Strategic Considerations in the Emergence of Private Action Rights

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The design of mechanisms for the enforcement of rules regarding anticompetitive practices has been the subject of considerable controversy in both developed and developing countries. Public competition authorities have advantages in terms of scale economies and coordination of competing policy objectives. Private rights of action enhance the capacity of legal regimes to generate information and deter collusive agreements and exclusionary practices. Private enforcement also increases the transaction costs of regulatory capture. Given these differences, mixed regimes are likely to be superior to purely public or private arrangements. However, most national jurisdictions grant exclusive authority to public agencies and prosecutors. This article explores the puzzling resistance to the development of mixed competition enforcement regimes by studying recent attempts in the European Union (EU) to enhance private rights of access. The analysis suggests that decentralization of enforcement rights limits the capacity of a government to employ competition rules as an instrument of strategic trade policy. Evidence from EU illustrates that tensions between domestic and international policy considerations can generate distinctive paths of procedural development.

1. Introduction

Negotiations through the General Agreement on Tariffs and Trade (GATT) and later the World Trade Organization (WTO) during the 1990s resulted in the adoption of a binding regulation relating to tariffs, non-tariff barriers, and intellectual property rights. Efforts to impose multilateral legal constraints on the capacity of firms and national governments to engage in anticompetitive practices have been less successful.[1] In contrast to the global situation, Member States of the European Union (EU) exhibit a higher degree of consensus about the need for credible legal constraints against anticompetitive practices that transcend national borders. Despite the adoption of legal instruments aiming to limit anticompetitive practices that restrain or distort internal trade, there is however little agreement among Member States about the design of mechanisms necessary for the implementation of EU rules.

This article explores how international strategic trade interests can shape decisions by lawmakers about the organization of mechanisms for the enforcement of legal prohibitions against anticompetitive practices at the level of nation states. The analysis

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[1] Bernard Hoekman & Kamal Saggi, 'Trading Market Access for Competition Policy Enforcement', World Bank Policy Research Working Paper No. 3188 (2003). Andrew Guzman, 'The Case for International Antitrust', in *Competition Law in Conflict: Antitrust Jurisdiction the Global Economy*, ed. Michael Greve & Richard Epstein (Washington, DC: AEI, 2004), 99–125. Ajit Singh, 'Competition and Competition Policy in Emerging Markets: International and Development Dimensions', G-24 Discussion Paper Series, No. 18. United Nations Conference on Trade and Development (2002).

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looks at how efforts in the EU to enhance private rights of access to national judiciaries to implement EU Treaty obligations have been received by Member States, with particular reference to Poland. Development of a credible regime for the enforcement of rules against agreements and practices that restrain or distort internal trade in the EU provides evidence relevant for answering two broader observations about the organization of national and international legal regimes for the regulation of anticompetitive practices: Why have almost all jurisdictions with competition statutes failed to construct more efficient mixed enforcement regimes by granting rights of action to those damaged by illegal practices?[2] Why is there so little agreement about the introduction of public or private legal mechanisms for regulating anticompetitive practices that can influence international trade?

The experience of Poland in the EU is a particularly interesting setting for exploring more general problems in the interaction of national and international laws. With the expansion of the EU in 2004, the weakness of instruments for the enforcement of EU agreements prohibiting anticompetitive practices has become an important source of concern. The growth in the size of the economy and the number of emerging disputes has stimulated attempts to decentralize the system for addressing cases that arise under EU Treaty obligations. Two basic solutions to this bureaucratic overload problem have been proposed. Member States appear to prefer increasing the scope of national competition agency jurisdiction on EU-related issues. The European Commission and the European Court of Justice (ECJ) emphasize the need to enhance private rights of action to national courts. This tension provides a basis for exploring the links between external and internal considerations that influence the design of mechanisms for the enforcement of competition laws.

The next section characterizes the status quo transnational arrangements and the fissures between developed and developing country governments about the role of competition law in international trade. An illustrative decision by the United States Supreme Court documents the negotiation position of industrialized country governments, which has hampered the introduction of binding restrictions on the ability of states to exempt or encourage anticompetitive practices of local firms in international markets and limit their liability for illegal practices in other jurisdictions. The second section explores the EU level manifestation of broader global tensions about the design of mechanisms for mitigating external costs of collusive agreements and abusive practices. The final section investigates how the EU compromise to allow Member States a high degree of autonomy in designing enforcement procedures has been implemented by the Member States, with particular attention to decisions by lawmakers in Poland.

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[2] For an analysis of theoretical considerations in the design of enforcement mechanisms, see Mitchell Polinky & Steven Shavell, 'Public Enforcement of Law', and Reza Rajabiun, 'Private Enforcement of Law', in *Criminal Law and Economics*, *Encylopedia of Law and Economics*, ed. Nuno Garoupa (Chettennam, UK, Northampton, MA, USA: Edward Elgar, 2009), Chs 1–2.

2. International Trading Relations

While some jurisdictions have designed competition laws with the objective of safeguarding or promoting competition, most national legislation tends to contain secondary objectives and introduced a rule-of-reason approach to statutory prohibitions. For a sample of around sixty jurisdictions, Voigt found that in addition to protection or promotion of market competition, competition statutes included an average of three and half other objectives.[3] The notion that the laws should aim to promote or improve international competitiveness is one of the more common secondary objectives mentioned in the competition statutes introduced mainly in the 1980s and 1990s. Private rights of action can limit the capacity of governments to exempt anticompetitive practices that appear to serve the public interest in terms of international trade and competitiveness, as well as other policy objectives.

Importantly, policies that aim to improve coordination of exporters are likely to have a certain level of cost on the domestic economy, in particular on downstream firms and final consumers. While a flexible competition regime may appear to have certain advantages in terms of improving international competitiveness, it might also limit the credibility of rules against anticompetitive practices as they apply to domestic markets. When strategic trade policy considerations dominate lawmaking, a purely public regime allows the government to balance competition and coordination incentives across different sectors.[4] Per se prohibitions on collusion and private rights of access restrict the discretion of a government that aims to employ competition law as an instrument of trade policy.

This section documents that the impetus to engage in strategic trade policy has limited the development of credible mechanisms for mitigating the costs of anticompetitive practices. The global legal analysis provides the context for understanding problems that the EU is trying to solve by enhancing private access to claim damages for violations of EU Treaty obligations relating to anticompetitive agreements and exclusionary practices that restrict internal trade.

To capture the link between strategic trade policy preferences of a state and the features of its competition laws, this section employs a relatively recent decision by the United States Supreme Court as an illustration of customary practices and policy positions. The case is particularly interesting since it documents the high value that large and powerful industrialized country governments, including some pivotal Member States in the EU, place on their ability to limit the liability of their exporters abroad.

The Sherman Antitrust Act tradition in the United States represents an anomaly in the comparative perspective in its reliance on per se prohibitions and private enforcers. However, while distinct in the design of its competition laws, the US regime has

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[3] Stefan Voigt, 'Competition Policies Matter – At Least at the Margin: Cross-Country Evidence Using Four New Indicators', paper presented at the Canadian Law and Economics Association Conference (Toronto, September 2006).

[4] Singh, *supra* n. 1.

not been immune to political pressures that prefer such regimes to function in terms of the rule-of-reason approach and under the exclusive jurisdiction of a competition bureaucracy and public prosecutors. The following case study illustrates how these tensions influence the state of the legal regime for the regulation of anticompetitive practices.

Hoffman-La Roche Ltd. and its associates were convicted in the US of price fixing conspiracy in the international vitamins market. In *Hoffman-La Roche Ltd. et al. v. Empagran S. A. et al.* (hence, *Empagran*),[5] foreign companies from mostly developing country jurisdictions joined US entities in a claim of damages against the conspirators.

The decision involved the interpretation of the Foreign Trade Antitrust Improvements Act (FTAIA) of 1982 adopted with bipartisan support with the objective of limiting the liability of US exporters against actions by entities from abroad. Specifically, the FTAIA had stipulated that sections 1 to 7 of the Sherman Act 'shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations'.[6]

The US Supreme Court, however, denied these foreign claimants standing in US courts. The submissions to the Court by a number of governments, including that of the United States itself, Germany, Japan, and Canada and the reasoning of the judges all emphasize the sovereign right of a state to grant exceptions to its own laws. More importantly, the majority and concurring opinions of the US high court agreed with the position of industrialized country governments that the existing global system of trade regulations does not in any way provide for legal restraints on the ability of public or private entities to engage in anticompetitive practices abroad, and for national governments to protect them against contractual, tort, or criminal liability as they see fit. It is notable that the judges recognized that non-American plaintiffs had rarely been granted standing under the Sherman Act by lower courts in the United States.[7] The judges nonetheless go to great lengths to justify their decision to protect US firm from liability, under foreign and US laws, as long as damages are externalized:

> The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), *however anticompetitive*, as long as those arrangements adversely affect only foreign markets.[8]

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[5] 542 U.S. 155 (2004) Case 03-724. Decided 14 Jun. 2004.

[6] Unless '(1) such conduct has a direct, substantial, and reasonably foreseeable effect:

(A) on trade or commerce which is not trade or commerce with foreign nations, or import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section'.

[7] Only six relevant cases were identified by the parties to the court.

[8] Majority opinion by Justice Breyer, s. II, para. 1, emphasis added.

In justifying their decision, the court rejected the argument made by the respondents (downstream developing country firms) that the similarity of substantive prohibitions across countries implies that the objectives of national regimes are compatible:

> even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies. The application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy…. And several foreign nations have filed briefs here arguing that to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes. Thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody.[9]

This argument is important since it shows that the decision was not simply a function of additional administrative costs for US courts, which might arise if foreigners were allowed to join domestic victims in pursuing their claims. Indeed, the judges seem to recognize that non-US litigants can benefit the US by providing additional information in respect of, and deterrence against, illegal actions that harm US entities. The decision is primarily justified on the basis of the idea that a less parochial approach to defining standing rights would erode the power of the US and other governments to engage in discretionary enforcement and limit the liability of entities engaged in illegal activities abroad. The concurring opinion by Justice Scalia justifies the position of the majority as consistent with the norms of customary international trade law:

> I concur in the judgement of the Court because the language of the statute is readily susceptible to the interpretation the Court provides and because only that interpretation is consistent with the principle that the statutes should be read in accord with the customary deference to the application of foreign countries' laws within their territories.

This uncharacteristic deference to the sovereignty of other states illustrates that further development of international legal mechanisms for managing anticompetitive practices stands in tension with national sovereignty and the promotion of strategic interests. In the context of Preferential Trading Areas (PTAs), Chapter 15 of the North American Free Trade Agreement (NAFTA) formalizes the customs that appear so valuable to national governments. The provision excludes the possibility of binding legal constraints on the capacity of participating national governments to immunize, or encourage, anticompetitive arrangements and regulate monopolies:

> Article 1502.1: 'Nothing in this Agreement shall be construed to prevent a Party from designating a monopoly.'[10]

Interest and consensus across a broad spectrum of judges and industrialized governments in *Empagran* and this feature of NAFTA highlights that national governments find it very important to retain their autonomy in allocating monopoly rights. While some monopolies may appear reasonable because they can help local industries, others may exploit the fragmentation of the international legal regime. The resulting uncompensated external

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[9] Section IV, para. 10.

[10] Furthermore, Art. 1501.3 makes it clear that 'No Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article.'

costs when the effects of the monopoly have economic implications elsewhere have been the subject of much discussion since the rise of colonialism. A notable example of these costs, particularly for developing countries, can be found in the cartelization policies and regulatory mechanisms that coordinate prices of agricultural produce in industrialized countries such as the United States and the EU. Legal and political consensus suggests that little progress has been made in the development of public and private international laws in this area. Given apparent successes in reaching arrangements that bind nation states by a wide variety of other rules, this institutional failure reveals the importance of maintaining the status quo regime by governments of larger industrialized countries that dominate the design and interpretation of public and customary international laws.

With increased openness to trade in goods and services since the 1980s and 1990s, the limitations of transnational regulatory mechanisms have exacerbated tension in business and intergovernmental relations. For instance, the desire of developing countries to incorporate competition law within the WTO framework was a major point of conflict in trade negotiations in the 1990s and might be a contributor to failures of the Doha Round. Needless to say, given the deeply held positions expressed in the *Empagran* case, individuals and firms in developing countries should be pessimistic about the emergence of effective legal mechanisms for the regulation of anticompetitive practices at the global level.

One response to this institutional failure has been the development of ad hoc networks of national bureaucracies. An example of these networks is the International Competition Network (ICN) set up in the early 2000s to provide competition authorities with a venue for informal coordination.[11] Tarullo, a policy maker intimately involved with the implementation of US antitrust policy in the 1990s, argues that this class of coordination mechanisms is preferable to binding international rules because they are more flexible.[12] The flexibility and prosecutorial discretion under ICN imposes little credible deterrence against anticompetitive practices with extraterritorial costs. Limitations on civil and criminal liabilities against laws of other jurisdictions pertaining to anticompetitive practices, for instance bribing public officials and rigging procurement contracts, complement the ad hoc approach to coordinating competition law and policy.

3. Procedural Autonomy in the EU

The experience with the development of competition law in the EU Member States has diverged to some extent from the global arrangements and customs documented in the last section. Articles 81 and 82 of the European Community (EC) Treaty aim to prohibit practices and arrangements that restrain internal trade among the Member States.

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[11] <www.internationalcompetitionnetwork.org/>.

[12] Daniel Tarullo, 'Norms and Institutions in Global Competition Policy', *American Journal of International Law* 94, no.3 (2000): 478. For an analysis of transnational policy networks, see Imelda Maher, 'Competition Law in the International Domain: Networks as a New Form of Governance', *Journal of Law and Society* 29, no. 1 (2002): 112–136.

In addition, Member States have long agreed to the need for a centralized enforcement regime in the form of the Competition Directorate General of the European Commission to address emerging concerns and conflicts. This design strategy stands in contrast to the implementation of rules pertaining to public procurement for example, which involved harmonization of substantive rules and decentralized enforcement of the rules through private rights of access to local courts and tribunals. The relatively more flexible and centralized approach to the design of mechanisms for the enforcement of EU rules against anticompetitive practices illustrates the resistance to the development of binding constraints in the regulation of anticompetitive practices, even in a small group of jurisdictions committed by treaty.

Until the late 1990s however, the centralized approach to the enforcement of community laws appeared more or less sufficient from the perspective of Member States. With the expansion of internal trade following the adoption of the Euro and the rising number of Member States, the volume of disputes increased rapidly. This motivated the European Commission and the Member States to search for enforcement mechanisms that can address the growing demand for competition law. Two general classes of procedural reforms have been proposed and implemented to varying degrees with the objective of addressing rationing and under-enforcement expected under a purely centralized approach to the implementation of EU laws.

The solution promoted by some Member States has involved the creation of a European Competition Network (ECN) as a forum for cooperation by national competition authorities and the EC.[13] With no explicit legal authority, the ECN functions mostly as a means for exchange of information and allocation of cases. The informal approach under the ECN reflects the preferences of large incumbent members of the Union such as the United Kingdom, Germany, and France. Smaller jurisdictions, in particular the new Member States, as well as the European Commission and the ECJ have instead proposed expanding the authority of EU law by decentralizing enforcement and enhancing private rights of access through national judiciaries.[14] The basic pattern of interjurisdictional conflict appears consistent with the global policy positions of pivotal EU Member States about the value of their sovereign rights to regulate monopolies and protect domestic entities from liability imposed by foreigners.

The impetus for employing private access rights as a means to enhance the effective scope of EU competition laws has found judicial support from the ECJ in a widely quoted decision from 2001. In *Courage v. Crehan* (Case C-453/99), the ECJ argued that the practical effect of prohibitions under Article 81(1) of the EC treaty would be limited unless non-state entities are able to make claims for damages as a result of losses from both contractual and non-contractual actions that restrain or distort competition.

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[13] <http://ec.europa.eu/comm/competition/ecn/index_en.html>.

[14] Specifically, see the 2005 Green Paper (COM(2005) 672) and 2008 White Paper (COM(2008) 165) on damage actions for breach of the EC antitrust rules.

The ECJ offers two distinct justifications for the necessity of decentralized enforcement mechanisms:

- Constitutional argument: Private rights of action enhance the credibility of agreements among Member States to prohibit anticompetitive practices.
- Economic argument: The judges point out that practices that restrict or distort competition also tend to be frequently covert. Decentralization of enforcement rights is consequently justified because of its ability to expand the range of available information about illegal activities.

The first justification relates to the specific legal arrangements that connect the Member States of the EU. The second argument is more generic, since it implies that information about collusive agreements and anticompetitive practices is hard to obtain, even in the presence of competent and relatively benevolent competition bureaucracies. The ECJ essentially argues that enforcement of public norms by private actors can complement a purely public enforcement regime because it would be able to constrain costly practices that would otherwise likely go undetected and, hence, under-deterred. As such, the argument for private access rights and overlapping jurisdictions is not based on an assumption about the presence of regulatory capture of local competition authorities by well-organized national interests. Instead, private access rights seem desirable to the ECJ because they improve the capacity of the regime and make EU obligations more credible. In other words, decentralization aims to lower the probability that illegal acts would go undetected and unpunished because private enforcers can generate information distinct from that produced by public agents.

Shortly before the expansion of the EU in 2004, the impetus to address the procedural shortcomings of EU enforcement regime culminated in a political agreement among the governments of Member States, which was formalized in EC Regulation 1/2003 (also known as the modernization regulation).[15] Official reasons for the need to modernize the regime included the complexity of administration under the rule-of-reason approach to the treatment of agreements and the inability of a centralized enforcement system to cope with the increasing volume of legal conflicts. The new regulation mandated that national courts and bureaucracies should be 'empowered to apply Community law', a task previously under the exclusive jurisdiction of the European Commission and its Directorate for Competition. Article 7 of the agreement specified that:

> National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.

This statement reflects the view among Member States that centralized public enforcement (the European Commission) or decentralized grouping of national competition authorities

[15] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:NOT>.

(the ECN) is likely to be an insufficient instrument for implementing existing interstate commitments. The agreement instead introduced overlapping jurisdictions between national courts and bureaucracies. As expected, the arrangement has been criticized by a wide range of observers. Depoorter and Parisi, for instance, criticize the complementary use of courts and bureaucracies embodied in the regulation primarily because it results in a 'multiplication of interpreters'.[16] They further argue that this will increase the costs of compliance with EU laws for businesses and, hence, will be an inefficient design strategy. Their assessment, however, does not account for the advantage of private enforcement in terms of information acquisition and, hence, identification and deterrence of offences. They also do not account for the fact that separation of power across the courts and the bureaucracy may make it more difficult for interest groups to unduly influence regulatory decisions.

Despite the broad agreement to institute a mixed enforcement regime, the 2003 regulation did not harmonize the specific manner in which national governments design rights of access to courts. In the absence of consensus on the issue, lawmakers in the Member States received the authority to determine the exact allocation of tasks between public and private enforcers (that is, procedural autonomy). This feature of the modernization regulation is particularly problematic since lawmakers in European countries have historically resisted extending private rights of access to enforce competition laws to their own nationals. Effectively extending standing rights to entities from other members of the EU will likely be opposed, at least in part, by the same interests that have previously limited the ability of local parties to access the court directly, hence bypassing local competition authorities. Tables 1 and 2 document this historical experience.[17]

Table 1 reveals that lawmakers in some Member States have tried in the past to develop a mixed enforcement regime and hence incorporated explicit provisions for private claims in the national legislations. In other member countries, claims for damages in cases of anticompetitive practices were theoretically possible under the general rule of standing for contract or liability disputes.

The presence of an implicit or explicit legal basis for private claims, nevertheless, did not result in the development of a mixed enforcement regime in any of the EU jurisdictions. This is documented in Table 2. Historically, less than 100 actions by nonstate entities have been identified across all EU jurisdictions prior to the modernization regulation of 2003. For comparison, while volatile in the long term, in the US regime there are approximately 700 private cases on a yearly basis, outnumbering public actions by about 7 to 1.[18]

The evidence illustrates that prior to the modernization regulation around half of Member States provided some form of specific statutory or general tort/contract basis

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[16] Ben Depoorter & Francesco Parisi, 'Modernization of European Antitrust Enforcement: The Economics of Regulatory Competition', *George Mason Law Review* 13, no. 2 (2005): 309–304.

[17] <http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html>.

[18] Douglas Ginsburg, 'Comparing Antitrust Enforcement in the United States and Europe', *Journal of Competition Law and Economics* 1, no. 3 (2005): 427–439.

Table 1. Formal legal basis for private enforcement in the EU

	Specific basis in national law	Recognition of basis in EC law	Identical legal basis for national/EC
Austria	–	–	Y
Belgium	–	–	Y
Cyprus	Y	–	–
Czech Rep.	–	–	Y
Denmark	–	–	Y
Estonia	Y	–	–
Finland	Y	Y	Y
France	–	–	–
Germany	Y	–	–
Greece	–	–	Y
Hungary	–	–	Y
Ireland	–	–	–
Italy	Y	–	–
Latvia	Y	–	–
Lithuania	Y	Y	Y
Luxembourg	–	–	Y
Malta	–	–	Y
Netherlands	–	–	Y
Poland	–	–	Y
Portugal	–	–	Y
Slovakia	–	–	Y
Slovenia	Y	–	–
Spain	Y	–	–
Sweden	Y	Y	Y
UK	Y	–	–

Source: European Commission (2004).

for private rights of action. However, Table 2 documents that these rights did not necessarily translate into an effectively mixed regime for the enforcement of substantive rules in any of these jurisdictions. This is indicative of the presence of significant procedural and institutional barriers that curtail the ability of victims of anticompetitive practices to access the courts. It also suggests that individuals and groups that benefit from the historical allocation of enforcement rights are likely to counteract efforts to implement the

*Table 2. Effective private access rights in the EU**

Austria	0
Belgium	2
Cyprus	0
Czech Rep.	2
Denmark	5
Estonia	0
Finland	0
France	13
Germany	40
Greece	0
Hungary	1
Ireland	2
Italy	10
Latvia	1
Lithuania	2
Luxembourg	0
Malta	0
Netherlands	6
Poland	2
Portugal	0
Slovakia	0
Slovenia	1
Spain	1
Sweden	10
UK	3

*Actions brought based on damages, including completed and pending cases based on national or European cause of action.
Note: The relatively large number for Germany reflects mostly cases where actions by private litigants were rejected/excluded by local courts on the basis of their contradiction with the existing public regime.
Source: European Commission (2004).

judicial guidance by the ECJ and the EU level agreements relating to the complementary implementation of public and private enforcement mechanisms.

Importantly, the evidence implies that resistance to private access in the national systems of competition law exists across civil and common-law traditions, or distinct civil law histories (socialist, Scandinavian, German, and so on). The invariance of the enforcement architecture with respect to the origins of a particular legal system is particularly interesting since it further highlights the anomalous nature of the institutional

mechanisms for the enforcement of the Sherman Antitrust Act that evolved in the United States after World War II. None of the West European jurisdictions that were allies with, or occupied by, the United States at the time appear to have implemented a mixed regime. Central and Eastern European jurisdictions that introduced competition laws after the collapse of socialism essentially replicated the centralized design strategy typical in Western Europe at the time.

Building on this description of de facto procedures for the enforcement of substantive prohibitions against anticompetitive practices as of 2004, the rest of this section characterizes the range of responses by national governments to Regulation 1/2003 and other attempts to develop private rights of action. The subsequent section studies the Polish experience with the implementation of the modernization package in order to explore the interplay between local and external factor shaping institutions of competition law. To describe possible paths of procedural change, consider the costs and benefits associated with moving from a centralized enforcement regime to a multidivisional one where public and private enforcers, or alternatively bureaucracies and courts, have overlapping and non-exclusive jurisdiction to prosecute illegal acts under EU Treaty obligations.[19]

As emphasized by Depoorter and Parisi,[20] the multiplicity of interpreters under the EU modernization package is likely to increase the costs of compliance with EU and national laws for some businesses. The possibility of court actions clearly increases uncertainty about the range of permissible actions particularly for businesses that in the past have enjoyed implicit or explicit exemptions under the rule-of-reason approach to the interpretation of anticompetitive agreements under EU and national laws. More generally, it is plausible to accept the hypothesis that private access rights can result in some duplication and delay in processing disputes. These and other possible costs do not, however, necessarily imply that a mixed regime is inferior to centralized mechanisms employed in the past.

From an economic perspective, the costs associated with a multiplicity of interpreters must be viewed in terms of possible benefits from effective rights of access that function independently of the discretion of the competition authorities. According to the ECJ, and supported by comparative evidence provided by Roberts and Ginsberg, private actions can enhance the institutional capacity for the production of information.[21] In this context, claims for damages are not aimed at pursuing compensatory/distributional policy objectives. Instead, they function as incentives for private enforcers with specialized knowledge about anticompetitive practices to reveal their valuable information. Hence, decentralization costs must be viewed in relation to the reduced informational costs, which is an empirical question that research in the future of the regime will have to assess.

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[19] Yingyi Qian, Gerard Roland & Chenggang Xu, 'Coordination and Experimentation in M-Form and U-Form Organizations', *Journal of Political Economy* 114, no. 2 (2006): 366–402. Yingyi Qian, Gerard Roland & Chenggang Xu, 'Why is China Different from Eastern Europe? Perspectives from Organization Theory', *European Economic Review* 43 (1999): 1085–1094.

[20] Depoorter & Parisi, *supra* n. 16.

[21] Jack Roberts, *International Comparative Analysis of Private Rights of Access* (Ottawa: Industry Canada, Competition Bureau, 2000). Ginsburg, *supra,* n.18.

The theoretical literature on the design of regulatory mechanisms, suggests another possible benefit.[22] The separation of regulatory powers associated with a multidivisional enforcement system can increase the transaction costs of capture facing entities advantaged in their capacity to influence bureaucratic or judicial decision. However, this body of literature also points out that precisely when the separation of regulatory authority is efficient from an economic perspective, it may not be feasible for political reasons. For instance, if the ECJ is correct in *Courage v. Crehan* about the informational gains from private rights of access, devolution of enforcement powers to victims is likely to shed light on a range of anticompetitive practices by businesses or governments across the EU, which currently are unidentified and hence under-deterred. Entities benefiting from this situation clearly have strong incentives to coordinate and lobby against the effective implementation of the EU decentralization mandate in legislations of Member States.

To analyse possible institutional responses to the introduction of a mixed regime, consider the following strategic elements of decisions by lawmakers in Member States of the EU. In addition to the hypothetical costs and benefits suggested by the existing literature, local lawmakers are also likely to incorporate observations about actions by their counterparts in other EU Member States into their design choices in evaluating how they should interpret procedural autonomy. In this context, past policies of large trading partners, as well as the sequencing of the legislative process might add complexity to the generic costs and benefits outlined in the literature on the economics of competition institutions. If large trading partners act first but do not sufficiently alter the customary limitations on private access rights relating to their own citizens, and hence entities from other Member States, then national lawmakers may respond in kind. This can result in an overestimation of the costs of decentralization and underestimation of its benefits in the legislative process, hence a resistance to enhanced private action rights to both domestic and EU entities. Alternatively, lawmakers in other jurisdictions may use the opportunity to address the historical limitations of their own national regimes in terms of private access and embrace the EU mandate unilaterally.

When some jurisdictions exhibit a large degree of resistance to the proposed reforms, instituting private rights of action in other countries gives rise to another challenge. By establishing procedures that allow victims to access the courts more readily, the authority of the competition bureaucracy to grant exemptions based on the rule-of-reason approach to the interpretation of substantive norms is constrained. Unilateral change, without attention to how other countries have implemented the law, can reduce the range of exemptions that competition authorities grant now, or hope to grant in the future. The value of the option to protect local monopolies and limiting the liability of exporting firms and associations appears to be particularly high in EU jurisdictions

[22] Jean-Jacques Laffont & David Martimort, 'Transaction Costs, Institutional Design and the Separation of Power', *European Economic Review* 42 (1998): 673–684; Jean-Jacques Laffont, *Regulation and Development* (Cambridge: Cambridge University Press, 2005).

that revealed their policy positions so clearly in the US Supreme Court case detailed in the last section. When strategic considerations dominate lawmaking in large incumbent members of the community, they are likely to generate some degree of resistance in other Member States to the implementation of a mixed regime.

Based on the above outlined considerations, we now analyse three possible paths by lawmakers in reaction to the EU modernization regulation:

(A) Lawmakers can change existing procedures and implement legal and regulatory mechanisms that allow for effective private action rights by both local and EU citizens. Such a reaction would suggest that the lawmakers discounted arguments about the costs of overlapping jurisdictions offered by the supporters of the status quo, emphasized national commitments under the EU Treaty, or used the opportunity to overcome political barriers that had hindered the emergence of a mixed enforcement regime before. The de facto legal regime in this class of jurisdictions has a higher chance of diverging from West European tradition in the design of competition enforcement mechanisms. According to Brokelmann, Spanish and Portuguese lawmakers appear to have enhanced the scope for private actions to some degree pursuant to Regulation 1/2003 and, hence, might represent examples of this theoretical path of institutional development.[23]

(B) Lawmakers may accept justifications by winners from the status quo arrangements and potential losers from further EU integration and chose not to alter the existing regime for prosecution and exemptions in a substantive manner. This could happen when private rights of action are characterized in terms of blackmail as in the seminal analysis of the subject by Landes and Posner.[24] In this perspective, the capacity of private rights of action to generate information results in over-enforcement of regulations and prevents socially desirable behaviour.[25] Depoorter and Parisi[26] extend the traditional resistance in this line of thought to private enforcement in their analysis of EU reforms and offer a number of other generic justifications for maintaining the status quo. If the expected local costs of decentralization appear to be high relative to benefits of compliance with the modernization regulation, then old institutional features are likely to persist. Wurmnest and Klees document that changing the features of the German competition laws under the EU mandate faced considerable resistance by incumbent enterprises

[23] Helmut Brokelmann, 'Enforcement of Articles 81 and 82 EC under Regulation 1/2003: The Case of Spain and Portugal', *World Competition* 29, no. 4 (2006): 535–554.

[24] William Landes & Richard Posner, 'The Private Enforcement of Law', *Journal of Legal Studies* 4 (1975): 1–46.

[25] For the seminal critique of the Landes and Posner over-enforcement hypothesis, see David Friedman, 'Efficient Institutions for the Private Enforcement of Law', *Journal of Legal Studies* 13 (1984): 379–397.

[26] Depoorter & Parisi, *supra* n. 16.

and associations of service providers.[27] According to these studies, the 7th Amendment to the Act Against Restraints of Competition, debated after the introduction of the modernization regulation and enacted in July 2005, did not substantially depart from the customary regime. Hence, German or EU citizens did not gain credible legal rights to enforce national or EU substantive norms directly through the courts.

(C) Lawmakers in some jurisdictions may wait for other governments that have in the past shown significant hostility to the idea of a mixed enforcement regime to act first and only then balance competing considerations in their approach to procedural autonomy. This delay strategy would allow lawmakers to observe the revealed preferences of their trading partners and evaluate the credibility of their commitments to their EU level obligations and the authority of the ECJ. If commitments by important trading partners appear credible, then lawmakers will likely have a higher degree of freedom to respond in kind and accept theories that stress gains from creating a liability regime in this area. Persistence of old institutions in some Member States can limit the capacity of lawmakers to grant private rights of access to domestic and foreign entities, generating retaliatory incentives to either not alter, or weaken, their current legislative provisions. Such a process can explain the prevalence of the discretionary rule-of-reason approach to substantive design and exclusive reliance on public enforcement observable in both the EU and the global levels. Given the well-documented resistance to change in Germany, and the strong economic relationship between Germany and Poland, the reaction of Polish lawmakers to the EU decentralization mandate is likely to follow this path of institutional development. From a strategic perspective, the Polish legislative proposal was debated two years after the 2005 adoption of the German law, thus suggesting that lawmakers in Poland had sufficient time to observe actions by an important trading partner, as well as other members of the EU. The next section documents this hypothesis.

4. Design of Competition Enforcement in Poland

The Polish experience with the implementation of the EU modernization regulation provides a particularly interesting setting for exploring the tensions between internal and external factors that shape national competition laws. During the 1990s, Poland employed competition law as a relatively effective instrument for decentralizing the structural legacies of central planning and constraining anticompetitive practices in the

[27] Woldfgang Wurmnest, 'A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition', *German Law Journal* 6, no. 8 (2005): 1173–1189. Andreas Klees, 'Breaking the Habits: The German Competition Law after the 7th Amendment to the Act against Restraints of Competition', *German Law Journal* 7, no. 4 (2006): 399–420.

emerging market system. Much like their counterparts in Western Europe and other post socialist jurisdictions, the Polish lawmakers of the early transition period introduced a centralized bureaucratic model of competition enforcement. However, they diverged from both groups in their choices about the design of substantive prohibitions, adopting a regime based on more predictable per se prohibitions. For instance, they did not allow for an efficiencies defence in the case of agreements or abusive practices, replicating a substantive model more similar to the approach under the Sherman Antitrust tradition in the United States.[28] Specifically, the scope for exemptions was limited to actions and arrangements that appeared 'indispensable' from an economic or social perspective, rather than merely reasonable.

According to measures constructed by Dutz and Vagliasindi, Poland developed a competition regime by the mid- to late 1990s that was relatively more effective than those operative in other former socialist countries in Central and Eastern Europe.[29] Despite their apparent contribution to the rapid and sustainable recovery of the Polish economy from the mid- to late 1990s, the divergence of substantive rules from the less restrictive EU standards had to be addressed under accession requirements. In 2000, Polish lawmakers enacted a new competition statute, introducing the rule-of-reason approach to the interpretation in an attempt to placate the European Commission and incumbent members of the EU. Hence, prior to the period under analysis here, transnational pressures had already resulted in substantive changes to the Polish regime.

The rest of this section describes how the rules and procedures for the implementation of competition regulations evolved in Poland in the period following accession in the context of broader conflicts detailed in the last sections. In particular, we study how lawmakers in Poland have changed (or not) elements of the statutory mandate with the adoption of the 2007 Act on Competition and Consumer Protection. This Act was debated and enacted after Poland became a full member of the EU, which likely increased the degree of freedom that lawmakers enjoyed relative to the constraints imposed by accession requirements prior to EU membership. Similarly, long-term growth and development of the economy since the 1990s and the relatively high degree of competition facing Polish firms in the domestic market likely provided lawmakers with a relatively high degree of freedom to experiment with new substantive and procedural features.

Given the conflicting objectives and tensions that can generate the three possible paths of institutional development detailed in the last section, the overall impact of external and internal considerations shaping the 2007 Polish Act appear ambiguous from a theoretical perspective and requires empirical attention. The high degree of resistance to the implementation of effective mixed enforcement regimes at the global level, and in the case of some of Poland's trading partners in the EU, suggests that maintaining the

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[28] Russell Pittman, 'Competition Law in Central and Eastern Europe: Five Years Later', *Antitrust Bulletin* 43, no. 1 (1998): 179. Tibor Varady, 'The Emergence of Competition Law in (Former) Socialist Countries', *The American Journal of Comparative Law* 47, no. 2 (1999): 229–275.

[29] Mark Dutz & Maria Vagliasindi, 'Competition Policy Implementation in Transition Economies, an Empirical Assessment', *European Economic Review* 44 (2000): 762–772.

status quo design might have been a viable option for lawmakers. The analysis of persistence and change in the national legal regime contributes to a growing body of studies on the implications of the impetus to decentralized mechanisms for the enforcement of competition laws in EU members.[30]

5. Competition Law Objectives

Enacted in 1998, Article 20 of the Polish constitution provides the legal basis for the economic system in Poland and helps understand the general role of competition law in the new economy:

> A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland.

This basis clearly reveals that the development of efficient market institutions is not viewed as an end to itself but can find a legal basis if it fosters some broader social gain or serves the public interest. Notably, in contrast to a number of other jurisdictions in developing and transition countries, the lawmakers did not incorporate the objective of promoting or protecting competition, or specifically restricting monopolistic structures and activities in the constitution, as in the Russian Federation for example.[31] The only constitutional provision in Poland that provides a basis for the enforcement of laws against anticompetitive agreements and practices is Article 76, which generally assigns competence to public authorities to 'protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices'. Hence, the constitution does not specify which regulatory instruments are available to public authorities to regulate markets. The emphasis instead appears to be the protection of the weak and the disclosure of information.

Wise reviews the objectives assigned to competition law in Poland after the start of the recovery of the economy and the adoption of the constitution in 1998.[32] In contrast to the early transition period, when the law functioned as an instrument for restructuring agglomerations before privatization and mitigating abusive practices in the emerging private markets, his analysis suggests that 'efficiency' had become a strategic objective for the authorities by the late 1990s. According to Wise,[33] the concept of efficiency implied a number of different ideas to public authorities in Poland, including:

- Enhancing the adaptability of businesses and their responsiveness to market signals.
- Reducing costs of Polish firms and increasing their competitiveness.

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[30] See Brokelmann, *supra* n. 23; Wurmnest and Klees, *supra* n. 27. Likewise, see *The Competition Law Review* 3, no. 1 for a number of related studies on the emerging role of private enforcement in the EU.

[31] Reza Rajabiun, 'Competition Law and the Economy in the Russian Federation: 1990–2006', *Global Jurist* (forthcoming).

[32] Michael Wise, 'Review of Competition Law and Policy in Poland', *OECD Journal of Competition Law and Policy* 5 (2003): 2.

[33] *Ibid*.

- Rationalizing production and distribution costs.
- Improving product quality.

Increased emphasis on the concept of efficiency as an objective of competition law illustrates the impetus for a shift from the legal (per se rules) to the economic (rule-of-reason) approach to the interpretation of prohibitions against anticompetitive agreements and abusive practices. Furthermore, the notion that competition law could serve to promote international competitiveness suggests the enhanced relevance of strategic trading considerations prior to EU accession. Harmonization of substantive prohibitions under the 2000 Act on Competition and Consumer Protection to EU requirements consequently increased the discretion of public enforcers to prosecute, exempt, or regulate activities that appear anticompetitive relative to the regime in place during the 1990s. Given the long delays and limited commitment of many incumbent EU Member States to the expansion of the trading block, Polish lawmakers likely had little choice in this regard in the late 1990s. However, with EU accession in 2004, the balance of regulatory powers has likely changed substantially.

The 2007 Act on Competition and Consumer Protection does not codify any specific economic or social objectives that should govern its implementation. Instead, the law defines its objectives broadly, in terms of 'development and protection of competition, as well as rules on protection of interests and consumers, undertaken in the public interest' (Article 1). This characterization of the objectives of the law is consistent with the expansion of the range of responsibilities of the bureaucracy to include consumer protection in the late 1990s. The lawmakers mandate that the regime should aim to both protect and develop market competition in the public interest. As in the 1990s, the role of competition law is not defined purely in terms of protection of consumer interest as the new law continues to allow for the application of regulatory instruments to shape the development of market mechanisms in the public interest.

The 2007 Act does not explicitly include secondary objectives, such as those relating to national interest or competitiveness. While such powers can be deduced from broader regulatory powers of the state under the 1998 constitution, the focused objectives of the regime differs from design features present in many other jurisdictions that rely more heavily on the rule-of-reason design strategy. This observation about the overarching objectives of the regime suggests that elements of the per se approach to regulatory design operative in the 1990s remain in the system, despite the introduction of the rule-of-reason approach in the 2000 statute.

6. Substantive Prohibitions

Although the 1991 Europe Agreement between Poland and the Member States of the EC did not liberalize trade in goods and services to a large extent, it committed the parties to the language of competition-related provisions in the Treaty of Rome/EC Treaty. The 2007 Polish Act replicates the approach to the design of substantive prohibitions operative before the EU harmonization pressures, prohibiting anticompetitive agree-

ments in general terms, without explicitly distinguishing between the horizontal and vertical natures of the restraint. The general nature of the prohibitions in Polish laws was relatively unique in post socialist jurisdictions adopted in the early 1990s. Importantly, as Pittman[34] notes, this feature of the Polish regime was enacted contrary to the advice of the networks of technical experts advising reformist governments in Central and Eastern Europe in the early to mid-1990s. Article 6 of the 2007 Act elaborates on a number of more specific classes of practices, which, by object or effect, continue to be prohibited. These include:

- Fixing, directly or indirectly, prices and other trading conditions.
- Limiting or controlling production or sale, as well as technical development or investment.
- Sharing markets for sale or purchase.
- Limiting access to a market by parties that are not subject to the particular agreement.

These types of anticompetitive practices are considered legally void under Article 6.2, unless they are subject to the general exemptions set out in Articles 7 and 8. Article 7 excuses horizontal and vertical arrangements where the individual market share of firms is below 5% and 10%, respectively, a feature that persists from the 1990s. Article 8, however, details a number of interpretive exemptions and defences that reflect the transition to the more complex standards typical of the rule-of-reason approach to the interpretation of prohibitions against anticompetitive practices and agreements.

Specifically, Article 8.1 provides for the efficiencies defence by exempting agreements that, while potentially anticompetitive, 'contribute to improvement of production, distribution of goods or to technical and economic progress'. Article 8.2 extends the complexity of the standard by exempting agreements that 'allow the buyer or user a fair share of benefits resulting thereof'. Such agreements are exempt as long as they are indispensable and do not 'eliminate' competition. This standard is clearly weaker than those operable in the 1990s, as it does not apply to anticompetitive practices that less dramatically restrain or distort competition. The vague wording of the Article is also worrisome as it is open to various interpretations about the degree of acceptable infringements from substantive rules. The term indispensable remains in the statutory mandate, which might restrict the scope of the efficiencies defence under the 2007 Act in the future.

Also reflective of convergence of Polish laws with traditions in Western Europe is the feature of the new regime that allows enterprises to obtain exemptions from the competition bureaucracy on an *ex ante* basis. Enhanced flexibility might enable public enforcers to reduce the degree of uncertainty faced by entities engaged in potentially anticompetitive practices. Although the scope for the efficiencies defence under the 2007 Act is not yet clear, this statutory mandate appears to have retained, and to some degree

[34] Pittman, *supra* n. 28.

extended, the substantive design approach under the 2000 Act. Even with their increased degree of freedom in setting local laws after EU accession, lawmakers in 2007 did not chose to reestablish the per se approach to substantive design of competition law.

In contrast to the EU-inspired changes in the general treatment of anticompetitive agreements and practices, specific provisions on abuse of dominance from the 1990s appear to have persisted in the 2007 Act. Article 9 of the 2007 Act continues to ban abusive practices in general terms and grants the authorities a wide variety of instruments to remedy them. Abusive practices by one or more undertakings under Article 9 include:

- Imposing 'unfair' prices, including predatory prices.
- Limiting production, sale, or technological progress of contracting parties or consumers.
- Counteracting formation of conditions necessary for the emergence or development of competition.
- Market sharing according to territorial, product, or entity-related criteria.

While the strength of abuse of dominance provisions remains consistent over time, the substantive rules in the area of merger control follow a pattern of change similar to those of prohibitions against collusion in Article 6. Since 2000, new merger rules have allowed the authorities to consider evidence indicative of the potential benefits of a transaction, which otherwise may have a significant negative impact on the degree of competition in a particular market. The primary objective of the new regime for the control of concentrations is to prevent transactions only if they lead to a 'significant impediment to competition, in particular, by creation or strengthening of a dominant position in a market' (Articles 18 and 20). Concentrations expected to contribute to economic development, technical progress, or the national economy are exempt from the scope of merger control provisions.

While lawmakers have enhanced the possibility of invoking efficiencies/national interest defences over time, it is important to note that another common justification for exempting anticompetitive practices has not yet been adopted in Poland. The 2007 Act continues to allow the competition bureaucracy the power to address costly anticompetitive practices that arise in the context of health, safety, or other public or private self-regulatory arrangements. This means that competition rules, and increasingly standards, are applicable to providers of professional services such as lawyers, doctors, or nurses, for instance. An application of this feature of the Polish laws is exemplified in efforts by the Office of Competition and Consumer Protection (OCCP) between 2004 and 2006 to remedy anticompetitive practices by local associations aiming to institute minimum prices for veterinary services.[35] In many jurisdictions, including larger Member States of the EU,

[35] 'OCCP Annual Report' (2006). Office of Competition and Consumer Protection, Republic of Poland: <http://vokik.gov.pl>

sector-specific regulators and/or self-regulatory organizations are routinely exempt from the scope of the competition laws.

Despite the continuity of overlapping jurisdictions between regulatory powers of this type in Poland, evidence from the evolution of competition legislation highlights significant changes in the design of substantive prohibitions. Prohibitions against anticompetitive practices have become increasingly complex with the incorporation of efficiencies and national interest exemptions to broad per se rules operative in the formative days of the market economy. The pattern of institutional change in Poland between the 1990s and 2000s has obvious implications for lawmakers in other jurisdictions that imported the rule-of-reason approach to substantive interpretation in their new competition laws.

7. Enforcement Procedures

While important, the decision by early reformers to diverge from the West European tradition in the design of substantive prohibition represents only one element of the effective competition regime that emerged in Poland during the 1990s. With respect to procedural mechanisms for the implementation of the rules, the early reformers essentially replicated the construction of competition law as an exercise in regulation by public bureaucracy and state prosecutors. Hence, they did not adopt a US style mixed enforcement regime in the 1990 Act. Political accountability and oversight, the per se approach to substantive design, and a narrow bureaucratic mandate, nonetheless limited bureaucratic discretion and the need for engaging in balancing acts of competing considerations.

The Antimonopoly Office (AMO) functioned until 1996 as an agency with a narrow mission, mandated to assist in the restructuring of large enterprises both before and after privatization. This observation is important since the absence of unfair competition statutes within the mandate of the bureaucracy effectively limited the capacity of public enforcers to use their resources to target smaller organizations with little capacity to engage in sustainable anticompetitive practices. As argued by Varady,[36] enforcement efforts by many competition authorities in the region focused on this class of offenders in the early part of the transition. Even with the expansion of the bureaucratic mandate to include unfair competition statutes and the creation of the OCCP in 1996, data on the enforcement activities of the bureaucracy suggest that it was reluctant to divert significant resources from the task of identifying and sanctioning anticompetitive practices by large enterprises to cases involving unfair competition and consumer protection. For example, in 1998 the OCCP opened 245 matters relating to abusive practices and issued sanctions or orders in 118 of them. In contrast, it investigated 138 cases of unfair competition, issuing adverse decisions in ten cases. Hence, during the formative days of

[36] Varady, *supra* n. 28.

the recovery from shock therapy, public enforcers remained focused on practices that are likely to have large social and economic costs. In other words, despite the expansion of responsibilities of the public enforcers by the lawmakers, old patterns of bureaucratic practice persisted until the early 2000s.

Other factors that shaped how substantive prohibitions were mapped into regulatory authority included the high degree of direct monitoring of the practice of competition law by the government and the judiciary. After the transition in political power in 1993 and the formation of a stable government, the AMO became a central element of microeconomic restructuring policies aiming to reverse the collapse in production and employment. Significantly, the AMO did not generally resort to price regulations during the 1990s. The competition bureaucracy focused instead on the identification and sanctioning of anticompetitive practices rather than trying to set market prices.

Given that lawmakers in Poland did not establish a mixed public-private enforcement regime in the 1990s, the harmonization of enforcement procedures did not become a significant source of tension during the EU accession process. In contrast to the shift away from per se rules under the 2000 Act, joining the EU did not materially alter the organizational features of the public enforcement system. One exception to this observation is related to the authority for the allocation of state aid, which lawmakers reallocated from the Ministry of Economy to the OCCP pursuant to EU accession requirements.

The resistance to a mixed enforcement regime in Poland before accession to the EU in essence meant that the EU and local procedures were, more or less, harmonized before the 2003 modernization regulation. This regulation explicitly identified increasing workload at the EU level as a reason for enhancing access by private enforcers to national courts to enforce EU law. In the Polish case, it is plausible to suspect that long-term economic expansion and reliance on a purely centralized enforcement regime can similarly result in some measure of under enforcement/rationing. If this basic economic hypothesis is correct, it would be plausible to detect some impetus to decentralize enforcement rights pursuant to the EU level impetus to a mixed regime.

Some evidence of the demand for decentralization in Poland can be found in the opening of local offices, ostensibly to collect and disseminate information about acts violating unfair competition and consumer protection statutes. Geographic decentralization potentially aims to inform consumers about their collective interest at the regional level or help the national agency collect accurate information about practices hard to detect from the capital. Opening these offices may also reflect an attempt to build confidence about the ability of the bureaucracy to implement its legislative mandate. Full control over the local offices, nonetheless, lies with the OCCP President who has the discretion to take over a case initiated by a local office (Article 33.5 of the 2007 Act).[37] To the extent that geographical decentralization takes public enforcers closer to the action and improves the acquisition of information, this feature can enhance the ability of public enforcers to

[37] Chapter 2 of the 2007 Act further elaborates on the overlapping jurisdiction of territorial governments and consumer groups in the area of consumer protection.

identify anticompetitive practices. However, if the President or high-ranking members of the organization at the centre do not have the right incentives to pursue a case identified by local agents, they can block the flow of local information and legal actions.

The 2000 Act offers more specific evidence of a demand for the development of a mixed enforcement regime with overlapping jurisdictions to enforce substantive prohibitions. The Act postulated that private complaints may be filed with the OCCP but did not provide private entities legal rights to file cases with institutions other than the competition authority. This design feature can clearly increase the range of information available to public enforcers about market conduct and performance. However, as in the case of geographical decentralization, when the public administration does not have the right incentives to act on this information, the regime provides no other legal remedies.[38] The exclusive option to identify/exempt anticompetitive practices by public enforcers was a feature of the Polish competition regime prior to the EU modernization agreement.

Adopted after the EU modernization packages, the 2007 Act has not altered the purely public enforcement model. Article 29 of the 2007 Act specifically assigns the primary competence for the protection of competition and collective consumer interests to the President of the Office (OCCP), under the direct supervision of the Prime Minister. The architecture of the enforcement procedures consequently persists, despite the regulation at the EU level that local courts and bureaucracies should provide overlapping jurisdiction for filing claims against actions that prevent, restrain, or distort competition in the internal market. Of course, judges in lower courts may decide to hear claims for liability in case of violations of EU law, but this would appear to be inconsistent with the legislative mandate. Consequently, the lawmakers have not provided domestic or EU entities with a mechanism to bypass the bureaucracy when it fails to act against particular transactions or practices. This procedural feature might limit the under-enforcement expected in a purely public regime to some degree by increasing the size of the information set available for analysis and decision making by the competition bureaucracy.

While the filing of private complaints with the bureaucracy can help lower certain types of false negatives, the absence of an option to bypass the public enforcers can exacerbate other drivers of under-enforcement and increase expected false positives in the regime. In particular, separation of regulatory powers can increase the transaction costs powerful interests must invest in capturing regulatory authority.[39] If the efficiencies defence is interpreted broadly by public enforcers, the absence of overlapping jurisdictions by private entities can limit the scope of the substantive rules on enterprises and groups with capacity to influence national politics and competition policy. This can reduce the credibility of legal constraints against costly anticompetitive practices that motivate investment in capture by such firms, leading to under-enforcement of the law against firms and interests likely to be advantaged in shaping regulatory authority and over-enforcement with respect to actions with relatively low expected social and

[38] Zhijun Chen, 'Private Enforcement against Collusion in Mechanism Design', MPRA Paper No. 873 (2006).
[39] Laffont & Martimort and Laffont, *supra* n. 22.

economic costs. This is because, as detailed by Becker and Stigler and Friedman, self-interested and budget maximizing public enforcers have stronger incentives to achieve a private Coaseian bargain with offenders who have imposed a relatively high level of uncompensated costs (negative externalities) on their victims.[40]

The resistance to a mixed enforcement regime in Poland illustrates that the relatively high value placed on centralized enforcement organization for the application of competition statutes can persist. It does not, however, tell us exactly which internal or external considerations were used to justify decisions by lawmakers. The fact that Poland's large EU trading partners introduced a similar legislative approach in their responses to the decentralization policies suggests that strategic considerations may have motivated lawmakers in Poland to also deny direct rights of action to entities from other members of the EU. However, this choice also limits the ability of Polish entities to identify and prosecute offences that a purely public regime may choose to ignore or officially exempt (false negatives). Consequently, strategic trading concerns likely played a part in shaping the legislative response in Poland to political failures at the EU level to reach a binding agreement on private rights of access and the lack of credibility associated with procedural autonomy.

In the absence of strategic considerations, the observed resistance to the introduction of a mixed enforcement regime in Poland under the 2007 Act would be particularly puzzling because the Polish regime has developed an extensive system of judicial oversight through a specialized antimonopoly court. Since the 1990s, the review process has been streamlined under the jurisdiction of the specialized Court of Competition and Consumer Protection, a part of the Warsaw District Court. The Court of Appeal and the Supreme Court have further competence for appeals based on questions of law. Private entities consequently have rights to challenge adverse decisions by the bureaucracy that arise from inaccurate information or interpretation of the law. This illustrates that the Polish system has long accounted for the possibility that public employees may interpret and enforce substantive rules in an unjust or inefficient manner.

On face value, the presence of judicial review in Poland may not seem unique since in many jurisdictions courts have some power to review regulatory decisions, and offenders have some rights to establish their innocence. In Poland however, this mechanism is more widely used than in many other jurisdictions, where the review process applies only to very few cases. Reports by the OCCP from the late 1990s and early 2000s indicate that around one third of adverse decisions were appealed. A 2006 Report by the OCCP shows that public enforcers investigated 360 cases under restraints of trade

[40] Hence, when transaction cost of bargaining between enforcers and offenders is low, public enforcement has incentives to deter behaviour with low levels of social and economic harm and ignore relatively costly practices. See Gary Becker & George Stigler, 'Law Enforcement, Malfeasance and Compensation of Enforces', *Journal of Legal Studies* 3 (1974):1–18; Nuno Garoupa & Daniel Klerman, 'Optimal Law Enforcement with a Rent Seeking Government', *American Law and Economics Review* 4, no. 1 (2002): 116–140; Nuno Garoupa & Mohamed Jellal, 'A Note on Optimal Law Enforcement under Asymmetric Information', *European Journal of Law and Economics* 14 (2002): 5–13; Friedman, *supra* n. 25.

provisions, issuing adverse decisions in 200 of those cases. Out of the 200 decisions, around eighty were appealed by alleged offenders, out of which sixty were upheld, ten were amended, and nine were dismissed. The increased appeal to decision ratio potentially reflects the introduction of the more complex and less predictable rule-of-reason approach to the interpretation of substantive norms under the 2000 Act. The ability of the OCCP to sustain its decisions in a large portion of appeals has, nevertheless, not changed significantly over time; and around 80% of decisions by public enforcers are upheld by the antimonopoly court on a consistent basis.

Experience with procedures for mitigating the false positive problem in public enforcement has apparently not increased the incentives to adopt private rights of action in cases where public enforcers fail to act. Under the 2007 Act, and implementation legislations in other large EU Member States such as Germany, private parties do not have direct access to the specialized antimonopoly court, or any other general-purpose courts. Hence, when the bureaucracy mistakenly or because of the traditional problem of regulatory capture exempts or fails to take action against costly anticompetitive practices, the regime does not provide a mechanism for correcting the problem.

8. Summary and Implications

International public and private laws impose few constraints on the capacity of national governments to protect their exporters from liability for anticompetitive practices abroad or to encourage cartelization in the hope of promoting international competitiveness. The need to address this problem and strengthen the common market in the EU has stimulated attempts to decentralize the enforcement regime and enhance the private rights to claim damages through national judiciaries. However, practical implementation by Member States has been lagging due to political resistance and strategic trade policy considerations.

In the context of broader debates on the design of domestic and transnational mechanisms for mitigating the economic costs of anticompetitive practices, the experience from Poland and the EU has an important implication. The resistance to private rights of access in the EU helps explain why the introduction of per se rules against anticompetitive practices and a mixed enforcement regime has been so difficult in other industrialized and developing countries. These features limit the capacity of the government to exempt practices that are purported to be efficiency enhancing or in the national interest.

However, the analysis also suggests that a lack of private rights of access and bright line rules against collusion and exclusionary practices limits the credibility of substantive rules. As detailed by the economic approach to the study of legal and regulatory institutions, and emphasized by the ECJ, decentralized mechanisms mitigate informational and rent seeking problems relative to centralized agencies and prosecutorial offices. The path for the organization of competition enforcement regimes is not likely to be deterministic since lawmakers may chose to grant domestic, and potentially

foreign, entities legal rights to access the judiciary in order to improve information production. While centralized enforcement hierarchies persist in jurisdictions such as Germany and Poland, the balance of internal and external considerations may motivate others to extend private rights of action as instruments for enhancing the effectiveness of competition laws.