause. This is most evident in the case of legal and liberal intergovernmental arguments about the constraining effect of the Treaty on specific policy goals (especially market integration). While the relevant parts of the Treaty (the preamble and Articles 2 and 3) have not changed in any significant way since the 1950s, the goals of antitrust policy have. It follows that either the presumed cause is not really one, or that the mechanism that leads from cause to effect is under-specified.
- 2) Historiographical mistakes such as anachronisms and excessive discounting of more remote events. This is most evident in the case of arguments regarding the ineffectiveness and the poor staffing of DG COMP in the 1960s and 70s, or the exceptional talents of commissioners Sutherland and Brittan. True as it may be that the number of decisions grew steadily after 1985, it must also be recognised that ground-breaking decisions such as *Consten and Grundig* (1966), *Continental Can* (1971)⁸, and *Hoffmann LaRoche* (1976)⁹ were made long before that. Similarly, although recent commissioners have indeed proved to be men and women of substance, it does not follow that such intellectual and political leaders as Hans von der Groeben were not.
- 3) Excessive focus on the nominal decision-making unit. This is most evident in those works which take a public administration perspective, distinguish between core and non-core actors on the basis of impression, and concentrate on the immediate decision-making unit. This procedure leads to excessive emphasis on causes internal to the core actor, who seems to be the only one active in policy-making; by the same token it neglects contextual conditions and constraints, and it does not allow for an exploration of the interdependent strategising which so often characterises politics.
- 4) A-theoretical empiricism. Most importantly, the vast majority of the legal and political-scientific works on European antitrust do not work up from clear assumptions to the logically complete derivation of testable hypotheses. Rather, they amount, at best, to a rationalization of stylized historical facts. We therefore

⁸ On the importance of this case, see Goyder 2003: 336-37.

⁹ Goyder 2003: 268, 291.

lack a positive device that identifies conditions conducive to particular policy options.

A model of European antitrust policy-making

As discussed in the previous section, the discipline of European politics is still in need of an analytical model which, departing from simple assumptions about the nature, the preferences, and the strategies of the relevant actors, spells out the different institutional and political conditions that lead to different antitrust policies. This section attempts to remedy that situation by presenting a formal theory of the choice of European competition policy. The model is based on a game played to determine the internal redistribution over the Com's collective authority and resources. As it turns out, the multi-task and collegial character of the Com renders European antitrust policy-making very similar to other redistributive politics (see generally Persson and Tabellini 2000, Boix 2003). Thus, whether DG COMP succeeds in passing its preferred decisions depends on (1) the relative distance between its preferred option and that of the pivotal DG in the Com, and (2) its ability to redeploy its resources to policy-making activities that are not subject to Com voting.

Assumptions

Before I provide details of the model, it is necessary to clarify four simple, plausible, and important assumptions. First and foremost, the model is based on a view of the Com *not* as a unitary actor which can be assumed to have some set of preferences in any meaningful way, but as a collective actor whose internal politics are equally important to policy outcomes as its external environment. Thus, I explicitly depart from views such as that “the Council established DG Comp’s legal competence to operate as an autonomous and quasi-judicial policy-making institution under Regulation 17/62” (McGowan 2005: 989). Rather, I base my concept of the Com on the following quote:

“... the Commission is not a monolithic or even a unitary body. It is made up of directorates-general ... each of which is responsible for a particular functional or sectoral policy and each of which is motivated by different goals and value systems. The potential for conflict is, therefore, immense. This can make decision-making

within the Commission a sensitive and highly political business, for in the Commission we can often see a microcosm of the European Union as a whole ... The potential for disputes within the College and amongst Commissioners is great...” (Cini and McGowan 1998: 43; see also Cini 1996: 458, and Korah 1994: 17)

Consequently, for the purposes of the model, the Com is constituted by a number of pro-antitrust, a number of anti-antitrust, and a number of antitrust-neutral DGs, where preferences come from portfolios (mandates). The first category of DGs (the more “liberal”) can be represented as L ; the second (the “non-liberal”) as N . In any one decision-making event DG COMP and perhaps DG MARKT may belong to L ; DG IND, DG REGIO, and DG INFSO may belong to N . Historically, N have been a natural majority with a share $\alpha > \frac{1}{2}$ of the vote in the college, and L a minority with a share $1 - \alpha$ of the vote in the college. On the other hand, L have enjoyed a better initial distribution of legal and political authority, and professional and logistic resources. Battles between the two factions may be decided by an explicit vote, and the pivotal DG can be represented as P . Related to this assumption about politics being played between DGs, I also assume there is no relevant politics *below* the level of the DG: neither directorates nor individual bureaucrats have intrinsic motivations because their contracts create incentives that make them accountable to their hierarchy.

Second, policy conflict revolves around two main issues: first, the autonomy of the expert DG in deciding matters that fall under its delegated jurisdiction; and second, the professional, logistic, and temporal resources at the disposal of the expert DG. Both of these issues are important, since the former (i.e. turf wars) relates to policy content, including policy goals, while the latter (i.e. resource-related wars) relates to the quantity of decisions produced. In order to capture the dual nature of the conflict, it is convenient to describe turf (t) and resources (r) as a single quantity, policy stock (II). Consequently, $II = t + r$. Further, N , who are the majority, hold together a total policy stock II_N . The other faction, L , who are the minority, hold II_L . The Com-wide stock of policy is $II_N + II_L = II$ and the battle concerns the relative size of the two terms. One very important managerial and political implication is that DGs will do everything they can to (a) protect their II , and (b) avoid spending resources and gaining expertise on the preparation of policy decisions and/or proposals that will later be outvoted by the

college of commissioners. Hence, the size of Π determines the degree to which that DG has achieved its policy preferences and career concern objectives. Formally, $\Pi_j = y_j, j = N, L$.

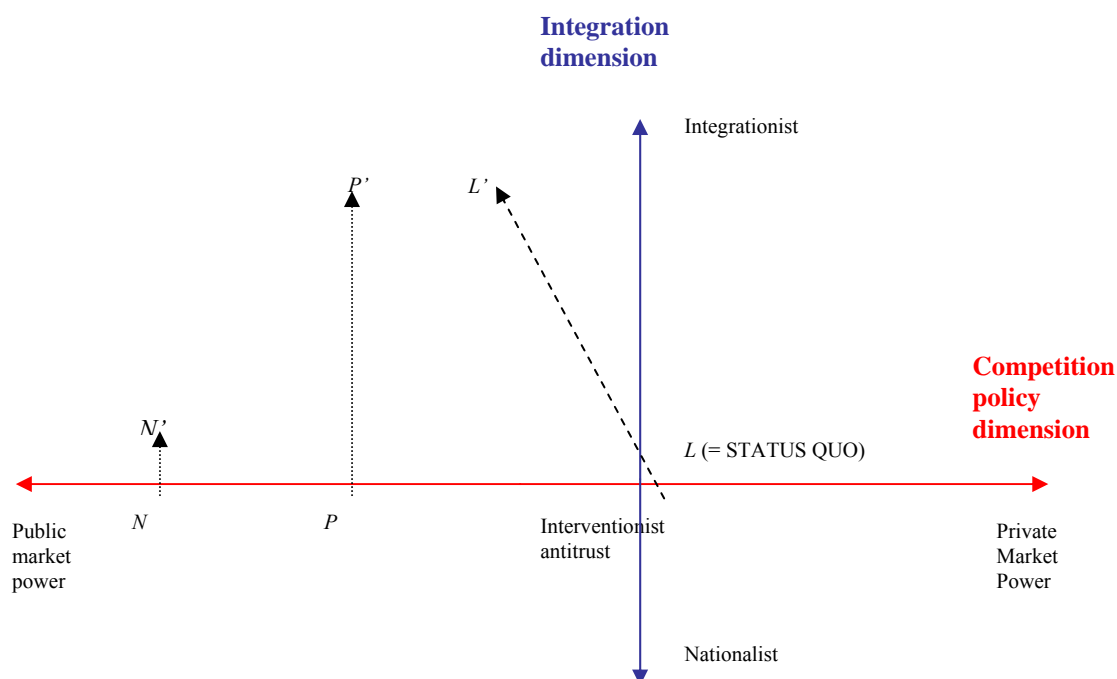
Third, I assume that the DGs which constitute the Com have preferences that can be described as points on a Cartesian plane, and not just on a one-dimensional continuum described by Π . Although the horizontal axis measures their preferences on a specific policy dimension – in competition policy, values range from public market power to strong competition policy to private market power – this does not exhaust the dimensionality of intra-Com antitrust politics. Rather, the vertical axis measures preferences on the integration dimension, ranging from extremely nationalistic to extremely integrationist. (See Figure 2 below.) DGs may have diametrically opposed preferences (mandates) on the horizontal axis. At the same time, however, all of them belong to an organization that benefits from ever more integration and from keeping united against other branches of government and/or public opinion. Thus, they all acknowledge the importance of the vertical axis, both in general ideological terms and in terms of preserving the Com's constitutional prerogatives. The appropriate metaphor, then, is that they all argue about their respective slice of the pie, while acknowledging their common interest in enlarging the pie. In the language of game theory, DGs play a game with mixed motives.

The important points behind these first three assumptions are two: (1) DGs are engaged in a perennial game with mixed motives: while they recognize that it is in their common interest to reach consensual agreements and to protect the unity of their umbrella organization, they are also motivated by heterogeneous, often outright conflicting policy goals. And (2) these conflicts translate into tensions over the distribution of the Com's total authority and resources (it "policy stock"). DGs that receive delegated powers to manage a policy can be thought of as starting off with limited policy stocks. Each one then invests its limited resources in augmenting its own stock. Because Com policies can afford to be only so much inconsistent, and only in the short run (in the medium and long run the Council of Ministers and/or the ECJ will intervene to correct anomalies that produce excessively uncertain legal effects), such investments eventually lead to internal frictions. When that happens, each DG fights for a favourable redistribution (i.e. expropriation) of as much policy stock of other DGs as possible. This

is most obvious in the example of a DG's (or an individual bureaucrat's) fear of being denied the returns on its investment – e.g. of DG COMP being denied a decision on a complex case on IT systems by a negative pivotal vote by the commissioner responsible for fisheries. But it is vital for a correct understanding of the model to appreciate that the fight over limited policy stocks may be triggered by “aggressive” moves, too, such as in the example of DG INDUSTRY trying to get DG COMP to draft an exemption decision for a crisis cartel in the steel industry.

Figure 2 below tries to illustrate both this situation and, anticipating the argument that follows, the pressure that it puts on DG COMP (L_I) to co-opt P by emphasizing its commitment to the common goal of market integration. The final Com decision depends on the distance between the ideal point of, on the one hand, P and, on the other hand, each of the two contending policy proposals, N and L . Where decision-making involves only the horizontal dimension, L is farther from P than N , and so the latter is adopted. But if L manages to make decision-makers concerned with the vertical dimension, too, and is willing to engage in costly signalling with respect to that dimension, then it positions itself closer to P than N is, and so P votes L .

FIGURE 2: Intra-Com politics between L and N : From one to two dimensions.



Finally, policy decisions relate to a bureaucracy's limited resources and to individual bureaucrats' career concerns in a way that makes them somewhat specific to the bureaucratic unit that makes the decision. For example, interventionist antitrust decisions to regulate markets in Europe can be made either by DG COMP or, with certain restrictions, by national competition authorities (hereafter, NCAs). Whenever something like this happens, such decisions lose a share σ of their value for DG COMP. That is because sponsoring, training, convincing, advising, and monitoring the NCAs are all costly to DG COMP's limited resources and/or because a decision by an NCA does not satisfy the career concerns of European bureaucrats. More exactly, policy stock Π , which produces $y = \Pi$ whenever decisions are made by DG COMP, produces $y^a = \Pi(1 - \sigma)$ when decisions are left to other bureaucracies, such as the NCAs. The variable σ can take values from 0 to 1. Increasing values indicate that the option of delegating powers to other bureaucracies becomes less attractive, and vice versa.

Taxes on Π , internal politics, and external alliances

Com politics can take place either in isolation from external actors or with the involvement of such actors. In the former case, DGs either know the distribution of their preferences and accept the resulting distribution of Π , or they proceed to explicit votes, whereby the distribution of Π is decided by P on a case-by-case basis. Changes in the status quo distribution of Π are thus equivalent to a tax on DGs' authority and resources: the majority (including P) draws from the resources of the minority. On the other hand, Com politics may involve the intervention of powerful outsiders. That may occur when either L or N do not acknowledge the commonality of interests between Com factions (i.e. they attempt to ignore the vertical axis in Figure 2), and so one or more DGs seek to forge an alliance with one or more national governments. For example, if DG COMP finds the erosion of the status quo policy, authority, and resources (Π_L) unacceptable, it may forge (at some cost) an alliance with similarly-minded governments (say, the governments of Germany, the Netherlands, and the UK). The purpose of such an alliance will be to outvote Π_N policy proposals in the Council and/or the Parliament. Finally, there is a third case, which may follow up from the involvement of outsiders: both factions seek external support, and an EU-wide crisis begins. However, its effectiveness, and hence the final outcome of the conflict between L and N , is uncertain.

Assume as a baseline model that the first case obtains, and that Com politics remains intra-organizational. Each DG produces its own policy, and at some point frictions occur. Such frictions are resolved by a redistribution of Π according to the preferences of the pivotal DG, P . Since, by definition, P belongs to N , it will set a redistribution tax (which can be represented by $\Delta\Pi$) such as to maximize Π_N . Taking into account that this procedure generates some welfare losses which, for simplicity, can be represented by the quadratic function $(\Delta\Pi)^2 / 2$, this means that P seeks to maximize the following function for $\Delta\Pi$ ranging from 0 to Π_L :

$$\max_{\Delta\Pi} (1 - \Delta\Pi) \Pi_N + \Delta\Pi - [(\Delta\Pi)^2 / 2] \quad (1)^{10}$$

In maximizing net transfers, the pivotal DG will be subject to members of L choosing not to defer production or even to delegate policy decisions to other actors. For example, if DG SANCO is P , it will try to bite into DG COMP's policy stock subject to DG COMP moving relevant antitrust decisions in the area of health to NCAs. This constraint can be expressed as follows:

$$(1 - \Delta\Pi) \Pi_L \geq (1 - \sigma) \Pi_L \quad (2)^{11}$$

Solving this optimization problem, the redistributed (i.e. expropriated) policy stock will be:

$$\Delta\Pi = \min \{1 - \Pi_N, \sigma\} \quad \text{where } \Pi_N = \Pi_P \quad (3)$$

Hence, P will choose a level of redistribution equal to the smaller of two parameters: the level of specificity of the policy stock (σ), and the difference between the status quo distribution of authority and resources and the policy stock owned by P , who, as mentioned above, has historically belonged to N . The policy stock of each DG that results from this maximization can be denoted by y'_j . The interpretation of this result is straightforward: Where σ is high, approaching a maximum of 1, L lose a lot by

¹⁰ The intuition behind this formula is simple: the pivotal DG of the Com attempts to maximize the amount of resources and authority that serve its own policy preferences. It therefore maximizes its own policy stock (the first term), minimizes DG COMP's policy stock (the second term), and tries to save on transaction and other procedural costs (the third term).

¹¹ Again, the intuition is simple: the Com pivotal DG faces a participation constraint: it can expropriate DG COMP only to the point where the latter starts preferring incurring the costs associated with delegating the decision to NCAs. The left hand-side of the inequality expresses the benefits to DG COMP after redistribution. The right hand-side expresses the benefits to DG COMP after delegation of powers to NCAs.

delegating powers to NCAs. Accordingly, they cannot credibly threaten to bypass the Com, and so the level of ΔII is not constrained by delegation. In such a case, the optimal level of ΔII for the pivotal DG is determined simply by the relative size of Π_N and Π_P . Geometrically, this means that the greater the distance between P and N , the higher the expropriation imposed by the former on the L will be.

When the costs of delegating antitrust powers to NCAs decrease, and σ approaches 0, the expropriation of DG COMP becomes constrained by the possibility that L will sincerely attempt to bypass the Com. Even if preferences are scattered very wide apart, and the pressure to impose a high ΔII is strong, neither N as a whole nor P as a moderate member of N can redistribute the policy stock of DG COMP because, under those circumstances, European antitrust would just be implemented by NCAs. In short, the ability to bypass the Com and to rely on NCAs, like low heterogeneity of policy preferences, results in low redistribution of authority and resources.

Let us now turn to the second type of Com politics, where one faction appeals to an external ally, thereby threatening Com unity. Since we have been most interested in the case where DG COMP is attacked by expropriation-minded opponents of a strong antitrust policy, let us explore the possibility that DG COMP (or more generally L) reacts to such a threat by forging an alliance with a necessary number of national governments, but not without noting that such an alliance may just as well be offensive rather than defensive (see Figure 3 below). As mentioned above, the goal here is to protect antitrust by establishing issue-linkages, whereby DG COMP's allies threaten N on their own policy grounds. Since most DGs that belong to N are not in charge of a policy as supranational as antitrust, the threat may be credible. The creation of such an alliance is, however, costly, both in terms of the policy concessions that L must make to their allies and in terms of the lost unity of the Com. These costs can be represented as ρ . Given that the alliance manages to set $\Delta II = 0$, L 's benefits can be denoted $\Pi_L - \rho$. Of course, ρ is a variable that can take on different values; low values mean that L can successfully resist N 's attack, and vice versa.

Finally, there exists the possibility that both factions turn to powerful outside allies, and that an EU-wide crisis occurs, thereby annihilating Com unity and the medium run prospect of an increased Π . In other words, the blocking of redistributive claims by the

L -led alliance may not be left uncontested. On the contrary, N may find their own supporters among powerful national governments, perhaps in Italy, Spain, and France. As already mentioned, the outcome of the ensuing crisis will be a function of the resources of the two factions, which is equivalent to saying that it will depend on the alliance costs borne by L , i.e. ρ . If that is low, L will eventually succeed in fending off the attack and will attempt to enlarge Π_L . If the cost they incur during a crisis in which they are successful is ω , then their final gain will be $y_L^{crisis} = \Pi_L - \omega$. In turn, N will lose a part ζ of their policy stock, ending up with $y_N = \Pi_N - \zeta - \rho$. Finally, if N emerge victorious from the crisis, they impose a high $\Delta \Pi$ on that part of L 's policy stock that cannot be delegated to NCAs. Hence, they end up with a payoff $y_N^{crisis} = \Pi_N + \sigma \Pi_L - \omega$.

From types of politics to types of policies

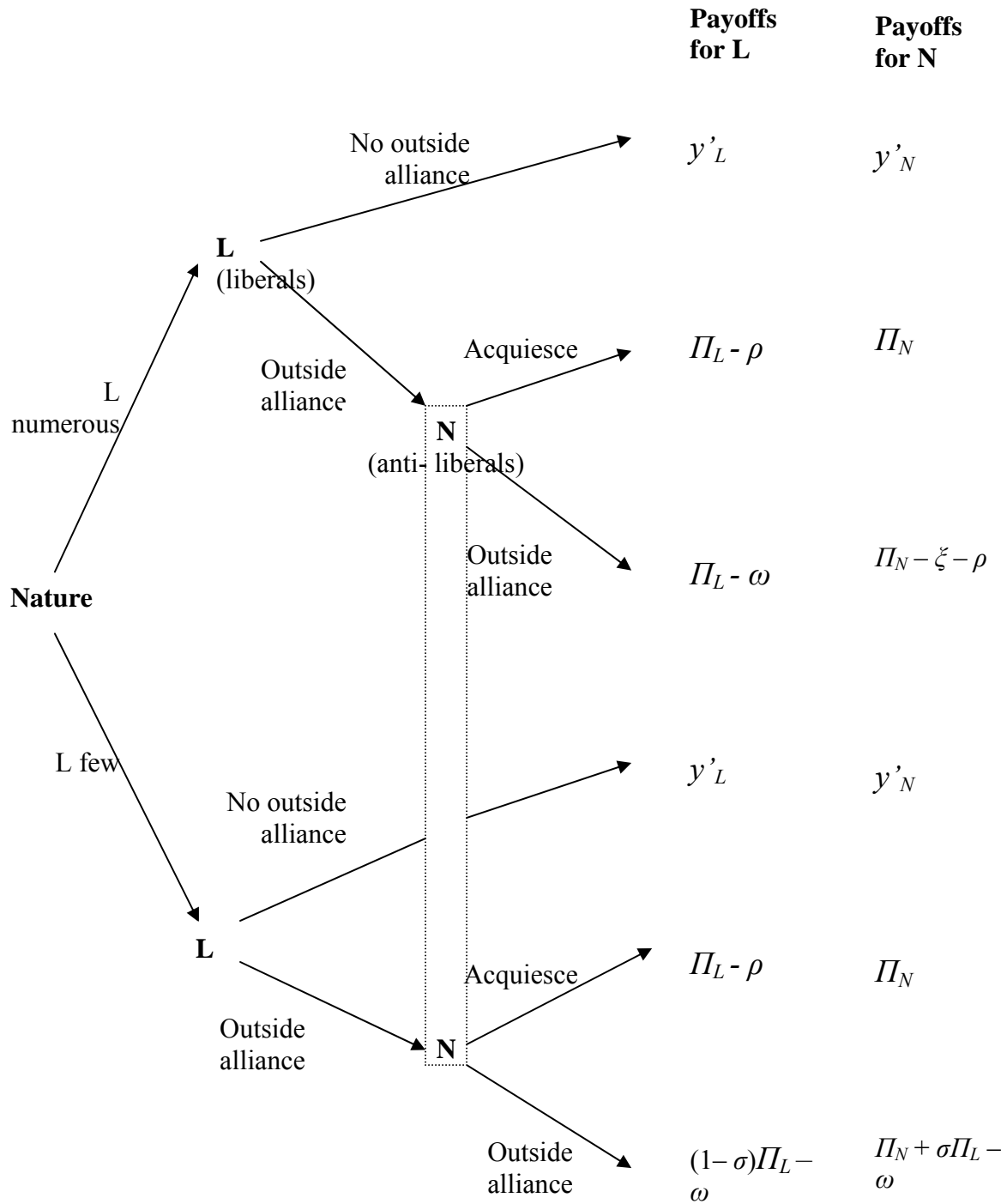
Having identified the main actors of the model and their payoffs under different assumptions about (a) DG preferences, (b) the possibility of delegating policy authority to NCAs, and ultimately, (c) the type of Com politics, it is now possible to explore the conditions that determine the selection of the type of politics, and hence the probability of different policies. Remember that the goal is to explore the conditions under which DG COMP will play a strategy of cooperation with other DGs, and when it will not.

Following Boix (2003) again, we may ask why the factions would ever adopt the third type of politics (crisis). Rational actors should anticipate the balance of powers involved and reach the same outcome that crisis would bring about without incurring costs ω . And yet we know from the historical record that DGs do enter acrimonious crises, and that they do appeal to outside forces. To account for the emergence of crises, I refer to the informational asymmetry about the resources of the opposition, and in particular about the precise level of external alliance-building costs ρ . Because it is the only one who participates in the advisory committees, international forums, and informal meetings, DG COMP has private information about the exact value of ρ . When N over-estimate that value while L over-estimate the collective action problems of N , crises may occur.

The choice of the type of politics, and by implication of the type of policy, can be thought of as resulting from the following game, with the moves and payoffs as

summarized in Figure 3. Nature determines the exact number of DGs belonging to N and L respectively as well as their respective policy stocks Π_N and Π_L . Then, the liberals

FIGURE 3 : Choice of antitrust politics type, with DG COMP moving first.



choose whether to seek an external ally or to comply with the decisions of the pivotal DG of the Com. After the liberals make their choice, the non-liberals respond.

If the liberals do not form an outside alliance, European antitrust politics remains largely an intra-Com affair, cases are decided by voting at the college of commissioners, and power rests with the pivotal DG in the Com. Since the pivotal voter belongs to the non-liberal camp, and provided politics remains uni-dimensional (the horizontal axis in Figure 2), it will expropriate part of DG COMP's policy stock (i.e. resources and/or authority). For example, DG COMP may spend resources investigating a joint venture and end up proposing a prohibition, but the pivotal DG may ask for an exemption or at least a conditional exemption. Hence, the liberals end up with a diminished policy stock, and the anti-liberals with an increased policy stock (y'_L and y'_N respectively).

If, on the other hand, the liberals choose to form an outside alliance, the non-liberals may either choose escalation (i.e. do the same) or détente (not do the same). In the latter case, a strong antitrust policy prevails, which does not reflect the preference of the majority of DGs in the Com. The liberals solidify the status quo, but pay a price in terms of (a) concessions to their external ally, and (b) diminished Com unity. The non-liberals retain their policy stock.

Finally, if the non-liberals seek an external ally and allow for a crisis, they may eventually gain from it. Where that is the case, they expropriate as much of the liberals' policy stock as their alliance wishes. Conversely, if their struggle fails, it is the liberals that expropriate as much of the non-liberals' policy stock as they want. Crucially, however, the non-liberals are uncertain about the cost and solidity of the liberals' alliance (note the information set in Figure 3). Accordingly, they estimate that cost is high with probability q , and low with probability $1 - q$.

This reasoning leads to certain Nash equilibrium strategies: the members of L must decide what set of actions to choose, given their expectations about N 's reaction to such actions. So, L look forward to the consequences of their choices in terms of N 's reaction, which in turn defines the final payoffs, and reason backwards to what the best choice is for them (i.e. for L). The comparative statics results indicate that the choice of antitrust politics depends on the dispersion of DG preferences (i.e. the distance between

the ideal points of L , N , and P), the ability of DG COMP to delegate powers to NCAs, the cost of forging an external alliance, and the availability of information:

Equilibrium 1: Tightly-scattered preferences or readily available NCAs. To decide what strategy to follow, the members of L compare their payoffs after forging an alliance with an external power with their payoffs after the pivotal DG, P , has expropriated them by transferring authority and/or resources from Π_L to N . For sufficiently small distances between the ideal points of L , N , and P , or otherwise where DG COMP can readily transfer antitrust powers to NCAs, the level of non-liberal attacks on antitrust (ΔII) will be low enough to make acceptance of P 's preference cheaper than the forging of an external alliance (unless the costs of the latter can only be expressed in terms of Com unity, i.e. unless the ideal points of DG COMP, the other members of L , and the national governments are all identical). Under these conditions, the dominant strategy for L is to let the commissioners vote on antitrust decisions. Intra-Com politics prevails, and European antitrust policy is decided by the pivotal DG in the Com, denoted by P . (I will come back to a final point about this equilibrium below.)

Equilibrium 2: Medium-scattered DG preferences and medium-level costs of delegation to NCAs. Again, the members of L must decide what strategy to follow by comparing their payoffs after forging an external alliance with their payoffs after the pivotal DG, P , has expropriated them by some amount. But here, the greater distance between L and P , and the greater cost of delegating powers to NCAs, means that ΔII and σ increase, and hence that ρ becomes relatively more attractive. Hence, the likelihood of antitrust policy being decided by the mere preferences of the pivotal DG in the Com declines, and depends on the level of ρ . Where the latter is relatively low, L will forge a solid external alliance. N will not do the same because, given the solidity of that alliance (i.e. the fact that ρ is comparatively low, even compared to medium levels of ΔII and delegation costs), that would only result in an erosion of Π . Antitrust policy will therefore progress, though probably only in an incremental fashion and with a bias in favour of the national governments that back it up.

Equilibrium 3: Widely-scattered DG preferences and unavailability of NCAs. Faced with the same problem as before, the members of L must now begin to seriously worry about non-liberal attacks on antitrust. Not only do the members of N have radically

different preferences, but they also know that no antitrust case can be easily delegated to NCAs; they only need to wait for a proposal to come out of DG COMP for a vote and they then reject it (or engage in an outright attack). Unless it accepts to cease production, L must seek an external ally. The crucial question, therefore, concerns the way N will react to that alliance. Will they acquiesce or will they try to form their own external alliance? The answer lies in their payoffs, which depend on the level of q (i.e. the probability they attach to the existence of high alliance costs for L). If q is low, the expected gain of forging a second external alliance is smaller than the value of accepting antitrust progress, and vice versa. Hence, for a whole range of values of q and σ , N will accept that L forge an external alliance without reacting by building their own external counter-alliance. Policy will look as it does under Equilibrium 2. On the other hand, as (a) preferences become very widely-scattered, (b) delegation to NCAs becomes unfeasible, and (c) N think they can create an anti-alliance more powerful than that of L , crisis erupts. Antitrust, just like all other EU policies, will suffer.

Finally, it is worth returning to Equilibrium 1 to examine the options of DG COMP when it must rely on the good faith of the pivotal commissioner. As noted above, the latter may have very little of antitrust matters, be it in terms of the policy's historical trajectory, of the requirements of legal consistency, or of the economic consequences of different options. That is the very essence of multi-task collegiality, and that is what makes European antitrust so different from, say, its U.S. counterpart. For, in putting forward its proposal (e.g. for a decision or for a Block Exemption Regulation), DG COMP must either accept a very high probability of being outvoted and therefore expropriated, or create a second political dimension, integration (the vertical axis in Figure 2). Unlike other instances of heresthetics (Riker 1986), this bi-dimensionalisation of European antitrust politics is easy to both think of and to achieve.

Conclusions: A plausibility probe, and extensions

If this theory is correct, the past obsession of DG COMP with the goal of market integration is due neither to any objective set out in the Treaty nor to any problem of acute legalism among DG COMP bureaucrats and/or leaders. Rather, it may be explainable by the very structure of the Commission as a multi-task and collegial

organization, and (a) the configuration of preferences therein, and (b) the ability or not of DG COMP to delegate powers to NCAs.

The utility of this model, however simple it may be, is that it goes beyond simple anecdote or, at best, rationalization of variegated historical facts. Rather, it puts structure to our theoretical thinking of the context of European antitrust, and, though the identification of specific variables, it leads to falsifiable hypotheses. More generally, it demonstrates, I think, the advantages of thinking about EU politics not just in terms of “empty” constitutional politics, but in terms of the politics of specific public policies.

In terms of empirical validation, consider the following plausibility probe, in two parts. First, before national governments passed “Europeanized” national competition laws, DG COMP focused much more on the goal of market integration than on any other possible antitrust goal. The Europeanization of national policies started somewhere between the late 1970s (when Greece adopted the first Europeanized national antitrust law in view of its entrance in the EEC) and the mid 1980s (when the newly-elected Chirac government in France passed ordinance 86-1243 of December 1, 1986). Italy then passed its first ever antitrust statute in 1990, and various other countries followed suit. For example, Section 60 of the British Competition Act 1998 obliged the national authorities to interpret national legislation according to European concepts and principles. With Germany, France, the UK, and Italy, plus many smaller countries, being able to deal with antitrust cases in a European way, DG COMP was able to “escape” the pivotal voter in the Commission, and hence to push for a more normal antitrust policy. That was indeed what happened right from 1997, with the publication of the *Green Paper on vertical Restraints in EC Competition Policy*¹², which inaugurated the era of “modernization” of European antitrust. The selection of vertical agreements as the first area to be modernized was not a coincidence: this area was where DG COMP had had to opt for the systematic prioritization of market integration (i.e. co-opt the pivotal DG in the Com) for over 30 years.

Second, where DG COMP cannot rely on NCAs, where DGs have preferences that are too widely scattered, and where the non-liberals are uncertain about the strength of the

¹² At http://europa.eu/documents/comm/green_papers/pdf/com96_721_en.pdf

alliance between the liberals and a powerful external ally, the whole system may fail. This was the case in at least two cases. First, in the 1950s, the High Authority was in charge of what the Commission took over after 1957, with the only difference that the former had more supranational powers than the latter. Yet, although the ECSC Treaty delegated vast antitrust (including merger control) powers to the High Authority, not a single antitrust decision was ever produced. On the contrary, protracted negotiations between the French members of the Authority (who wanted antitrust) and their German colleagues (who refused to hear about it) led to the involvement of all national governments and, eventually, to the collapse of the High Authority, the proposal for a new European Community, and the retirement of Jean Monnet (see Spierenburg, and Poidevin 1993). Second, the adoption of the European Community Merger Regulation in 1989 was initially considered a huge success. When it came to publish the first decision blocking a merger, however, the Com fell apart: the liberals tried to recruit national allies, the non-liberals were uncertain about the strength of that alliance and so engaged in building one for themselves, too, and the final outcome was an absurdly motivated decision that cast a huge shadow on the Com's credibility as a merger regulator (Pollack 2003: 281-99).

In terms of extensions, my impression is that this model is far from being specific to an idiosyncratic reading of EU politics or to a few historical cases. On the one hand, the formal structure of the model is much more general, as it is expressly inspired from macro-political economic models of redistribution and democratization (Boix 2003). On the other hand, the plausibility probes offered above form merely a random sample of cases that I could think of without engaging in empirical work.

Finally, it is precisely by engaging in empirical work that we might learn about this way of conceptualising European Union politics, Commission politics, and antitrust politics. Of course, a lot will depend on the interpretation we make of specific events. If the application of the model is directed towards large-N studies, where the model predicts "typical" behaviour under the assumed circumstances, the issue of interpretation will arise in terms of measurement error. This can be remedied by directing the application towards small-n comparative studies, i.e. towards "token" behaviour (for example, of the *Walt Wilhelm* saga on the allocation of authority between the Com and NCAs).

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