Externalizing EU competition policy

Implementation and coordination realities in non-EU countries and global forums

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This dissertation is about competition policy as an example of external EU governance. Competition policy has traditionally played a key role in European integration and is arguably one of the EU’s strongest assets. More recently, EU competition policy has also become a main point of reference for regulatory competition regimes worldwide. What are the characteristics that make it so successful? This research looks at the governance of competition policy within the EU and then assesses the EU’s influence on competition policy in Norway and Turkey and on the OECD and the International Competition Network. It argues that a certain degree of internal diversity, rather than full harmonization at EU level, has a positive effect on the externalization of competition policy to non-EU countries and global forums.
Externalizing EU competition policy:
Implementation and coordination realities in non-EU countries and global forums

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Externalizing EU competition policy: 
Implementation and coordination realities in non-EU countries and global forums

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1. **INTRODUCTION**

Clearly visible from the Schuman roundabout in Brussels, in the heart of the European district, is a massive temporary piece of graffiti that reads “THE FUTURE IS EUROPE”. That is not such an evident statement as it was ten or fifteen years ago; in fact, the EU seems almost to be disintegrating at a faster rate than it integrates. For the first time, an EU member state has decided to leave the Union; there are consistent concerns about the rule of law in Hungary and Poland; and cooperation in areas where the EU faces major challenges, most notably defense and migration, is progressing slowly. Anti-European sentiments voiced by populist parties, both in the national context and in Brussels, have become part of the ‘new normal’. Also globally the focus seems to have shifted inwards, as the discourse is ever more about national concerns and the protection of national interests, rather than on multilateral problem-solving of global issues such as climate change.

In particular in such challenging times, we should reflect upon the strengths of the EU and on the added value it can bring to its citizens. What areas of EU policy-making are delivering well, and what are the EU’s success stories? This question will most likely revert one back to Europe as a project of market integration, in other words, to the EU’s single market rules, including the rules on competition. Competition policy is perhaps the EU’s strongest and least contested policy area. It is an area where the European Commission enjoys full, exclusive competences and has been successfully enforcing rules almost since the very beginning.

The last chapter in this story has been the term of Commissioner Vestager (2014-2019). More so than previous Commissioners, Vestager’s enforcement decisions seem to have been aimed at enhancing citizens’ support for Europe.1 During her mandate, she has targeted large (American) companies like Google and Amazon for abuse of a dominant market position and receiving illegal state aid.2 But she has taken a similarly strong stance on the application of competition rules to European companies, which was not necessarily appreciated

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2 E.g.: Google was subject of several cases under Vestager’s mandate: Case COMP/39.740 Google - Google Search; decision issued on 27.06.2017 and Case COMP/40.099 Google Android; decision issued on 18 July 2018. Amazon was involved, inter alia, in a state aid case in 2017, where Luxembourg had to recover illegal tax benefits that had been given to the company in violation of EU rules: [http://europa.eu/rapid/press-release_IP-17-3701_en.htm](http://europa.eu/rapid/press-release_IP-17-3701_en.htm)
by national governments - most notably in the context of the blocked Siemens-Alstom merger. The latter resulted in an EU-wide debate on the desirability of creating ‘EU champions’ in order to be able to compete globally, most notably with China.

The term of Commissioner Vestager illustrates that EU competition policy can be adjusted to changing circumstances. The initial rationale to apply competition enforcement in the internal market was that to ensure that no private barriers would be erected where public barriers to trade in the internal market had been lifted - for example by companies engaging in geographical sales restrictions or price agreements. While the single market remains the core rationale for competition enforcement in Europe, EU competition rules have been flexible enough to support also ancillary goals such as the liberalization of most notably energy and telecom markets, and more recently to tackle both tax benefits and unfair behavior by large (dominant) firms in ‘winner takes all’ markets. Therefore, EU competition policy is essentially a tool to accomplish a number of interrelated policy goals by regulating markets.

While the US has a longer tradition in competition (antitrust) policy enforcement, professionals from the other side of the Atlantic are increasingly interested in the EU system. This transpires for example from the rise of US ‘hipster antitrust’ – a call not only for more interventionist US antitrust enforcement, but also for the inclusion of goals beyond economic efficiency (most notably employment goals). William Kovacic, a leading scholar and former US practitioner, called the EU’s competition system ‘globally pre-eminent’ in terms of both enforcement capacity and as a source of inspiration for regulation enforcement worldwide. As countries in Latin-America, Asia and Africa have built up competition law and enforcement since the late 1990s, for many of these the EU has been an important source of inspiration. For countries in Central and Eastern Europe it was clear that the EU model was the preferred if not de facto mandatory policy model, as they wanted to accede to the Union and had to incorporate the EU’s competition rules in order to do so. But the EU’s influence in competition policy seems to reach beyond accession, even though it is not clear to what extent that is the case and through what mechanisms externalization takes place.

EU competition policy has not been the main focus of the academic work that engages with EU as a global ‘normative’ or ‘regulatory’ exporter. In the external EU governance literature,

4 https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/antitrust/hipster-antitrust-brief-primer/
6 In this sense see for example the intervention of Prof. Eleanor Fox during the European Competition Forum in 2012: http://ec.europa.eu/competition/forum/2012/panel3_en.html
there has been much interest in particular for the export of democratic values and practices to the EU’s immediate neighborhood and beyond (e.g. Börzel and Van Hüllen, 2011; Lavenex and Schimmelfennig, 2011). While competition policy is regularly discussed in the global context, it is often one of several policy areas under study in a comparative contribution (e.g. Slaughter, 2004; Laïdi, 2008; Bradford, 2012), even though there have been more comprehensive dedicated studies on this topic as well (most notably Aydin, 2012a; Botta, 2014 and Damro and Guay, 2016). The EU’s competition policy is however often considered as affecting the global order mainly by the extraterritorial effects or ‘spillovers’ of its internal decisional practice (Drezner, 2007; Bradford, 2012).

There is a particular lacuna what it comes to the implementation and coordination realities of EU competition policy beyond the EU itself. In bilateral settings, that is probably the case because the external EU governance literature is focused predominantly on the externalization of EU rules rather than considering what happens with these rules after adoption. In a global context, the EU and global governance literature looks mostly at the extraterritorial effects of the EU’s competition law, i.e. at EU enforcement towards non-EU companies (most notably in merger cases) rather than at how EU policy has changed competition policy in other countries or how it has shaped the working and/or the outputs of global forums. This absence of practical implementation and coordination realities is remarkable, as it cannot be assumed that rule adoption, direct EU enforcement or membership of a global network or organization will automatically result in domestic change beyond the EU itself. Therefore, in order to assess to what extent the EU is indeed a global leader in competition policy, the practical realities of implementation and coordination are key and they are currently to a large extent lacking.

While the full global landscape is well beyond the sensible scope of a PhD project, this research proposes a comprehensive study of representative examples in order to draw lessons from these. Two country studies of closely associated non-EU countries, Norway and Turkey, may in particular provide experiences in view of Brexit and new forms of (economic) association with the EU, for example through new generations of free trade agreements that provide for enhanced regulatory approximation. The Competition Committee of the Organization for Economic Co-operation and Development (OECD) and the International Competition Network (ICN) on the other hand are the two main forums with global coverage that deal with competition matters and can tell us something about the EU’s interactions with, and preferences of, other key participants in competition policy at the global level. In all these settings, the ‘hard power’ of the EU is mitigated as there is no direct accession conditionality acting as the main driver for regulatory externalization.

In order to interpret such implementation realities beyond the EU, it is key to first consider the implementation dynamics in the EU itself. That is because with a focus on implementation of EU policy in a non-EU context, it is not sufficient anymore to consider what rules
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the EU may be externalizing; instead, we should consider the full ‘export product’ including the way it is implemented in the EU. The thesis argues that a certain degree of internal diversification in implementation of EU competition policy has enhanced the possibilities for successful externalization of this policy area, rather than undermining its coherence.

The remainder of the chapter introduces the main research questions, followed by a motivated selection of the case studies and the research puzzle. The chapter then discusses the limits of the existing literature, the main findings of the empirical chapters and a number of considerations related to methodology and data-gathering. The chapter also outlines in more detail the theoretical and empirical contribution of the thesis.

Research questions

This thesis considers how the EU shapes competition policy both in non-EU countries and in global forums in the absence of accession conditionality, where the ‘hard power’ of the EU is mitigated. Before proceeding to the research questions, it is important to provide working definitions of some key concepts. These are most notably:

- “Competition policy” is understood as competition rules and the implementation of these rules.

- “Competition rules” are understood as binding competition regulation by law; in the EU context this includes regulations and directives in addition to the text of the Treaties. While this working definition includes both substantive and procedural law, it does not include soft law documents that are not formally binding, such as guidance documents - such soft law is considered to be part of the implementation.

- “Implementation” of competition rules relates to how competition rules are used in practice, and should be explicitly considered as an open concept. Implementation includes most notably enforcement (and thereby interpretation) of the competition rules, normally by investigations and decisions of competition authorities vis-à-vis companies - for example fining companies for prohibited conduct, accepting (behavioural) remedies for prohibited conduct, or assessing a proposed merger between companies. However, while a core activity, implementation is broader than competition enforcement. It includes other enforcement-related outputs and activities by ministries and/or enforcing authorities, such as advocacy and the publication of soft law, guidance documents and (in)formal guidance to companies. Finally, implementation can include court proceedings over contested enforcement decisions and, when considered in the broadest sense, also the activities of private actors in this field, such as law firms providing compliance advice and legal counseling.
Introduction

The main research question addressed in the thesis is: What describes the externalization of EU competition policy in the absence of accession logics, and what accounts for the patterns that emerge?

In order to frame the inquiry and set the stage for the empirical case studies, I will analyze in a first stage the existing literature, in particular the external EU governance literature and the EU in global governance literature, and the functioning of EU competition policy within the EU itself. The first and second subquestions, addressed in part I of the thesis (‘setting the stage’) are the following:

a. How have scholars characterized the ways in which the EU is externalizing policy to closely associated non-EU countries and global forums, and what is the research approach of the thesis in mapping this externalization?

b. What are the main governance features of EU competition policy that are possibly relevant in light of the externalization of this policy?

The focus then turns to the external dimensions of EU competition policy. The second part of thesis looks at how EU-style competition policy travels to countries that lack a short-term accession perspective, either because they do not wish to accede themselves or because it is not possible for them to accede to the EU. The third subquestion, addressed in part II of the thesis (‘EU competition policy in non-EU countries’) is the following:

c. In the absence of a clear perspective of EU membership, how is EU-style competition policy implemented in non-EU countries that are closely associated with the EU?

Further looking into the external dimensions of EU competition policy, the third part of thesis considers how EU-style competition policy travels to global competition forums. The fourth subquestion, addressed in part III of the thesis (‘the EU in global forums’) is the following:

d. In what ways does EU competition policy influence the deliberations in, and outputs of, global governance forums?

Finally, I will generalize the findings from the specific case of competition policy to a more general level of external EU influence. The final question is therefore:

e. What are the broader implications of the findings for the role of the EU as regulatory exporter beyond accession conditionality?
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Case selection

The thesis will study several cases where there is a significant level of engagement in the area of competition policy between the EU and the country or global forum in question. This is to allow lesson-drawing from positive cases of EU influence beyond membership. For the country studies, I selected countries that have a close relationship of association with the EU, but no short-term membership perspective. This will allow giving more empirical depth to the external EU governance literature and to learn lessons for a Union that in the short run is no longer enlarging, but rather engaging with non-member countries in a comprehensive manner through a range of regulatory association and trade agreements. With regards to the externalization of EU competition regulation to a global context, I selected forums with global coverage in which the EU actively participates, either at the EU level and/or through individual member states. Studying relevant global forums in competition policy where there is potential of EU influence will show how mechanisms of uploading and downloading work in practice and provide insights about the role of the EU in the global context.

The Norwegian case study (chapter 4) is relevant because of Norway’s participation in the EU’s internal market without being an EU member. Through the European Economic Area (EEA), Norway in theory fully adheres to the EU internal market acquis, including its competition rules. While Norway has deliberately chosen not to accede to the EU, the country is thus still unilaterally downloading a large part of the EU rules. Therefore, we still expect hierarchical governance (top-down, vertical and coercive dynamics: see most notably Lavenex, 2008) to play an important role in the relationship between the EU and Norway in competition policy, although not in the form of accession conditionality. How competition policy is implemented in the Norwegian context, in particular as rules that are not related to the single market are not transposed to the EEA, how the (absence of) formal supranationality of the EU rules is dealt with in the Norwegian context and how the Norwegian competition authority interacts with its EU counterparts are all relevant questions that this thesis will look into.

The Turkish case study (chapter 5) is relevant because of Turkey’s association with the single market through the EU-Turkey customs union and its uncertain status as a candidate for EU accession. While in the early 2000s, Turkish accession to the EU seemed imminent, this scenario has become increasingly unlikely. Arrangements between the EU and Turkey regarding the single market remain covered by the EU-Turkey customs union, which entered into force in 1996. The Turkish case study is relevant as the EU likely had a strong influence on the adoption of Turkish competition rules, but arguably less influence on the way this regulation was implemented in practice over time. In the absence of an imminent accession perspective, it is likely that networked governance (bottom-up, horizontal dynamics and cooperation: see most notably Lavenex, 2008) will play a relatively important and increas-
ing role in the implementation of competition rules. As in the Norwegian case study, the thesis will consider how competition rules are implemented in Turkey, how the (absence of) formal supranationality of the EU rules is dealt with in the Turkish context, and how the Turkish competition authority interacts with its EU counterparts.

One would think that potentially relevant country case studies should have included other countries in the EU’s neighborhood. At the same time of the EU accession rounds in 2004 and 2007, a ‘European Neighborhood Policy’ (ENP) was set up to deal with the EU’s new neighborhood. The ENP covers relations between the EU and a range of neighborhood countries in different policy areas. The policy has an Eastern dimension (‘ENP east’: Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine) and a southern dimension (‘ENP south’: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Tunisia, Syria). The EU even offers a (remote) accession perspective to “ENP east” countries.

Most countries covered by the ENP are however unsuitable case studies in the context of this thesis because there is little evidence of enhanced implementation of competition policy in the domestic context. In particular the externalization of competition rules to countries in the ENP south has proved very challenging. There are thus insufficient levels of implementation, including enforcement, to study EU engagement with these countries in the specific area of competition policy (Dabbah, 2007; Bender, 2013). The aftermath of the Arab spring in Northern Africa and ongoing civil wars in Syria and Ukraine (Donbass region) also make significant EU-inspired developments in competition policy unlikely in the short term.

The OECD case study (chapter 6) is relevant because its Competition Committee is one of the main global contexts where competition policy is discussed; the European Commission and most EU member states participate in it. The OECD works on a large number of trade-related issues in a number of different institutional settings. Its Competition Committee has been active since the 1960s and generated a high number of outputs, such as papers and guidelines. As membership of the OECD is selective, we would expect the EU to be relatively influential in uploading competition policy in this context. Still, we know little about the governance in the competition work of the OECD and the EU’s actual influence in this area. While we can assume that EU contributions to the OECD’s competition work are numerous, we know very little about these interactions in practice. More specifically, it is unclear what are the dynamics of the OECD’s Competition Committee, which are likely to shape EU influence, and how the EU and its member states engage with this Committee in practice.

The ICN case study (chapter 7) is relevant because next to the OECD it is the other main global competition network. Like in the OECD’s Competition Committee, the European Commission plus all EU member states participate in the network. The ICN was established
in the early 2000s on US initiative, and has been characterized as a truly horizontal governance network, where experts from competition authorities worldwide gather to deliberate and socialize. Since its inception, the network published many outputs in the form of best practices and training materials for competition authorities. Mainly because of the inclusive nature of the network and its focus on exclusively competition policy, we might expect a more intensive downloading rather than uploading by the EU from this network. While the governance of the network itself is rather well studied, we know little about the EU’s actual engagement. In view of the formal participation of DG Competition and competition authorities from all EU member states, we would expect also here many interactions between the network and the EU, although we do not know what these look like in practice.

While one would think that other relevant case studies should have included the WTO and UNCTAD (the United Nations Conference on Trade and Development), I would argue that this is not the case. The EU attempted to include binding competition rules in the WTO’s Doha development round, which was eventually unsuccessful. Since the negotiations ended in a deadlock, the WTO is in the near future not a likely candidate to address global competition matters. While the EU currently tries to reinvigorate the WTO, especially in the area of subsidies, it is early to assess what result these initiatives will have if any. A further possible global forum could have been UNCTAD, which adopted a set of ‘equitable principles and rules for controlling restrictive business practices’ in 1980. Adoption of this set represented an important stage in the development of transnational competition networks, but the relevance of UNCTAD as a global competition platform is currently limited since it mainly focuses on development issues (Maher and Papadopoulos, 2013). Therefore, in the area of competition policy UNCTAD is a forum that is mainly used by developing countries without much apparent engagement from the side of the EU.

Research puzzle

EU competition policy presents an interesting research puzzle for regulatory externalization. On the one hand, competition policy is one of the flagship EU policies. EU competition policy is a highly developed policy area that is as such relatively little contested within the EU itself, one of the areas in which the EU has exclusive competence and which has greatly contributed to the construction of the internal market. In that sense, EU competition policy seems indeed a likely candidate for successful export to non-EU countries and global networks. There are also indications that EU competition policy has been an inspiration for rule adoption and implementation across the world.

At the same time however, it is highly unclear how this externalization takes place beyond

accession dynamics. EU competition policy is traditionally characterized as a highly ‘supranational’ EU policy area (McGowan and Wilks, 1995), meaning a policy area where EU law prevails over national law coupled with top-down oversight from the European institutions. The experience with the implementation of EU competition policy in a top-down manner is closely related to the integration of the EU’s internal market. This begs the question to what extent EU competition policy can be successfully externalized beyond EU accession, meaning not only without binding oversight mechanisms, but also to what extent it can be used as a tool to achieve outcomes that are different from (full) market integration. Therefore, EU competition policy is a highly successful internal policy area where the EU is highly experienced; however, a number of questions can be raised regarding its externalization in practice.

Studying EU influence in contexts where the ‘hard power’ of the EU is mitigated is increasingly relevant. Rather than further enlargements, with the exception perhaps of the Western Balkans, the EU is likely to face further fragmentation and with that, divergent models of association. In addition to the EEA and the EU-Turkey customs union, new forms of association proliferate - not only in the discussions on the future relationship between the EU and the UK but also through increasingly ‘regulatory’ FTAs (i.e. free trade agreements that include regulatory harmonization) that the EU has been concluding with neighboring countries and key trade partners for some time. It is unclear what we can expect from these association models for internally supranational policy areas like competition policy. Similarly, in global policy forums the EU’s structural market power is likely to be mitigated by both the expert-driven nature of the discussions and the broad coverage of the membership. In the absence of binding global competition rules through the WTO, global discussions on competition matters will mainly take place in such forums. Below I will turn to a discussion of insights from the relevant literature about EU influence in the absence of EU membership.

**Limits of the literature**

Theoretically, the thesis builds on three main perspectives: the literature on external EU governance, the literature on the EU and global governance, and the legal literature on external EU competition policy. While these perspectives provide important insights into the externalization of EU competition regulation, they leave a number of issues unanswered regarding both the domestic implementation of EU-inspired competition rules in non-EU countries and the coordination realities of the EU’s engagement in global forums. Such implementation and coordination realities, understood as how competition rules are used in practice in a domestic non-EU setting, and what actual EU engagement looks like in global forums, are important because they will likely tell us more about EU influence than the formal (competition) rules or formal network membership in itself. In other words: adoption of competition laws or membership of a global forum are one thing, but considering what
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happens in practice after is at least equally, if not more important.

For Norway and Turkey, the country studies in the thesis, the literature on external EU governance (discussed in section 2.1) provides the most relevant insights. This literature looks at the influence of EU governance beyond its borders, mainly in EU’s immediate neighborhood. The main limit of this literature is its emphasis on the extension of EU rules, rather than on the implementation realities in the domestic context (Lavenex, 2004; 2014). Likely as a result of the emphasis on rule adoption, the external EU governance literature finds that accession conditionality is among the most successful drivers for externalization.

Competition policy was not among the main initial fields of empirical interest in the external EU governance literature, which to an important extent focused on democracy promotion rather than economic regulation. While an increasing number of studies have now looked into competition policy from an external EU governance perspective, these studies often focus specifically on the difficulties of exporting EU state aid rules to the EU’s near abroad in the absence of accession conditionality while not addressing the other aspects of EU competition policy or implementation realities (Blauberger and Krämer, 2013). The available work on Turkey relates to the adoption of competition laws more generally (Aydin, 2012b) but only to a limited extent to the implementation these rules in the domestic context.

For the OECD and the ICN, the global forums under study in this thesis, the literature on the EU and global governance (discussed in section 2.2) is the most relevant point of departure. This literature considers the export of the EU’s internal rules to multilateral networks and/or international organizations. While attributing an important role to global expert networks in general (Slaughter, 2004a; 2004b) and pointing out the EU’s preference for multilateral, institutionalized cooperation (De Búrca, 2013), the effectiveness of these global settings and the role of the EU in these settings beyond formal membership (i.e. coordination realities) remains little understood. A further limit of the literature is the assumption that the EU is deliberately attempting to export its internal policies to the global level, which is not necessarily the case for all policy areas or all global networks.

An increasing number of contributions have considered EU competition policy in a global governance context. Such contributions have compared the different global forums where competition policy is discussed (Botta, 2014; Damro and Guay, 2016) but only to a limited extent focused on the role of the EU in these forums. The OECD as a global forum for competition policy has received very little attention in the academic literature in general.

The legal literature on external EU competition policy (discussed in section 2.3) is relevant for both the country case studies and the global governance case studies. It is relevant in the context of this thesis because it closely follows developments in the competition field.
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and offers empirical details that are largely unavailable through other sources. This is in particular the case for the EU’s representation in global organizations (e.g. Kaddous, 2015 for global organizations in general) and for the mapping of existing global competition networks and their main substantive areas of work (e.g. Maher and Papadopoulos, 2012). But also for the country studies the legal literature is of empirical value as it maps the landscape of extraterritorial enforcement and of EU-style competition rules in bilateral agreements (most comprehensively: Papadopoulos, 2010). The main limits of the legal literature are the frequent lack of discussion of the implications of the empirical insights on the one hand, and the lack of attention for implementation and coordination realities beyond the ‘law on the books’ and formal organizational membership on the other.

Findings

From the empirical analysis the following findings emerge. The discussion of the internal workings of EU competition rules within the EU (chapter 3) shows that the implementation of EU competition policy is more diversified than is commonly assumed. While this policy area is often perceived as operating with little discretion at national level and strict oversight from DG Competition and the EU courts, the chapter shows that competition implementation in the EU actually includes a range of intermediate policy goals, national authorities and tools. The governance of EU competition policy can therefore be characterized as hierarchical, but with networked features.

In terms of goals, EU competition policy moved from an emphasis on reducing private national barriers in the internal market towards including the reduction of governmental impediments to EU-wide competition. In terms of enforcing agencies, this shift was accompanied by a proliferation of national competition authorities, both in old and new member states. These cooperate with the European Commission’s DG Competition through the European Competition Network (ECN). While EU National Competition Authorities (EU NCAs) are since 2004 bound to apply EU legislation in certain national cases, the range of instruments at the disposition of EU competition authorities also has become increasingly diverse. While traditionally relying mostly on infringement decisions with a fine, most NCAs now have the explicit powers to engage in ‘alternative’ enforcement, such as behavioral remedies, market monitoring and advocacy.

This thesis argues that such a margin of diversity rather than full harmonization can positively contribute to a successful externalization of EU competition policy to non-EU countries and global forums. First, the changing emphasis in enforcement to include state barriers to the internal market rather than exclusively private barriers diversifies both the motivations behind the export of regulation and the motivations for importing it. Second, national experiences with implementation of EU competition rules can provide more comparable experiences for learning in other national contexts, and internal cooperation in EU
networks could include non-EU countries. Third, international cooperation on alternative enforcement is less difficult to realize than case-related cooperation as it requires a lower level of similarly between systems. Despite this margin of variation, EU competition policy does remain to an important extent harmonized and as such provides a largely coherent regulatory framework, which can be a further advantage for its externalization.

Norway (Chapter 4) is a first case study in which I examine how EU competition policy is externalized beyond EU membership. Norway is associated with the EU through participation in the EEA, currently the closest form of EU integration without membership. Examples from the Norwegian natural gas market and the Norwegian food market show that implementation (or the lack thereof) is more varied than we would have expected in advance. Unilateral EU enforcement in the Norwegian gas sector through a hierarchical dynamic was ultimately unsuccessful in fragmenting market power, while networked cooperation between the Norwegian and EU competition authorities in the food sector has resulted in a more common approach to implementation in this area.

The case study therefore suggests that successful extension of EU competition policy to the Norwegian context relates to dynamics of learning and cooperation rather than compliance. While efforts to impose EU rules in energy matters made tensions explicit and emphasized direct economic interests between the EU and Norway, governance through cooperation in the ECN brought out a more productive interaction between the EU and the domestic (Norwegian) system, focused on common problem identification and problem solving directly between competition authorities. The networked approach thus seems more promising in the absence of EU membership, even in a close association such as the EEA where we would expect a more hierarchical implementation dynamic.

Turkey (Chapter 5) is a second case study in which I show the externalization of EU competition policy beyond membership. While accession of Turkey to the EU has become increasingly unrealistic, the Turkish and EU market are currently integrated through the EU-Turkey customs union. The examples of state aid and the telecom sector show a mixed picture in terms of EU competition implementation. The implementation of EU-style state aid rules has been unsuccessful in the absence of EU accession conditionality. The rationale for a state aid prohibition is less clear in a purely national context, both because it limits possibilities for rent-seeking and industrial policy and because it results in practical problems of implementation in the absence of a supranational authority. At the same time, the implementation of competition regulation in the telecom sector has resulted in a relatively successful opening of the mobile telecom market to non-Turkish companies. This happened in the absence of direct cooperation with EU competition authorities, but in a situation of external IMF conditionality and domestic alignment of interests for market opening.

The Turkish case study therefore suggests that successful extension of EU competition pol-
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icy strongly relates to the domestic context. In the absence of an accession perspective, it is more important to consider the role of competition policy in the domestic system – both in institutional terms and in terms of perceived gains and losses for domestic players. A key factor in ensuring a properly functioning competition system in Turkey is the capacity and influence of the competition authority in the domestic administration. The formal independence of the Turkish competition authority has proved to be less relevant than informal ways of the authority to exert influence.

Turning to the EU’s participation in global competition forums, the OECD’s Competition Committee (Chapter 6) is the fourth case study of the thesis and looks at the EU’s engagement in this global forum. In formal terms, the OECD is an organization with a limited membership, which is dominated by EU member states. The membership of the Competition Committee however also includes a large number of non-OECD members and is thus more inclusive than expected. At the same time, rather than staff from national ministries, many EU NCAs participate directly in the Committee and so does DG Competition. The Committee also focuses on outputs that are directly relevant for competition authorities, rather than policy recommendations. That is different from initial expectations since the OECD formally works with representatives from national governments.

The example of evaluation of competition enforcement in the OECD illustrates the production of guidance in a new and technical issue area. Many competition authorities participating in the Competition Committee were uncertain how to best approach this issue, and the choice for this topic was mainly inspired by the demand from the participating experienced competition authorities. The OECD had the capacity to develop guidance in the form of economic modeling that authorities can use to measure the impact of their enforcement. Several EU NCAs are already using this guidance, also in the absence of guidelines on this topic from the EU side. This example therefore shows that EU NCAs can use the OECD to produce (non-binding) guidance that was not provided in the EU context, in this case mainly with the aim at increasing the legitimacy of their enforcement practices in the domestic context. While the input for the guidance document was influenced by DG Competition and several EU NCAs, the example also shows the strong role of the OECD secretariat is the steering and preparation of the output.

The ICN (chapter 7) is the fifth case study in the thesis, and looks at the EU’s engagement with this global network of competition authorities which was established on US initiative. While we would have expected the EU to be an important importer of the best practices that are developed in the ICN, because of its inclusive membership and the leadership role of the US, the chapter actually shows that the ICN struggles to deliver relevant outputs for participating authorities in view of its inclusive membership and the absence of a supporting secretariat. This is particularly (but not only) the case for more experienced competition authorities such as EU NCAs. While all EU competition authorities participate in the
Chapter 1

ICN, levels of engagement are relatively low.

The ICN’s Advocacy Working Group (ICN AWG) illustrates this dynamic. The group focuses on providing marketing strategies to promote the benefits of the work of competition policy in the domestic context. Its working products increasingly consist of mapping documents where different authorities - including DG Competition and EU NCAs - relate about their experiences. For less experienced competition authorities, such outputs seem of limited value because they do not engage in a discussion of the proposed benefits of competition policy, or in a discussion on levels of state involvement in markets. More experienced (EU) competition authorities on the other hand will benefit more from the more technical evaluation guidance provided by the OECD, which has as an added value that the OECD products are considered more authoritative.

The findings from the chapters on the OECD and the ICN show that EU’s internal circumscribed diversity in the implementation of competition policy has been a positive scope condition for more effective engagement. That is enabled by a clear emphasis on expert deliberation and experience rather than structural market power in both forums. The EU can influence these deliberations due to the increased number of EU competition authorities, who account for an important percentage of participants in both the OECD and the ICN.

The OECD and the ICN case studies also suggest that the interest in effectively influencing the ongoing work in these global forums is at least partially inspired by the need to obtain working products in return, rather than by an explicit interest in regulatory export. Therefore, rather than to looking at export or import of policy as separate phenomena, it would be more appropriate to speak of levels of engagement (including both export and import). Similar to the case studies that relate to the externalization of EU policy to non-EU countries, also in the global forums a main scope condition for engagement is based on the demand of competition authorities.

Methodological considerations and data-gathering

Since the inquiry in this thesis emphasizes the empirical realities of implementation and coordination, I opted for an eclectic approach (Sil and Katzenstein, 2010), combining different angles of theoretical research in order to explain causal empirical patterns. Much of the studies in external EU governance and the EU and global governance are de facto using such an approach; rather than working from a delineated research paradigm, they combine elements from realist, liberal and constructivist theory to formulate different conditions under which externalization of EU governance is more or less successful (Schimmelfennig in Sil and Katzenstein, 2010). The aim of this thesis is to build further on existing theoretical approaches by elaborating on and giving empirical flavor to existing concepts and drivers. The aim has been therefore to identify the main theoretical insights from the literature and
work with the concepts in an open-ended manner.

For studying externalizations of EU governance in search of implementation patterns and the drivers to these patterns, applying strict causal testing is not a suitable approach. European integration studies are generally characterized by a ‘dependent variable problem’ (Zielonka, 2006) - the difficulty of conceptualizing the outcome of European integration as such. This issue is even more accentuated when looking at external dimensions of internal EU policies, or differentiated layers of European integration in particular when considering implementation patterns. The lack of a relatively fixed dependent variable is problematic for models with a causal setup (e.g. King, Keohane and Verba, 1994). And because of the open dependent variable, it is also less sensible to predefine an exhaustive set of causal mechanisms. Therefore I have chosen for an open research design for studying the externalization of EU policy.

The thesis thus aims at detecting causal patterns of change from the empirics, rather than testing causality. From studying legal systems and transplants, lessons can be learned in order to arrive at a more dynamic conceptualizations of causation. Experimentalist governance (Sabel and Zeitlin, 2008) for example studies legal systems by emphasizing change and focusing on process rather than outcomes. In an experimentalist logic, open-ended regulation is continuously adjusted through a feedback loop. In conceptual terms, this means that both the main drivers and the main characteristics of experimentalist governance are defined in an open-ended manner. Milhaup and Pistor (2008) also emphasize the dynamic character of regulation. Their work underlines the interaction between regulation and markets (what they call: ‘the rolling relationship between law and markets’). Legal transplants, in their conception, are per definition dynamic and context specific. Therefore, we should focus on open categories such as the receiving context, the function of the law and the supply and demand for law rather than on *ex ante* fixed conceptual distinctions.

The thesis aims to develop a mid-range theory, which is ‘intermediate to general theories of social systems which are too remote from particular classes of social behavior, organization and change to account for what is observed and to those detailed orderly descriptions of particulars that are not generalized at all’. While these theories are not derived from a ‘single, all-embracing theory of social systems’, they are more than empirical generalizations (Merton, 1968: 39-41).

Mid-range theories fit well with an eclectic theoretical setup, since they may be compatible with several grand schemes of theory: ‘a given theory of the middle range, which has a measure of empirical confirmation, can often be subsumed under comprehensive theories which are themselves discrepant in certain respects’ (Merton, 1968: 43). This enables an open view to empirical realities, while at the same time benefitting from multiple theoretical insights. An advantage of remaining close to ‘real world problems’ and solutions is
that it allows for a more productive dialogue with policy makers and scholars in other disciplines. More specifically in the case of this thesis, the empirical emphasis enables a dialogue with policy makers at the European institutions and national competition authorities on the one hand, and scholars from legal disciplines, most notably from European law and competition law, on the other.

In terms of written sources, the most important primary resources for this thesis were legislative documents, guidelines and case law. The main types of legislation used in this thesis are EU competition law (EU treaties, regulations and directives) and national competition laws. In order to consider the implementation of these rules, guidelines, decisions by competition authorities, press releases and speeches were key points of reference, as were outputs of global competition forums (recommendations, best practices etc.). Secondary written sources, such as academic volumes and articles but also reports from think tanks and other commentaries were highly useful to understand both the relation between the EU and the case study in question in more general terms, and to contextualize the rules and implementation realities identified through the primary sources.

In order to properly assess the implementation realities in the different contexts, it was key to complement the primary and secondary written sources with semi-structured expert interviews. In the period from November 2012 until May 2015, I spoke extensively with 65 experts in the field. These interviews mainly took place in Brussels, Bergen, Ankara and Paris, but several interviews also took place in The Hague, Oslo and Istanbul and exceptionally via Skype or telephone. In Bergen, I extensively visited the Norwegian competition authority and in Ankara the Turkish competition policy. I also visited the OECD headquarters in Paris and attended an ICN workshop. In addition, I conducted fieldwork on developments in EU competition policy in Brussels, where I was living during the main part of my PhD trajectory.

An anonymized list of the interviewees and more informal ‘informants’ that have provided highly valuable background information can be found in Annex I. The majority of the respondents were (former) employees of competition authorities: officials working at DG Competition, officials from national competition authorities both in the EU and beyond, and officials at the OECD. However, interviewing only competition officials would give a too narrow perspective on the context in which competition enforcement takes place. Therefore, in addition interviewees also included staff from related national ministries or agencies, think tanks, organizations representing business interests, competition practitioners from the private sector and occasionally academics.

The balance between written resources and interviews varies between the case studies due to the availability of written material. For the chapter on EU competition policy (chapter 3) and the chapters on the OECD and the ICN (chapters 6 and 7), the main emphasis is on
written material, which was widely available since the best practices and recommendations issued by these forums are generally publicly available in English. For these parts of the research it was therefore less necessary to complement the written sources with interview material. For the chapters on Norway and Turkey (chapters 4 and 5) on the other hand, much less material was available in English. The emphasis in those chapters has therefore been more on the semi-structured interviews. This balance also shows in the number of interviews for each empirical case study: the largest number of interviews was conducted for the Turkish case, where there was the least available written material in English; the smallest number of interviews was conducted for the ICN, where almost all documentation is publicly accessible online.

In order to accommodate the open-ended nature of the research question, the interviews were not standardized. Instead, questions were formulated for each interview on the basis of the research questions and a first analysis of the available material (academic articles, primary written resources and interviews) at the time of the interview. The idea was to understand not so much the personal interpretation of the interviewee about the situation at hand, but to gather material on which to base the analysis (i.e. not: ‘what do you think about…’ but ‘can you give an example of…’). The open-ended nature of the interview gave respondents the possibility to prioritize certain issues over others, but the main topics for the interviews were generally agreed in advance. Two thirds of the interviews have been recorded and transcribed. From the interviews that have not been recorded – in cases where the respondents felt too constrained by recordings - detailed notes were taken.

In a number of occasions the interviewees, especially practitioners with a legal background, felt uncomfortable with the idea of a recorded interview for research purposes. Not only did some interviewees doubt the value of interviews as a resource for research in the first place, but many lawyers seemed concerned about possible quotations and references in the thesis, which they felt could be easily attributed to them personally. Although they were very happy to meet me for an informal coffee or lunch, they were more suspicious of an ‘official’ interview that was to be recorded and transcribed. These concerns are understandable in a legal culture which is relatively unfamiliar with the interview as a source for research, where it is considered good practice to remain off the record (‘just in case’), and where information regarding clients and infringement addresssees is often highly confidential. Also the dual role of respondents as competition professionals on the one hand and institutional enforcers on the other may conflict; this can be an additional reason for caution from the side of the respondents. Where interviewees felt uncomfortable with recordings, I decided not to record and let the information gathering prevail over reliability concerns.

Finally, a number of considerations regarding to the role of my own background in the interviews. Coming from a competition law perspective has generally been very helpful in conducting the expert interviews. It allowed me to make the translation from my inquiry to
the realities of the interviewees, which, in turn, enhanced my credibility towards them. It also allowed me to gain access to my interviewees. Interviewing competition administrators for a social science research project however required a change in outlook from my side, as I had to start thinking about broader implementation patterns rather than in terms of technical issues. While difficult in the first interviews, when the perspective of the inquiry clarified in the course of the research project, I became increasingly comfortable with my own position as a social science researcher. Once that had happened, my legal background allowed me to interpret the answers of my interviewees, and therefore facilitated the research.

**Contribution**

The main contribution of this thesis is that it shows the practical implementation and coordination realities of EU competition policy externalization. Chapters 4-7 discuss what happens when EU competition policy, understood as both rules and implementation, is externalized to non-EU countries and global forums. Based on the existing literature, we have only a limited understanding of how EU competition policy is received in such contexts.

That is remarkable in the first place because competition policy is a key policy area within the EU, which is relatively uncontested. In that sense, we may have expected that the dynamics of externalization of this policy would be a primary focus of the literature that looks at EU external governance and the literature on the EU and global governance.

But more importantly, it is remarkable because the externalization of rules - either by making non-EU countries or global forums adopt rules that are similar to those of the EU - as such does not tell us much about EU influence. What matters for influence is whether and how these rules are actually used in a domestic non-EU context (how they are implemented in the country to which they are externalized) and if and how EU participation in global forums actually results in influence on this forum (not necessarily by influence on the regulatory output but also in setting the agenda and contributing to best practices).

The thesis will also highlight conditions that shape implementation and coordination realities of EU competition rules abroad. While it is often assumed that the EU’s institutional setup or governance mode is a key factor in the externalization of EU rules, in order to go beyond rule adoption it is insufficient to only consider the internal governance mode of the policy area. Chapter 3 discusses the implementation of competition policy within the EU in a broad sense in order to identify potential internal scope conditions for successful externalization. By looking in particular at the rationale for implementation, a discussion beyond governance modes allows us to consider motivations for externalization from the EU side and on motivations for import from the non-EU side.
Structure of the thesis

The thesis is divided in three parts. Part I (chapters 2 and 3) sets out the research approach and discusses the internal implementation of EU competition policy, thereby setting the stage for the empirical case studies of policy externalization. Part I of the thesis answers the subquestions: a) How have scholars characterized the ways in which the EU is externalizing policy to closely associated non-EU countries and global forums, and what is the research approach of the thesis in mapping this externalization?; and b) What are the main governance features of EU competition policy that are possibly relevant in light of the externalization of this policy?

Chapter 2 first discusses the existing literature that is relevant for the thesis: this is mainly the literature on external EU governance, the EU and global governance, and legal literature on the externalization of EU competition law. While this offers many useful starting points to analyze external EU influence, we know little about how the domestic context of non-EU countries and global forums influences implementation. There are also several empirical gaps with regards to the externalization of the specific area of EU competition policy. The chapter then outlines how the research is set up. While in the country case studies, the main distinction is between hierarchical and networked governance, for the global forums, the main distinction is between policy export and policy import. For all case studies, the ‘domestic context’ of the non-EU country or global forum is expected to be a key factor for implementation, i.e. the national institutional context and the institutional dynamics at play in the global forum.

Chapter 3 proceeds with an analysis of the characteristics of EU competition policy that are likely relevant for externalization. In this chapter, the emphasis is placed on a partial shift from hierarchical to networked governance, in practice operationalized as a shift from top-down enforcement by the European Commission based on compliance to more inclusive and bottom-up measures of regulating markets. This shift is however only partial: the implementation of EU competition policy has become more diversified than we would have anticipated in a policy area that is traditionally characterized by full harmonization. This is also the case for the goals that underlie EU implementation of the competition rules. The chapter argues that this diversification is likely to have positive consequences for externalization.

Part II addresses competition policy implementation in Norway and Turkey. These cases allow us to consider how externalization of EU competition policy to non-EU countries takes place in the absence of full EU membership. This part therefore addresses subquestion c) In the absence of a clear perspective of EU membership, how is EU-style competition policy implemented in non-EU countries that are closely associated with the EU?
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Chapter 4 discusses the implementation of competition policy in Norway, which internalized the EU’s competition policy through being part of the internal market in the European Economic Area. In this chapter, the variation of implementation of EU-inspired competition policy is underlined by exploring two different dimensions of implementation. The example of the Norwegian natural gas markets shows the limits of an almost fully hierarchical approach by DG Competition in the absence of domestic implementation. The example of food markets illustrates on the other hand that institutional cooperation mechanisms between EU competition authorities may have a spillover effect to areas that are not covered by the EEA agreement, provided that they allow for the participation of non-EU actors. Even in a context where we would therefore expect the EU to be able to impose its competition policy, the networked dimension of implementation is of significant importance.

Chapter 5 examines the implementation of competition policy in Turkey, which has adopted the EU’s competition rules as part of an ongoing accession process, with a customs union as intermediate stage of market integration. In this chapter, the variation in implementation of EU-style competition policy is underlined by considering the implementation of state aid rules and of competition rules in the telecom sector. While the implementation of the state aid rules largely failed in the absence of a short-term accession perspective, the telecom market shows a more successful example of market opening. The latter was possible in the absence of direct possibilities for cooperation in EU networks; rather than EU cooperation, a combination of external conditionality and domestic interests allowed for this success to materialize. Even in a context where we would have expected a mainly networked governance dynamic, cooperation with the EU on competition matters only materialized to a very limited extent.

Part III addresses the EU’s influence in the OECD and the ICN, the two main global forums working on competition issues in which the EU is active. This part answers subquestion d) In what ways does EU competition policy influence the deliberations in, and outputs of, global governance forums?

Chapter 6 considers the EU’s engagement with the OECD’s Competition Committee. Most EU member states participate in the work of this Committee, which makes it likely that the EU will have much influence on the outputs of this forum. However, in view of the scarce literature on the OECD’s work on competition policy, we do not know much about the functioning of the Competition Committee. The chapter will look into the EU’s participation in the Committee and in particular assess the OECD’s work on the evaluation of competition enforcement.

Chapter 7 discusses the EU’s engagement with the ICN. Based on the literature, we would expect EU NCAs to download many of the ICN’s outputs because of its ‘competition only’ focus and inclusive nature. However, the chapter shows that these governance features ac-
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tually decrease the relevance of the ICN’s work in practice. The chapter will assess the ICN’s of the Advocacy Working Group, which works on best practices for promoting the benefits of competition policy.

Finally, the conclusions of the thesis relates to subquestion e) What are the broader implications of the findings for the role of the EU as regulatory exporter beyond accession conditionality?

Chapter 8 presents the main findings and links the findings from the empirical chapters to the concepts introduced in the theoretical chapter. The chapters offers some reflections on what can be considered as a ‘successful’ externalization of competition policy. It also presents policy implications of the findings and identifies a number of areas for further research.
PART I: SETTING THE STAGE
2. **RESEARCH APPROACH**

**Conceptualizing external governance**

This chapter outlines three theoretical perspectives on the externalization of EU regulation and the research approach of the thesis. The main research question, as outlined in chapter 1, regards the coordination and implementation realities of externalization of EU regulation in the absence of accession conditionality in non-EU countries and in global networks. This chapter provides a theoretical background to this question in proposing a conceptualization of the externalization of EU regulation, and discussing its main characteristics and scope conditions as they emerge from the existing literature.

Section 2.1 discusses a first theoretical perspective: the literature on external EU governance. This perspective emphasizes externalization of EU regulation to nearby countries through different governance ‘modes’, distinguishing mainly between hierarchical and networked modes of governance. The external EU governance literature focuses mainly on how the EU extends regulation, and on what kind of governance the EU extends to non-EU settings.

Section 2.2 discusses a second theoretical perspective: the literature on the EU and global governance. Theoretical perspectives in this category discuss the relationship between EU and global networks and mainly focus on the uploading and downloading (import and export) of EU regulation.

Section 2.3 discusses a third perspective: the legal research on external EU competition policy. This literature concentrates on unilateral enforcement of EU competition law and bilateral agreements between competition authorities on the one hand, and on issues of EU external competence and representation on the other. The legal research on EU competition policy therefore focuses on specific aspects of externalization.

While these existing theoretical perspectives from the literature offer highly valuable insights on the externalization of EU regulation, a major shortcoming is that the emphasis is generally placed on the formal export of rules rather than on implementation realities in the domestic context or on coordination realities in global forums. In order to explore such realities, section 2.4 outlines the theoretical approach followed in this thesis, building on the three theoretical perspectives discussed. Section 2.5 concludes with a summary of the chapter and links its main points to the next chapter on (internal) governance of EU competition policy.
Chapter 2

2.1 External EU governance

The literature on external EU governance provides insights regarding the extension of EU rules and practices to non-EU countries, more specifically to countries in the EU’s geographical proximity. The external EU governance literature proposes an ‘inside-out’ perspective, where EU governance is externalized from the core to concentric geographical circles. Emphasis is placed on how externalization takes place by looking at so-called “modes of governance” and their scope conditions; the main governance modes are conceptualized as hierarchical (top-down, vertical) governance and networked (bottom-up, horizontal) governance. Below I will discuss the insights and limits of the external EU governance literature on the extension of EU rules and practices to non-EU countries (section 2.1.1.) and the insights of this literature more specifically in the area of competition policy (section 2.1.2.).

2.1.1 Discussion of the external EU governance literature

The external EU governance literature works with an inside-out perspective to conceptualize EU influence beyond its borders. From such a point of view, external influence is understood as gradual EU integration of non-EU countries. Therefore, rather than considering EU membership as a zero-sum concept, this literature interprets EU integration as a system of concentric rings or circles of influence (De Neve, 2007). This idea is perhaps most clearly reflected in the work on external EU governance of Schimmelfennig (e.g. 2010) and Lavenex (e.g. 2014). Schimmelfennig initially focused in particular on transformation in recent EU member states following accession, and then started to consider the idea of ‘Europeanization’ extending beyond the member states. Lavenex on the other hand initially focused on EU influence in the EU’s new neighbourhood after enlargement (ENP East and ENP South) and from there evolved to a more theoretical research agenda on EU external influence in the broader sense. The main implications of the inside-out approach of external EU governance are threefold.

First, external EU policy is considered an extension of its internal policies, where the emphasis is on the externalization of regulation in a certain policy area. This implies that work in this field looks mainly at specific policy areas or sectors.

Second, the external EU governance literature considers that external governance is a continuation of the internal governance in a given area: in other words, it presumes a link between internal and external governance in a given policy area. This attributes relevance of the internal EU governance dynamic for any externalization beyond the EU. The approach therefore differs from a more traditional distinction between internal policies on the one hand, and ‘foreign policy’ on the other hand.

Third, an inside-out perspective of EU integration implies that in the geographical focus is
mainly on nearby countries in the EU’s influence sphere. Empirically, external EU governance is therefore most interested in countries in the EU’s immediate neighborhood. This immediate neighborhood is dynamic and has significantly changed with EU enlargements, most notably with the 2004 and 2007 enlargements to eastern Europe. Currently, countries falling in the neighborhood remit include EFTA countries such as Norway and Switzerland; current, potential or formal accession candidates such as Turkey and Macedonia; and countries covered by the ENP East (Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine) and ENP South (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Tunisia, Syria). As the first country to leave the EU, the UK will also become a neighbor rather than an EU member state.

**Governance modes**

The external EU governance literature mainly distinguishes between hierarchical and networked modes of governance (Lavenex, 2008); some contributions distinguish markets as a third main governance category (Lavenex and Schimmelfennig, 2009; Lavenex, Lehmkuhl and Wichman, 2009). Hierarchy is conceptualized as a top-down or vertical mode of governance, where externalization occurs through coercion. EU accession conditionality is one of the clearest examples of such hierarchical governance. Networks are a bottom-up mode or horizontal mode of governance, where externalization mainly occurs through networked cooperation, for example by opening internal EU networks to non-EU actors. Such governance can be both functional and social in nature, focusing either on problem solving and/or on the socialization of actors involved. Markets are a third mode of governance, where ‘outcomes are the result of competition between formally autonomous actors rather than the result of hierarchical harmonization or networked co-ordination’ (Lavenex and Schimmelfennig, 2009: 799). This latter mode of governance has not been used extensively in the literature, likely because the networked mode of governance also comprises regulatory competition when it is interpreted as non-coercive governance.

Hierarchical governance is most commonly associated with the export of rules, and networks with the implementation of these rules in the domestic context. However, especially in earlier work, external EU governance has been defined as the shifting of the *legal border* of authority, or the extension of the EU acquis of rules to non-members (e.g. Lavenex, 2004). Therefore, irrespective of the governance mode, the dependent variable of the research is a change in domestic rules, rather than a change in attitudes practices or implementation. Perhaps not surprisingly, these studies thus concluded that hierarchical governance in the form of accession conditionality is key for successful rule export. More recently,
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the focus of the external EU governance literature is increasingly towards the potential of networked governance in external dimensions rather than hierarchy. This can be linked to two developments: the limits of EU enlargement and the increased emphasis on new forms of governance in the EU itself.

EU enlargement was a highly successful model of EU regulatory export in the recent past, especially in the early 2000s when ten new member states in Central and Eastern Europe acceded the Union. However, it is not likely that additional countries will accede to the EU in the short run. In the absence of accession conditionality, the possibility that the EU can unilaterally dictate the terms for the relationships with neighboring countries (hierarchical governance) decreases. Where there continues to be a level of asymmetry between neighboring countries and the EU, conditionality becomes mainly a matter of (economic) market access, rather than a conditionality extending directly to political issues and governance reforms. This is the case both for countries that enjoy a historical and geographical proximity with Russia (ENP East) and countries in Northern Africa (ENP South).

In addition, internally the EU hierarchical governance mode might be on its return in favour of networked governance modes. Studies on ‘new governance’ emphasize a wide range of issue areas where EU policy fundamentally differs from supranational dynamics (see e.g. Tömmel and Verdun, 2009; Héritier and Rhodes, 2011; Sabel and Zeitlin, 2010). In many of the issue areas, such as social policy, the EU does not have exclusive competence and therefore has to cooperate with member states in order to achieve and define policy goals. The Open Method of Coordination, where member states jointly coordinate policy, is a prime example of such cooperative or horizontal governance. This tendency is also said to emerge in issue areas that have traditionally been regarded as hierarchical, most notably enlargement policy (Tulmets, 2010), and competition policy (Svetiev, 2010) which is the focus of inquiry in this thesis.

Therefore, while initially the focus was on the export of EU rules through hierarchical modes of governance, both the limits of EU enlargement and the development of new modes of governance within the EU increasingly necessitate a shift towards networked modes of governance and implementation practices. While there is an increasing focus on network and market modes of governance in the context countries without accession perspective in the European neighbourhood (Lavenex, 2004; 2008 Schimmelfennig, 2007; 2010; Lavenex and Schimmelfennig, 2011), studies on external EU governance generally do not consider the implementation of the transposed acquis (Lavenex, 2014).

While progress is being made in the Western Balkans, it has been anticipated that none of the current candidate countries are likely to accede before 2025 - Politico 15 December 2016 (http://www.politico.eu/article/the-race-for-eu-membership-neighborhood-turkey-uk-european-commission/).
Scope conditions

The external EU governance also identifies several scope conditions that may result in successful rule export, most notably EU institutions, EU (economic or political) power and domestic structures of the ‘target countries’ (Lavenex and Schimmelfennig, 2009). These are conceptualized as alternative, rather than cumulative explanations for the effectiveness in a given sectoral external dimension. The EU institutionalist explanation emphasizes the governance mode within the EU to account for external success. The power-based explanation emphasizes the (economic or political) power of the EU and the interdependence between the EU and the non-EU country in question. Finally, the domestic structure explanation emphasizes the governance mode of the domestic context as the key determinant of successful externalization, and is therefore similar to the EU institutionalist condition, but on the receiving end.

In particular, the literature on external EU governance has been interested in how internal EU governance modes (i.e. the EU institutionalist scope condition) shape external governance modes. Several contributions contrast the EU governance mode in sectoral dynamics (e.g. environment, aviation) with the governance mode in the overarching ‘macro’ EU policy (e.g. EEA, ENP). They conclude that not EU foreign policy objectives from the ‘macro’ policy, but rather ‘functionalist’ or sectoral logics are crucial in determining external governance modes (Lavenex, Lehmkuhl and Wichmann, 2009; Lavenex, 2014; Lavenex, 2015). For example, while the ‘macro’ policy ENP is considered to be a form of networked governance, the specific influence of EU aviation policy in Morocco and the Ukraine, both ENP countries, seems to follow rather a model of hierarchical governance, which is also the internal EU governance mode (Lavenex, Lehmkuhl and Wichmann, 2009).

In addition, also the institutional setup in the non-EU country (i.e. the scope condition of domestic structures) has been the subject of study (Schimmelfennig and Sedelmeier, 2004; Börzel, 2010; Börzel and van Hullen, 2011). The main conceptual idea is that a ‘fit’ between the political and institutional governance of the EU and the governance in the non-EU country results in a successful export, while a ‘misfit’ reduces the possibility for successful regulatory transfer. That is mainly due to the adaptation costs in the non-EU country where there is a large gap between the governance models, either in terms of money and/or influence for domestic players (Börzel, 2010; Börzel and van Hullen, 2011). Relatively undemocratic regimes will face significant adaptation costs if they want to approximate EU governance models with unsure outcomes, in particular if statehood is contested: the latter makes it difficult to bring about change even if there is political will to do so (Börzel and van Hullen, 2011). The literature also identifies other scope conditions related to the domestic structure, encompassing resonance and perceived legitimacy of EU rules and domestic capacity (Schimmelfennig and Sedelmeier, 2004).
Chapter 2

When regulatory export is not limited to rule adoption but also includes implementation of EU-style rules, a question that arises is which scope conditions would be relevant in such a scenario. When we consider implementation of EU regulation in non-EU countries, the emphasis is likely on more horizontal forms of governance, where we would expect in particular the domestic structure and the EU institutional setup to be relevant scope condition (rather than market power). That is because the working with imported rules in practice will depend to a large extent on the capacity and the institutional context of the receiving country, rather than on the EU’s capacity to impose formal rule adoption.

**Merits and limits**

The key insight of the external EU governance literature is the conceptual framework that it provides in reflecting on regulatory export as diffused European integration. In doing so, the external EU governance literature links internal features of EU sectoral governance to regulatory export. In addition, both the external EU governance literature and the literature that discusses ‘Europeanization beyond Europe’ increasingly emphasize the relevance of the receiving (domestic) side of regulation, and therefore also take into account the interaction between EU governance and domestic governance in the non-EU country.

However, the literature has a number of important limits. One of these is the continued emphasis on hierarchical modes of governance and on the export of rules. While the contributions show an interest in networked governance in theory, this networked governance is per definition ancillary to hierarchical governance in a setup that looks at the export of rules, rather than practices. External EU governance does not consider the implementation of regulation in practice, but has more focused on the adoption of EU-style rules (“on the books”). The crucial question as to how and if these rules are applied and developed in the domestic context is not taken into account and deserves further study.

A related limit is that the emphasis of the external EU governance literature is strongly on the side of the EU. While understandable, since the point of departure is to understand how the EU can shape regulatory regimes, the attention for the interaction between EU governance and domestic governance in the non-EU country remains understudied both in theory and practice. Also the range of factors that are relevant to consider in the domestic context needs more elaboration.

Finally, in terms of case studies, the theoretical literature on external EU governance seems mainly interested in areas of EU policy like democracy promotion, environmental policy and human rights, rather than on the externalization of economic governance to the EU’s near abroad (e.g. Lavenex and Schimmelfennig, 2011). Since external EU governance considers regulatory export as diffused integration, one would expect the focus to be on areas that are the cornerstone of EU integration (i.e. rules that directly relate to the internal
Research approach

While a number of contributions focus on competition policy from an external EU governance perspective (see most notably Aydin, 2012a; Blauberger and Krämer, 2013; Botta, 2013; Dimitrova and Dragneva, 2013), these often relate to the externalization of state aid, and therefore to a quite peculiar aspect of EU competition policy. This will be discussed below.

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<td>3) Domestic conditions</td>
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Figure 2.1: External EU governance: hierarchical and networked

2.1.2 Insights on competition policy

A growing number of contributions considers competition policy from the perspective of external EU governance; however most of this work focuses on the externalization of EU state aid rules rather than regulation on cartels, abuse of dominance and mergers. There is also a fair body of work discussing the internal governance mode of EU competition policy. Since internal governance is crucial from an external EU governance perspective, I will shortly address this literature as well.

Governance in EU competition policy

While EU competition policy has been traditionally of limited interest to the governance
literature, and to the social science literature more in general, this changed after Regulation 1/2003 entered into force. The Regulation introduced important changes in the previously centralized and top-down (hierarchical) enforcement. DG Competition started engaging more actively with national competition authorities (NCAs) and enforcing competition law in an ex post manner. Rather than working with a notification system, the initial assessment of illegality in cartel cases shifted largely to companies. This change has been interpreted by some authors as a shift to ‘multilevel’ or ‘experimentalist’ governance (Cengiz, 2010; Svetiev, 2010).

While Regulation 1 was presented by the European Commission as a decentralization of competition enforcement to NCAs in the different member states, some argued that in fact it was rather a ‘centralization in disguise’ since the Regulation would bring the NCAs closer to DG Competition and subject to control of the latter (Wilks, 2005; Lehmkuhl, 2009). After 15 years in practice, it seems that accusations of an assertive seizure of power by DG Competition have been at least partially unfounded (Kassim and Wright, 2009; Bender, 2014). However, the actual cooperation between DG competition and the NCAs remains somewhat of a black box. Similarly, with regards to the active engagement of companies in the enforcement process, for example through commitment procedures (Svetiev, 2014) there is uncertainty on how these procedures actually work in practice and to what extent these procedures are actually ‘new’ at all (Wils, 2015).

Whether EU competition governance is more hierarchical or more networked in nature therefore remains an unanswered question. The governance mode of EU competition policy is relevant because according to the external EU governance literature, this is an important scope condition for the externalization of EU rules, and is likely to influence the governance mode of externalization.

**External EU governance – state aid**

Several contributions on external EU governance in competition policy have specifically focused on EU state aid policy. This research strongly suggests that this element of EU competition policy is difficult to export beyond EU membership. Internally, state aid is enforced in a top-down manner (hierarchical governance). National (competition and/or state aid) authorities are not involved in this area, or only to a limited extent - for example to help with notification or act as national information points (Botta, 2013). State aid is also different from other areas of competition policy because interests and costs are more directly visible (Blauberger, 2009; Botta and Schwellnus, 2015): a state aid prohibition directly touches upon the capacity for national governments to engage in market support, and limits their room for industrial policy. Finally, state aid is unique because the EU competition regime is only system in the world with a state aid prohibition in force. The existence of this prohibition is linked to the creation of the EU’s internal market, where the idea is that state support
from member states would put (non-subsidized) companies from other EU members in an unfair position.

While in EU member states the implementation of state aid regulation is generally effective, this seems to be the result of top-down EU intervention rather than networked learning. Blauberger (2009) argues that the high level of behavioral compliance with EU state aid rules in Central and Eastern European Countries (CEECs) is mainly realized through the ‘stick’ of enforcement at the EU level. He emphasizes that the effectiveness beyond rule adoption mainly results from making certain types of aid unattractive for local authorities and companies by utilizing the uncertain nature of vertical enforcement. In other words, the Commission can channel both the granting and the demand for state aid because the rules are highly complex and the burden of proof is on the member state.

Botta and Schwellnus (2015) consider state aid compliance in the pre-accession phase in recent EU member countries (CEECs, Romania, Bulgaria and Croatia). The authors more specifically look into the role of national state aid monitoring authorities that were put in place before accession either as part of a ministry or of the NCA. They conclude that these authorities, or the institutional dimension of conditionality, were less relevant than direct conditionality (i.e. direct influence on local authorities to reduce state aid) in reducing state aid levels. These findings on the pre-accession period therefore complement and confirm the findings of Blauberger in that compliance seems to be hierarchical rather than based on mechanisms of socialization and learning. Blauberger moreover observes that in the CEECs there was not a single example documented of national authorities recovering illegal state aid pre-accession (2009: 1036).

Since effective compliance with EU state aid rules seems directly linked to centralized enforcement at the EU level, implementation is more erratic in countries with a remote accession perspective. Blauberger and Krämer (2013) argue that state aid is generally not successfully implemented beyond supranational modes of governance in the internal market; therefore, state aid is effective in the EEA, which is essentially an extension of the Single Market beyond the EU, but less so in EU candidate countries before accession, such as Croatia (effectively an EU member since July 1st 2013), Macedonia and Turkey, and even less so in countries with a more remote accession perspective, such as countries in the Balkan region and ENP countries.

Botta (2013) illustrates this in further detail for countries in the Balkan area (South East Europe or SEE countries), where, with the exception of Croatia, the lack of a clear timetable for EU accession has seriously hampered the implementation of state aid regulation. Botta argues that setting up national monitoring agencies for state aid has not been effective in the SEEs; in the absence of a short-term accession perspective, state aid schemes were not effectively reduced or changed in these countries despite the enactment of legislation and
the existence of monitoring agencies. The lesson learned here is that national authorities who monitor state aid schemes are, even when formally independent, in a difficult position in the national context, and without external incentives of accession beyond technical EU support are not able to guarantee effective implementation of EU-style state aid regulation.

In ENP countries without a direct accession perspective, the export of state aid regulation seems least successful. In these contexts the EU actively tries to approximate domestic legislation, including in the area of competition and state aid, through association agreements. Dimitrova and Dragneva (2013) focus on domestic conditions in Ukraine and in particular on ‘informal’ (i.e. non-institutional) veto players in the national context, blocking rule adoption and implementation of state aid regulation. This sheds further light on domestic realities of the absence of timely accession perspectives, where veto players (in this case national oligarchs: post-communist entrepreneurs) with direct interests in maintaining the status quo mobilize successfully against limitations of their freedom of operation, such as state aid regulation. The authors see a very limited role for networked governance in a centralized, hierarchical administration such as in Ukraine, and propose that stronger external incentives are necessary to overcome domestic veto players. What we can take away from this study is that national veto players may block the adoption of rules that impede their leeway when accession conditionality is not sufficiently strong.

Freyburg, Lavenex, Schimmelfennig, Skrikpa and Wetzel (2009) consider democracy promotion in the ENP east and ENP south through functional cooperation in state aid, water management and asylum in Moldova, Ukraine and Morocco. Empirically, the article concludes that rule adoption and democracy promotion in the area of state aid is weak in all three countries under study. Freyburg (2011) further explores the possibilities for socialization in the ENP south. She looks at EU-funded twinning programmes in the Moroccan bureaucracy with regards to state aid, and finds that networked governance can result in changed attitudes with regards to democratic governance (understood as transparency, accountability and accessibility of governance). Although the latter study shows some promising effects with regards to close socialization of civil servants with regards to general elements of democratic governance, it is difficult to infer implications for effective implementation of state aid legislation from this work. Establishment and implementation of state aid rules remain highly problematic in the ENP south in general, including Morocco, despite EU twinning and assistance programmes (Bender, 2013). Issues with regulation of EU-style state aid and other elements of competition policy have probably become even more accentuated in the aftermath of the Arab spring, as the EU’s development model of free trade has become increasingly contested.\footnote{See e.g. ANND (Arab NGO network for development): \url{http://www.annd.org/data/item/pdf/128.pdf}}
Research approach

External EU governance – cartels, abuse of dominance, mergers

There is only a small body of available work on the externalization or export of EU competition regulation in the area of cartels, abuse of dominance and mergers. A notable exception is Aydin (2012a), who discusses the different strategies of DG Competition in externalizing EU competition regulation. She distinguishes between unilateral enforcement of EU rules, binding and non-binding multilateral forums, bilateral cooperation agreements on competition and export to candidate member states, EFTA and neighbour countries. Aydin argues that although DG Competition has effectively mobilized all these strategies, it has been most successful in the export of EU competition rules to the immediate neighbourhood. However, she also points to the limits of such regulatory transfer, both in terms of implementation of competition legislation as well as in terms of geographical limits to this neighbourhood.

Aydin (2012b), Aydin and Kişiçi (2013) and Ozel (2013) more specifically discuss the extension of the EU’s competition regime to the Turkish context. The contributions emphasize mainly the factors on the domestic (Turkish) side in the implementation of competition policy. Aydin (2012b) emphasizes that negotiations on the customs union were crucial in the adoption of competition law in Turkey, since the proclaimed advantages of this union helped overcome opposition from domestic interests against competition laws (mainly large companies and business associations). In implementation on the other hand, the position of the Turkish competition authority in the administrative system (relatively isolated from political concerns), and the hiring of young and competent staff, to which the (international) reputation of the competition authority mattered to a high extent, are considered to be the crucial domestic factors. Similarly, Ozel (2013) emphasizes the important role of the institutional position of the implementing agency and the quality and socialization of the staff in successful implementation of EU competition rules. Both authors suggest that hiring new graduates for the Turkish competition authority, instead of staffing from existing government ministries, in combination with a relatively high formal independence of the authority, has prevented regulatory capture by vested interests. The contribution by Aydin and Kişiçi (2013) specifically emphasizes the role of international, non-EU socialization and global networks.

Therefore, while the literature points out the limitations of regulatory transfer regarding implementation in the non-EU context, the case study of Turkey gives a number of suggestions on what kind of domestic conditions are important. These mainly relate to the domestic capacity of the competition authority, both in terms of institutional position and in terms of staffing. Also international socialization seems to play an important role in successful implementation. The literature however does not provide a comparative perspective to other countries that are closely associated to the EU or detailed case studies of competition enforcement in Turkey; it also does not consider the implementation of state aid rules.
Chapter 2

Merits and limits

The work discussed in this section provides a number of important insights. The literature on the export of state aid in the EU’s neighborhood suggests that accession conditionality and top-down enforcement by the European Commission are crucial in implementation of state aid rules. This is also the main reason why rule adoption and implementation of this specific element of competition policy is problematic in the EU’s neighborhood, especially in countries with a remote or absent accession perspective. In the area of cartels, abuse of dominance and mergers, several factors allowing or blocking rule adoption and implementation in the domestic context have been examined in the Turkish example. The work of Aydin (2012b) and Ozel (2013) suggests that a combination of strong economic conditionality in the context of the customs union, coupled with domestic administrative capacity, is essential in successful adoption and implementation. While the advantages of access to the internal market through the customs union were sufficient to offset the concerns of potential veto players in the adoption of the rules, the positioning and staffing of the enforcing agency allowed for a relatively strong and internationally oriented implementation. Interestingly, most explicitly the contribution of Aydin and Kirisci (2013) adds a further layer of governance to the national and EU layer by linking rule adoption and implementation to global competition networks.

However, the literature also has empirical and analytical limits. Empirically, the main focus has been on state aid rather than other elements of EU competition policy (cartels, abuse of dominance, mergers). But when it comes to state aid, we lack a comprehensive perspective on countries that are closely integrated in the single market, mainly EEA countries and Turkey through the customs union, since research mainly focused on either accession or ENP countries. While in the area of cartels, abuse of dominance and mergers on the other hand there might be more potential for export than in the case of state aid, there is still a large empirical gap on EEA and ENP countries, since the available contributions focused mainly on Turkey. Analytically, the link between internal and external governance is not often explicitly made or further explored in EU competition policy. Therefore, it remains unclear what the relation is between the internal EU governance setup and the domestic structures at the receiving end, if any. In particular, the potential for networked forms of governance that would entail interaction between the EU and the domestic context remains underexplored. While the literature discusses (vertical) conditionality as an important driver for regulatory export, the potential effect of changes in the implementation of competition policy within the EU for the interaction with non-EU countries is not sufficiently addressed.

2.2 The EU and global governance

This section discusses a selection of theoretical literature related to the externalization of the EU’s rules and practices to a global context. As I will show below, the work that deals
with the relation between the EU and global governance has a number of limitations. The most important limit for the purposes of this thesis is the lack of attention for coordination realities; that is, the lack of insights on how the EU operates in global forums in practice and what is the EU’s actual extent of engagement in these forums, specifically in the area of competition policy. The section will first discuss literature on the influence of the EU on global governance (section 2.2.1) and then focus on research in the area of competition policy (section 2.2.2).

2.2.1 Discussion of the EU and global governance literature

The literature on the EU and global governance focuses mainly on the EU’s export (uploading) of its internal rules and practices to multilateral networks and/or international organizations. As Müller, Kudrna and Falkner (2014) point out, there is less attention for the import (downloading) of regulation from global networks to the EU.11 Falkner and Müller (2014) signal the absence of a comprehensive framework capturing both regulatory import and export in the relation between the EU and global networks. According to the authors, while in some policy fields the EU has emerged as an important standard setter at the global level (e.g. trade liberalization), there are also policy areas where the EU is downloading policies (e.g. asylum policy), is promoting policies that deviate from its internal regulation (e.g. in the area of social policy), or is protecting its internal policies by the avoidance of international commitment (e.g. agriculture). Therefore, the EU is not only an exporter, but also an importer and defender of regulation. The authors’ observation that in many policy areas, the importance of both EU and global governance steadily increased from the 1950s onwards (while the importance of national governance declined) makes a scenario of interaction between these governance levels, rather than unidirectional uploading, convincing.

Several theoretical approaches to governance underline that uploading and downloading of regulation between different transnational contexts is not a static process. Pluralist or experimentalist global governance is a mode of common problem solving by multiple actors under conditions of strategic uncertainty and power dispersion (De Búrca, Keohane and Sabel, 2013; 2014; Zeitlin, 2015). According to an experimentalist logic, under such conditions actors have a functional interest in establishing broad framework goals at the central level (for example the level of the global network, or the EU level). These goals are then implemented by lower-level units (for example the EU level in the case of a global network, or the national level in the case of the EU) and periodically revised. In an experimentalist setup, the network provides a forum for mutual learning between the participating actors, who have to explain their choices in a peer review mechanism; the central goals are periodically adjusted in the light of these implementation experiences. Experimentalist governance

thus provides an iterative policy cycle where both uploading and downloading take place: participants provide the input for the establishment of framework goals (uploading); these goals are then adopted and implemented by participants (downloading); the experiences in implementation then result in revised framework goals (uploading).

While it is therefore plausible that the relationship between the EU and global governance is characterized by a mutual exchange of regulation and experiences, the proposed factors underlying these processes from the literature focus mainly on the reasons of success of EU export and can be roughly divided in three categories. The first is market power. According to this logic the EU is influential because of its structural market power, allowing it to de facto impose regulation in a global setting. The second is regulatory experience. According to this logic, the EU is well suited to export regulation to global networks because of its internal regulatory experience. The third is the EU’s institutional setup. According to this logic, the EU is well suited to participate in international organizations because of its own networked and deliberative governance structure. Below I will discuss these factors in turn.

**Driver I: EU market power**

It has been proposed that the EU is globally influential in the export of regulation due to its large market power. This market power is mainly understood as structural market power, i.e. the EU as an important importer and exporter of products and services. Drezner (2007) argues that the ability to set global standards depends on the size of the demand of the market; import markets will be able to set standards elsewhere, also unintentionally, since producers located outside this market have to comply with the standards on the demand side, or expect that they may have to comply with these in the future.

Bach and Newman (2007) and Damro (2012) also start from the premise of the EU as a structural market power when discussing the role of the EU in (economic) global governance. However, while both see this market as a precondition for global regulatory influence, they do not specify how the existence of a large structural market actually results in the export of EU regulation. Rather, like Drezner (2007), they seem to suggest that structural market power spontaneously results in changes elsewhere, even without the specific intention of doing so. Bach and Newman (2007) refer to ‘the sheer size of the EU’s integrating market’; Damro (2012) to the material existence of ‘the largest advanced industrial market in the world’ which shapes the regulatory preferences of other market players by its sheer size. This contrasts with other authors, who have argued that EU explicitly uses access to the internal market as a bargaining chip for non-economic regulatory issues such as human rights (e.g. Meunier and Nicolaïdes, 2006).

While it may seem straightforward that the EU’s economic power is of relevance when exporting regulation, it remains to be seen to what extent structural market power is a driver
for export in the specific context of global policy networks. Such multilateral networks are often regarded as a horizontal governance setting where positions of economic and political power are mitigated, for example through a diverse membership that allows for coalition building, and/or because global networks are attended by experts who mainly value the viability of the proposed solutions (Slaughter, 2004a; 2004b). In other words, in such expert networks, the emphasis may be more on viability of the solutions proposed than on the economic or political power of the participants.

**Driver II: EU regulatory experience**

Perhaps more relevant in the context of global policy networks is therefore the regulatory experience and capacity that the EU has to offer to the other network participants. The credibility of the EU as a participant can in such a context be related to the existence of an internal regulatory framework as such, with in addition the ability to offer tested solutions to regulatory problems or ability to come up with innovative solutions for new problem areas.

Falkner and Müller (2014) consider the existence of an EU regulatory framework in a given policy area as a precondition for any export. They emphasize in particular the issue of timing: in policy areas where the EU is a latecomer compared to other participants, there is no regulatory framework of significance to externalize. Therefore, in such cases policy export to the global context is not expected to take place.

The EU’s experience is also a main driver for successful externalization in the work of Bach and Newman (2007) and Damro (2012), who refer to the elements of the EU’s regulatory ‘capacity’. This capacity includes both expertise, understood as the ability of policymakers to identify challenges and resolve them, and authority, which relates to the ability to punish non-compliance. This understanding of capacity thus directly relates to the experiences of regulators, and may refer to the experience of the regulator to effectively apply solutions for a known set of problems, but also to the ability of the regulator to come up with innovative solutions for novel problems.

**Driver III: EU institutional setup**

A further driver to successful export to global networks is the institutional setup of the EU. Laidi (2008) for example argues that the EU has a preference for the export of regulation in a multilateral setting; De Búrca (2013) similarly argues that the EU’s external approach is distinctive because it is multilateral rather than unilateral and with a preference for networked, institutionalized cooperation. Telò (2006, 2009) also proposes that the EU is globally exporting its own model of multilateral governance. From this perspective, the EU’s internal governance makes it not merely a good ‘fit’ to participate in global networks;
it is a blueprint that the EU, ‘the most advanced laboratory for institutionalized regional cooperation and integration to date’, has promoted effectively in other regional contexts, such as ASEAN and Mercosur. In doing so, the EU has been at the basis of a new concept in intercontinental relations, namely the idea of interregionalism, where different regions across the globe engage in partnerships with each other, which are reciprocal rather than unidirectional in nature.

Having said that, many consider the internal setup of the EU as potentially problematic for participation in global context, mainly in cases where there is internal disagreement and/or fragmented representation. This can be the case either between member states or between different EU institutions. Therefore, the EU’s position may not be clearly articulated in a global context and decrease EU influence (e.g. Bach & Newman, 2007; Gstöhl, 2008). Still, it seems that lack of full internal coherence may under circumstances actually be advantageous to policy export in a global setting. Trade negotiations have in this context been studied as an example, where perceived uncertainty regarding the EU’s internal coherence eventually resulted in better outcomes for the block (Da Conceição-Heldt and Meunier, 2014). The EU’s internal governance can also (positively or negatively) influence externalization where non-state actors come into play. Participation of non-governmental stakeholders in EU governance may for example increase the EU’s external legitimacy in a multilateral context and even drive this agenda forward, as in the case of the UN disability convention (De Búrca, 2015). Finally, Falkner and Müller (2014) suggest that pooling of EU resources in a global setting, for example in terms of unified voting or EU membership of the international organization, also enhances export of EU regulation.

**Merits and limits**

The literature on the EU and global governance provides many relevant insights on regulatory exchanges between the EU and global networks. First, it becomes clear the EU is likely to engage in both uploading to and downloading from global networks. In addition, the literature offers several explanations as to why the EU would be a suitable actor to participate in global networks and eventually shape or upload regulation. This may be through EU’s structural market power, through the EU’s regulatory domestic experience, or through the EU’s institutional setup. Conversely, the main hurdles to successful export of EU regulation may include: a lack of structural market power, either because other network participants are more powerful than the EU or because economic power is mitigated in the network; lack of EU experience, either in terms of substantive policy or in terms of enforcement capacity; or a lack of internal EU coherence, because EU member states (and potentially EU civil society actors) do not have a common position on the matter at hand.

While the existing literature provides insights on the motivations and scope conditions for externalization on the side of the EU, it offers limited insights relating to the “domes-
tic structures” of global forums. Therefore, it remains unclear how externalization of EU regulation is received in the global network, i.e. how the EU actually engages with global fora, which is not so much an implementation as a ‘coordination’ reality related to the interaction between the EU actors and the other participants in the forum. In addition, the underlying presumption is often that the EU is (actively) exporting regulation to a global context, which is not necessarily the case. There is also little empirical work that relates to policy import from global networks to the EU context.

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*Figure 2.2: The EU and global networks: uploading and downloading*

### 2.2.2 Insights on competition policy

Since global cooperation in the area of competition policy is a relatively recent phenomenon, we are only beginning to understand the EU’s engagement in this area. This is particularly the case for the global competition fora in which the EU participates. However, from existing academic work there are a number of initial observations and inferences that we can make about the way the EU acts in a global context in the competition domain.
Chapter 2

The EU and the US in a global context

The relationship between the EU and the US is relatively well documented, as for an extended period of time these were the main antitrust jurisdictions in the world (Damro, 2006a; Dewatripont and Legros, 2009; Damro, 2011; Damro and Guay, 2012; Svetiev, 2015). In particular Damro (2006a, 2011; Damro and Guay, 2012) has provided key insights into the transatlantic relationship. He discusses conflict in a number of major transnational merger cases and the subsequent transatlantic cooperation in the form of agreements and working groups. Damro links transatlantic cooperation between competition agencies to the desire of these authorities to avoid political involvement in competition cases. Svetiev (2015) also addresses the transatlantic relationship, but with an emphasis on divergent remedies in both systems and the mechanisms of learning between EU and US competition authorities. Such learning would be inspired mainly by pragmatic concerns of competition authorities in pursuit of better enforcement techniques.

A number of contributions discuss the EU and the US as ‘global leaders’ or ‘idea merchants’ in antitrust enforcement who are spreading these practices globally. These contributions recount the story of competition law in the WTO context in the late 1990s and early 2000s – an EU-supported initiative which ultimately failed. Fox (1998) and Marquis (2015) focus on substantive issues and explain that competition policy in the EU has a link with trade and economic integration, which explains the connection with the trade agenda of the WTO. Damro (2006b) takes a more institutional perspective and emphasizes the EU’s preference for binding multilateralism, while the US approach in competition policy was based on traditional notions of national sovereignty. The lack of US support for the EU’s competition agenda contributed to the failure to keep this issue on the WTO agenda. From a critical theory perspective, Wigger (2008b; Buch-Hansen and Wigger, 2011) argues that the EU’s WTO initiative was motivated by the interests of transnational capital, which – inspired by US neoliberalism - first captured the EU’s internal competition governance and subsequently pushed for more liberalization on a global scale.

This literature tells us that while the EU and the US, as the two most mature competition regimes worldwide, have thus worked towards better cooperation in competition enforcement, their stance on what competition policy in a global context should look like diverges. The EU in principle prefers binding rules and links competition policy to integration, while the US favors non-binding solutions on the enforcement side; and one might infer that without the US on board, it will be difficult to promote any global competition regime. The literature discussed above suggests further that both the EU and the US are deliberately trying to spread their competition practices globally, or at least have been trying to do so in the past.
The International Competition Network

When competition policy was removed from the agenda of the WTO’s Doha development round, the US-supported ICN became the main hub for global competition policy discussions. Several scholars have examined this network from a transnational governance perspective.

Starting with the work of Slaughter (2004a; 2004b), the ICN has been discussed as an example of a new, networked world order, where policy is made by experts in transnational networks. In such networks, legitimacy derives from expertise, instead of traditional notions of political or economic power. The work of Slaughter thus raises high expectations on the emergence and functioning of networks like the ICN; networks in which experts would be driving the global agenda in a given policy field. Yoshizawa (2012) has explored the tension between the diversity in the ICN’s membership with its aim for regulatory convergence. He argues that the ICN has been able to achieve results because of a combination of bottom-up governance, combined with a selective agenda and selective profile of participants (i.e. only competition experts).

Djelic and Kleiner (2006) also discuss the ICN as an example of transnational governance. They track more specifically the growth of national competition regimes and the coordination between these regimes, and describe the emergence and functioning of the ICN. The authors however characterize the network as an open community with the aim of creating common beliefs in the superiority of the market and competition (a ‘competition culture’), rather than an expert-centered network that is aimed at the generation of common rules. While they point out that the ICN revolves around socialization and community building, other authors have flagged that there is a likely experience or capacity imbalance in the network in favour of developed countries with a long-standing tradition of competition enforcement. Svetiev (2012) considers these asymmetries in the ICN, which would make the EU and the US de facto leaders in the network, in more detail. In his view, these asymmetries are mainly attributed to the experience and the resources to supply expertise - not so much to the structural market power of the EU and the US. As a result of this dominance in the network, Svetiev argues, the ICN does not sufficiently address the needs of developing countries.

The EU in global networks

While we know still relatively little about the governance of global competition forums, a number of contributions compare the role of the EU in these forums. This includes both uploading from the EU to global networks and downloading regulation to the EU context.

Botta (2014) considers the EU’s influence in the WTO, the ICN, UNCTAD and the OECD
and finds that in all these networks, the EU (understood as DG Competition and the EU NCAs together) operates in a relatively united manner. This is mainly attributed to coherence in its competition policy at the internal level. He argues that while the EU was unsuccessful in uploading competition policy in the WTO context, it quite successfully defends its own competition norms in the other three networks. Rather than qualifying the EU as a policy exporter or a ‘rule shaper’ of global norms in the area of competition policy, Botta emphasizes the defensive nature of the EU’s behaviour in global policy forums. He concludes that the EU has been able to ensure that guidelines developed in the ICN, UNCTAD and the OECD do not conflict with EU competition regulation. Compared to the US, he argues, the EU has been less successful in regulatory export. While the US initiated the ‘most successful competition network (i.e. the ICN), the EU was late in supporting the ‘soft’ convergence as promoted in the ICN, due to its own history in supranational harmonization. In addition, while the ICN was set up in the early 2000s, an internal recalibration of EU competition policy was ongoing (see chapter 3); this modernization would have resulted in a temporary decrease in external credibility of the EU model.

Damro and Guay (2016) consider the motivations for DG Competition to engage in policy export, and characterize the EU as a ‘venue shopper’ in the competition networks UNCTAD, the OECD, the WTO and the ICN. Starting from the assumption that DG Competition will be motivated mainly to participate where it will be most successful, they predict that the ICN is most likely to be DG Competition’s priority forum. In their analysis, they consider four different aspects of the networks under discussion: coverage, bindingness, target audience, mandate and EU representation. In particular the combination of DG Competition’s full membership to the ICN (EU representation), the broad country membership of the ICN (target audience), combined with a specific focus on competition (coverage) make the ICN in their view the most likely to be the DG Competition’s forum of choice, even in the absence of binding rules. While the authors do not engage in a test of these predictions, they make an important conceptual contribution by linking possible export motivations of DG Competition to network characteristics.

Svetiev (2010; 2015) considers both the EU and the ICN as possible examples of experimentalist governance, or open-ended policy-making with broad discretion for bottom-up implementation under circumstances of high strategic uncertainty and power dispersion. If both would turn out to be experimentalist, then the EU would be a good ‘fit’ to participate in the ICN, because its internal structures are a good fit with the governance structure of the ICN. However, Svetiev points out that bottom-up learning is in both cases little institutionalized; as a result, it is not (yet) possible to characterize internal EU governance in competition policy and ICN governance as fully experimentalist. Therefore, the extent to which the EU participates in the ICN as an ‘experimentalist’ actor largely remains an open question.

Danielsen (2013) discusses the relationship between the ECN, the ECA (‘European Com-
petition Authorities’, a more informal European network that is not run by the European Commission) the OECD and the ICN and their respective influence on Scandinavian competition authorities. He concludes that transnational networks have complementary and reinforcing functions rather than being in direct competition. Danielsen also notes that different forums may actually work on the same issues, but from different perspectives. His study provides insightful empirics on the level of domestic impact of the networks, suggesting that the ECN has by far the most impact (79 percent of the officials indicate that ideas and models are imported from the network), followed by ECA (56 percent) the OECD (56 percent) and the ICN (50 percent) (Danielsen, 2013: 92). Still, the question of how these networks influence domestic regulation remains underdeveloped. Since Danielsen underlines that professionalism is a key factor for participation, we may expect that the domestic impact will relate at least partially to the professionalism of the solutions offered. In addition, it is also not clear to what extent these networks impact EU competition enforcement beyond Scandinavian countries.

**Merits and limits**

The literature provides first of all some intuitions as to why the EU engages in a global context. The EU may be motivated to operate globally as a reaction to (a perceived risk of) conflicting decisions in the competition area (Damro 2006b; 2011); alternatively, the EU may be pushed to do so by large multinationals (Wigger 2008b; Buch-Hansen and Wigger, 2011), or engage in policy externalization because of the link between competition policy and trade that is inherent in the EU’s internal approach to competition policy (Marquis, 2015). Therefore, there are several reasons why the EU may engage with other global regimes or with global networks.

More importantly in the context of this thesis, the literature offers some initial insights on how the EU’s engagement takes place. We can infer for example, that the relationship between the EU and the US competition regimes is reciprocal, since mutual learning takes place (Svetiev, 2015), while the relationship between the EU and global networks is thought to be more unidirectional, with the EU uploading rather than downloading regulation (Svetiev, 2012; Danielsen, 2013) or at least attempting to make sure that the global regulation does not conflict with its internal regulation (Botta, 2014). In addition, when focusing specifically on DG Competition as the main actor in driving external EU competition policy forward, it is argued that DG Competition is likely to choose the venue where it will be most successful, depending on the characteristics of the network (Damro and Guay, 2016).

Despite these indications as to why and how EU engagement in global competition networks takes place, the literature on the externalization of EU competition policy to global networks only addresses the interaction between EU participants and other participants in the network to a limited extent. Therefore, it does not sufficiently address how the dynam-
ics of the network shape the reception of EU (attempts at) externalization in practice. That is surprising, as some of the authors do indicate that governance of the network is likely to shape the drivers, opportunities and/or the boundaries of EU action (Svetiev, 2015; Damro and Guay, 2016). In other words, the EU can or will only externalize internal regulation to the extent that the network responds or allows for this to happen, given the dynamics of the network context.

Also the drivers shaping interactions in the various networks remain underdeveloped in the literature. Considering the drivers for externalization of EU governance identified in section 2.2.1., we would expect that uploading of competition regulation to various global networks could be enhanced by: I) the EU’s structural market power II) the EU’s internal experience in the policy area at hand; and/or III) the EU’s internal institutional setup.

Danielsen (2013) argues that professionalism is of great importance in uploading to networks; the EU’s internal experience both at central and member state level is therefore likely to determine the EU’s influence on the network. Regarding the EU’s internal institutional setup, expectations are mixed. While Botta (2014) emphasizes internal coherence between DG Competition and NCAs and the EU’s supranational legacy of competition policy development as important factors in externalization, Svetiev (2010, 2015) on the other hand discusses the possibilities offered by the modernization of EU competition policy, in particular a more flexible approach to competition governance, which would make the EU a good ‘fit’ to participate in global networks. Therefore, the authors that address the role of the EU in global competition networks take different views on the expected effect of the internal modernization of EU competition policy on EU participation in networks; while Botta (2014) suggests that less coherence between actors at the EU level and lack of clarity of the substantive regulation decrease the EU’s external influence, the approach of Svetiev (2015) seems to be rather the opposite in proposing that more flexibility can actually enhance the EU’s external capabilities, because the ‘fit’ with the governance of the global network is better.

A further limit of the discussed literature is the uneven empirical interest for the functioning and the effectiveness of global competition networks. While the governance of the ICN has been discussed in the academic literature, this is much less so for the OECD’s competition work. There has also been little enthusiasm for competition policy in UNCTAD and emerging regional cooperation networks in the area of competition, for example in Asia (in the context of ASEAN) and Latin America (in Caricom and the Andean community). While this thesis looks more in detail at the governance of the ICN and the OECD, the latter

dimensions fall outside of the scope of this thesis.

2.3 **Legal research on external EU competition policy**

The legal literature on the extension of EU competition policy to non-EU countries and to global networks provides a third perspective on the externalization of EU competition law. While this literature provides little analytical insights on the EU as a regulatory actor, it gives valuable empirical context in the specific area of competition policy, as it follows the developments taking place in this field much closer. Below I will discuss literature on the application of EU competition law to non-EU countries, which mainly relates to extraterritoriality and bilateral agreements (section 2.3.1.), and the legal literature on the EU in global competition networks (section 2.3.2.).

2.3.1 **Insights on country cases**

From a legal perspective, there is a lively interest in the extraterritorial enforcement of EU competition law, i.e. external dimensions of EU competition policy understood as unilateral enforcement of EU competition law to non-EU companies. In the landmark case *Woodpulp*, the ECJ ruled that the place where an anticompetitive agreement was 'implemented' is decisive to establish EU jurisdiction. In practice, this means that direct sales from non-EU companies into the common market are sufficient to trigger the application of EU competition law.13 High-level examples of extraterritorial application of EU competition rules include companies in the US (e.g. proceedings in the Intel and Google abuse of dominance cases14), in Asia (e.g. Korean and Taiwanese companies in the LCD cartel15), and Russia (Gazprom abuse of dominance case16). While for cartels and abuse of dominance it is the effect on trade patterns in the common market that is crucial to trigger the application of EU competition rules,17 for mergers Regulation 139/2004 determines worldwide and community-wide turnover thresholds that mandate notification with DG Competition.18

16 Case COMP/39.816 Gazprom – upstream gas supplies in Central and Eastern Europe; commitments accepted by the European Commission on 24 May 2018 (no fine).
17 See also Guidelines on the effect on trade concept in Articles 81 and 82 of the Treaty (2004), in particular para. 100-101.
18 Regulation 139/2004, article 1(2). In Gencor Ltd. Vs. Commission, case T-102/96 (1999), the General Court confirmed jurisdiction over merger cases of non-EU companies on the basis of these thresholds (para. 78-88).
Contributions on the extraterritorial enforcement of EU competition law have generally focused on technical aspects of enforcement, i.e. the legal conditions that trigger enforcement. Extraterritorial enforcement is discussed both in EU competition law handbooks (e.g. Jones and Sufrin, 2014; Whish and Bailey, 2015) and in more specialized work on international competition law (e.g. Dabbah, 2010; Wagner von Papp, 2012). Also individual (conflicting) cases of enforcement have been subject of academic discussion (e.g. Fox, 1998 and Kovacic, 2001 on the EU-US Boeing-McDonnell Douglas merger). While there are also examples of analytical legal work on unilateral EU shaping of global regulation by EU enforcement beyond the EU borders, such as contributions by Bradford (2012) and Scott (2014), these are not (exclusively) focused on EU competition law and do not explore how EU-style rules ‘travel’ to non-EU contexts beyond unilateral enforcement.

The global proliferation of national competition regimes has been accompanied by a rich legal literature on bilateral cooperation between competition authorities. This research focuses mainly on tools for case cooperation in competition law, such as competition cooperation agreements and Memoranda of Understanding (MoU) (Demedts, 2012; Slot, 2014). While MoUs are of a non-binding and general nature, cooperation agreements contain more formalized obligations. The EU currently has four ‘first generation’ cooperation agreements on competition with the US, Canada, Japan and Korea, and one ‘second generation’ cooperation agreement with Switzerland - only the latter provides for the exchange of confidential information. Especially cooperation between the EU and the US is well documented: Zanettin (2002) discusses cooperation between competition agencies, with particular focus on extraterritoriality and the exchange of confidential information in the EU and US systems. However, similarly to the literature on extraterritorial enforcement, while the literature describes existing agreements, the implications of these cooperation agreements for the global influence of the EU remain underexplored.

Following the tendency to include competition provisions in ‘regulatory’ EU trade agreements, increasingly legal research appears on competition provisions in bilateral FTAs between the EU and non-EU countries, such as the 2010 FTA with South Korea (Papadopoulos, 2013; Bourgeois, 2014; Demedts, 2015). A comprehensive documentation of EU agreements containing competition provisions is the contribution of Papadopoulos (2010), who distinguishes between enforcement cooperation agreements and trade agreements with competition provisions (both bilateral and regional). This contribution categorizes the substantive provisions of competition law in the agreements under study, but does not address the implications of the analysis for the role of the EU in the global order.

Some legal scholars use the layered, onion-like conceptual framework from the EU external governance literature in their contributions. Cseres extensively studied the implementation of EU competition law in (candidate) member states. She discusses more generally the influence on EU competition regulation on candidate countries pre- and post-accession
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(Cseres, 2014; 2016) but also the impact of Regulation 1/2003 on enforcement in the CEECs (Cseres, 2010). She concludes that EU competition rules have had an exceptional influence on competition law in new member states, although procedural and enforcement divergences remain. These contributions therefore examine roughly the same cases as the political science literature on the export of EU competition policy and EU accession by Botta (2013). However, rather than looking at the drivers or mechanisms at work in implementation, the work of Cseres focuses on the ‘compliance’ of national regulation in (candidate) member states with EU law.

Merits and limits

An important merit of the legal research in this area is that it has closely followed the empirical EU policy developments in the competition field. The literature on unilateral enforcement, MoUs, the second-generation EU competition agreements and FTAs quickly followed the use of these instruments by the European Commission and provided a useful documentation of developments in these areas. A limit is that the analytical dimension of the research remains little explored. Not only are the implications for the role of the EU in a global context not addressed, but also these contributions do not tell us much about the underlying scope conditions that drive or limit export of EU regulation. The literature on bilateral cooperation (MoUs, cooperation agreements and FTAs) does not consider the implementation of EU-style competition law in non-EU countries. When it comes to the export of EU competition policy to EU member states and candidate countries, the available legal contributions provide a rather static perspective by comparing provisions of national competition law to EU competition law (e.g. Cseres, 2010) rather than looking at scope conditions or implementation of the rules in practice.

2.3.2 Insights on global forums

In the area of global networks and competition law, the main focus of the legal scholarship has been on the development of global competition standards. Several scholars elaborate on the necessity of establishing such global standards (e.g. Amato, 2001; Bertrand and Ivaldi, 2007), on the substantive and procedural form that these standards may take (e.g. Sweeney, 2010; Gerber, 2010) and on the appropriate forum where global competition issues should be addressed (e.g. Budzinski, 2004; Sokol, 2007).

From a legal perspective the key quality of global networks is their potential for the approximation of different legal systems - preferably in a direct manner. Harmonization of global standards in competition law is considered desirable because divergent regimes increase not only the risk of conflicting decisions, but also the costs and legal uncertainty for companies operating across borders and therefore may result in a barrier to trade and investment (Gerardin, 2009; Gerber, 2010). Regarding to the form that these standards may take, legal
speak.traditionally tend to consider the soft law, non-binding outcomes of networks as problematic (e.g. Verdier, 2009) – although recently there is an increasing interest in the potential of informal rulemaking as well (see Pauwelyn, Wessel and Wouters 2012). The WTO is often considered a superior domain for global competition regulation not only because it is comprehensive in terms of membership, but also because it provides binding solutions (Amato, 2001; Budzinski 2004).

When competition policy was eventually removed from the agenda of the WTO’s Doha development round in 2004, relations between national competition authorities became increasingly coordinated in a more informal manner by participation in a variety of non-binding global and regional networks. The legal literature closely followed these developments. Most notably Maher (2002) and Raustalia (2002) discuss the emergence of global transnational regulatory cooperation in competition policy. The authors are mainly interested in tracing and describing the phenomenon of the emergence of global competition cooperation in the late 1990s and early 2000s, mainly in the context of the WTO and the ICN. The emergence and functioning of the ICN are generally viewed in a favourable light by US scholars who stress the virtues of flexibility and inclusive membership of the network (e.g. Sokol, 2007; Fox, 2011; see also chapter 7). However, as section 2.2.2. points out, there are reasons to believe that the ICN actually does not function well in practice due to structural imbalances in the network.

Also the ECN, the EU’s internal and highly formalized cooperation network launched shortly after the ICN, attracted considerable attention in legal circles (e.g. Brammer, 2008; De Visser, 2009; Maher, 2011; Janevski, 2011; see also chapter 3). However, the analyses mostly discuss in detail the legal provisions governing the network rather than how the network operates in practice. That is problematic, because it seems that the ECN potentially operates in a less top-down manner and in any event focuses on different issues than was initially expected (Kassim and Wright, 2009; for a detailed discussion on the ECN, see chapter 3).

Compared to the ICN and the ECN, other regional and global competition networks remain relatively underexplored in the legal literature. While Sokol (2007) and Gerber (2010) shortly outline UNCTAD and the OECD in addition to the ICN, both authors do not go in detail. Maher and Papadopoulos (2012) discuss UNCTAD, the OECD and the ICN, and in addition a number of regional networks. Their contribution is to date the most comprehensive work on global competition networks in terms of the number of global and regional networks that are discussed. The authors provide an outline of the network membership and mean areas of activity of each network.

Regarding the role of the EU in global and regional networks, legal scholarship generally focuses on two issues: EU competence and formal representation of the EU. Work on the legal external dimension of the EU in global governance tends to focus first of all on issues
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of EU external competence (e.g. Cremona, 2013; 2014). While the external competences of the EU have been increasing, these competences have also been rather contested and are in most cases shared with EU member states. The issue of external representation of the EU in international organizations has also been discussed in the legal literature (e.g. Govaere, Capiau and Vermeersch, 2004; Kaddous, 2015). This literature considers the membership of the EU in different organizations such as the UN and the WTO.

Competition policy is largely absent in this debate; as opposed to most EU policy areas, competition is an area of exclusive EU competence. This may explain that from a legal perspective, there has been little interest in the issue of competition policy and external representation. Because the EU, in practice DG Competition, has exclusive competence in this area, the question of external coordination with the member states is not considered a problematic issue. This means that questions on how EU representation plays out in different global networks in practice remain unanswered. In most global competition networks, national authorities now participate in addition to DG Competition, as competition authorities have proliferated not only globally but also within the EU itself. The assumption is that these national authorities will follow (supranational) EU competition law. However, in view of the recent modernization of EU competition law it is the question to what extent this assumption still holds (see chapter 3). Also, national authorities may have a specific agenda in the international arena; for example, the Portuguese competition authority has a special link to the Portuguese-speaking authorities in Brazil, Angola and other countries in the Lusophone competition network (Tavares, 2011).

Merits and limits

Similarly to the legal literature discussed in section 3.2.1. relevant for country cases, an important merit of the legal scholarship regarding the EU and global networks in competition policy is that it closely follows empirical policy developments and offers a high level of descriptive detail. At the time when competition policy was on the agenda of the WTO’s Doha development round, there was much interest in the development of substantive minimum standards; subsequently, with the establishment of the ICN and other regional networks there has been an increasing focus on the institutional form and governance of these networks. The ICN and ECN are the networks that received the most attention in the legal literature; the existence and functioning of other regional and global networks is more sparsely documented.

Most importantly for the purposes of this thesis, when it comes to the role of the EU in global networks, the legal literature gives little insights on how EU influence and representation take place in practice. The literature mainly focuses on substantive legal output

\[19\] See for exclusive and shared competences of the EU Article 3 and 4 TFEU.
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of the networks, rather than considering how these networks function. The legal literature offers little help in explaining how EU representation in global networks takes place in practice, and how EU representation may or may not translate in influence beyond formal voting rights. While in addition to DG Competition, there are now 28 EU NCAs active in global networks20 - alongside DG Competition, but also sometimes in their own capacity as national authorities – we have little understanding of how coordination of EU representation in these forums works in practice and how it may translate in EU influence.

2.4 Research approach

This section will outline the research approach of the thesis on the basis of the theoretical perspectives discussed above. The research question, introduced in chapter 1, relates to the implementation and coordination realities of the externalization of EU competition policy in the absence of accession dynamics. While the research is informed by concepts and intuitions from the existing literature and theory, it has been set up and executed in a relatively open manner as to best capture the implementation and coordination realities that are at the core of the thesis.

Competition policy in the EU: focus on implementation

When considering externalizations of EU competition policy, we will have to start with an assessment of implementation realities in the EU itself. That is because the approach of this thesis, in line with the main theoretical perspectives discussed above, is to work with an inside-out perspective, implying that in particular the dynamics of implementation of EU competition policy will have a reflection on what, but also how and why this policy area is externalized. In considering these internal dynamics, the literature on external EU governance mainly looks at the EU’s internal ‘governance mode’ (hierarchy or networks) to account for the shape that regulatory externalization takes. The literature on the EU and global governance similarly focuses on the EU’s internal institutional governance structure (multilateral) as a main explanatory factor of the EU’s engagement at a global level. However, rather than focusing exclusively on these institutional elements, in my view a broader perspective is required in order to capture the implementation and coordination realities of the externalization of EU competition policy. This perspective includes both the rationale of application of competition policy (policy goals) and the toolbox that authorities work with in order to implement the competition rules.

Chapter 3 outlines a shift in the implementation of EU competition policy from a highly centralized to a more diffused implementation landscape, starting in the late 1990s. While EU competition policy has become more informed by economic modeling (the so-called

20 This number still includes the UK NCA.
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‘more economic approach’ to EU competition law), rather than shifting to a more uniform prioritization, the goals that EU competition policy is serving have become more diffused and also seem to have become more explicitly targeted at enhanced visibility towards the public at large. What is more, the actors involved in competition implementation in the EU have also become more diffused, as the EU has enlarged significantly and all member states now have actively functioning competition authorities that work alongside the European Commission (DG Competition). Finally, there is an increasingly wide range of remedies and of activities that EU competition authorities are engaged in; as the toolbox of EU competition enforcers has widened considerably, the EU’s implementation spectrum has been broadened beyond the classic type of enforcement (imposing fines).

From this picture of diversification rather than centralization (or total harmonization) of in the implementation of EU competition policy follows the question, how such fragmentation may create opportunities or threats for the export of this policy area to non-EU countries and to global networks. While traditionally one would expect that fragmentation or diversification has negative consequences for export of given policy area due to lack of coherence, I will identify a number of possible advantages that a diversity in implementation offers for export. Such advantages include a wider application range for competition policy in view of a wider variation of policy goals that this policy may support; a wider range of (national) experiences with EU competition enforcement in different contexts that may serve as examples for other contexts beyond the EU; and the facilitation of global cooperation on competition issues in view of increased an implementation spectrum beyond traditional enforcement, since cooperation on enforcement cases requires high levels of trust and compatibility between competition systems.

The thesis will proceed with the different case studies illustrating policy externalization. In order to gain a more comprehensive impression of this export, case studies include both externalization to non-EU countries (addressed in part I of the thesis) and to global networks (addressed in part II of the thesis). These two categories of externalization however require a different theoretical framing. For the country studies, the research approach will focus mainly on the conceptual distinction between hierarchical and networked governance and their scope conditions. For the global network studies, the approach will rather focus on coordination realities of EU engagement, including the distinction of policy export versus policy import and their respective scope conditions. These distinctions will allow us to formulate a number of expectations based on the existing literature and analyze and interpret the findings accordingly.

Throughout the case study chapters, links will be drawn with competition policy in the EU and the possible advantages of more diversified implementation for export as discussed in chapter 3. A first link is that between the policy goals of competition enforcement internally, the rationale for EU to export this policy and the rationale for non-EU countries to
import it. A second link is related to EU’s internal network of national competition authorities, and the possibility for competition authorities of non-EU countries to participate in this network; but also to the enhanced possibilities for both bilateral and multilateral cooperation with the EU in view of the multiple EU national competition authorities. A third link is related to the toolbox of competition authorities, and considers for example if the EU exports its full toolbox to non-EU countries and networks, and to what extent cooperation with non-EU countries and in global forums facilitated by the implementation forms other than enforcement.

Part II of the thesis: country case studies

For the country case studies, the literature on external EU governance provides a main theoretical point of reference. When we combine the literature on external EU governance (section 2.1.1), that of external EU governance in competition policy (section 2.1.2) and the legal literature on the externalization of EU competition policy (section 2.3.1), we see that all the available work has a strong focus on rule adoption rather than implementation. In addition, there also seems to be an empirical gap in terms of the countries under study. While for (rule adoption in) state aid, the focus has included the EEA and ENP but not the EU-Turkey customs union, for (rule adoption in) mergers, cartels and abuse of dominance the focus has been mainly on the EU-Turkey customs union but not on other closely associated countries (EEA/ENP).

As explained earlier, Norway and Turkey have been selected as relevant cases to consider implementation realities of export of EU competition policy because they have a close association with the EU, without an immediate membership perspective. I have chosen not to include ENP countries as case studies, because while these countries have often adopted competition policy, there is often insufficient enforcement to assess implementation in the domestic context. In view of the gap signaled above regarding the different countries under study, it would be logical to include at least an assessment of state aid rule adoption and implementation in Turkey and an assessment of rule adoption and implementation of mergers, cartels and/or abuse of dominance in Norway, as these are missing in the currently available literature.

As for the concepts and dynamics that describe, and to a certain extent explain, implementation in the domestic context, the most important conceptual dichotomy is that between hierarchical governance and networked governance. Since this in itself classical distinction has assumed a specific meaning in the external EU governance literature, I should clarify how the concepts are used here. By hierarchical, I mean governance dynamics that are vertical, top-down or coercive in nature. By networked, I mean governance dynamics that are horizontal, bottom-up and voluntary in nature. These categories are considered as the end extremes in a spectrum of possibilities ranging from highly coercive to completely volun-
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tary arrangements. It is important to underline that my use of these concepts is *not* related
to the institutional shape of the cooperation: hierarchical (vertical, top-down, coercive)
governance for example may very well take place in a network, while networked governance
(horizontal, bottom-up, voluntary) may take place in a supranational context. This is some-
thing in my view not sufficiently acknowledged in the external EU governance literature,
and it links back to the lack of focus on implementation realities.

In terms of the governance dynamics at play between the EU and Norway, we would expect
the following:

- the governance dynamic will be mainly one of hierarchy, as the Norway is closely
related to the EU in a semi-supranational arrangement. There is also a large power
asymmetry between the EU and Norway;

- in order to account for the implementation realities found, the following elements
can be explanatory factors. In view of the characterization of the EU-Norway rela-
tionship as mainly hierarchical, we would expect the EU’s structural market power
to be of key relevance, and to an extent also the EU’s institutional setup - the latter
in line with the external EU governance literature. In addition, domestic conditions
in Norway can be of importance, but to a lesser extent in view of the relatively high
asymmetrical relationship between the EU and Norway. Regarding the domestic
factors under consideration are domestic interests of various kinds and actors, and
the capacity and professionality of the national implementing authority.

In terms of the governance dynamics at play between the EU and Turkey, we would expect
the following:

- the governance dynamic will be mainly networked, as the accession perspective of
Turkey is very remote, and has in fact become almost completely unlikely. There is
also less of a power asymmetry between the EU and Turkey;

- in order to account for the implementation realities found, the following elements
can be explanatory factors. In view of the networked governance dynamics and in
line with the external EU governance literature on competition policy in Turkey,
we would expect domestic conditions in Turkey to be of key relevance, and to an
extent also the EU’s institutional setup. Domestic conditions may include domestic
interests or various kinds, (mis)match between the EU’s governance mode and the
governance mode of the domestic administration, and the capacity and profession-
ality of the national implementing authority. In addition, the EU’s structural mar-
ket power can be of importance, but only to a small extent in view of the relatively
symmetrical relationship between the EU and Turkey.
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The country case studies proceed in three parts. They first part considers the overall context of the relationship between the EU and the country in question in order to contextualize the export of EU competition regulation (sections 4.1 and 5.1). Then, the chapters proceed to analyze the domestic legal framework in the area of competition policy, in other words, looking at rule adoption (sections 4.2 and 5.2), followed by an analysis of the implementation and the domestic context (sections 4.3 and 5.3). The chapters include specific examples of competition implementation areas for each country case, where one relates more to a hierarchical governance dynamic and one that relates more to a networked governance dynamic.

Part III of the thesis: global forums case studies

In the case studies on global forums, the literature on the EU in global governance is the main point of reference. From the sections on the EU and global governance literature (2.2.1), the section on the EU in global competition governance (2.2.2) and the legal literature on the EU in a global context (2.3.2) the following picture emerges. While offering some suggestions as to how EU engagement in global forums takes place, important gaps remain specifically on the empirical level as to how global competition forums function in practice and how the EU engages with these networks. This is specifically the case for the OECD, which has received very little academic attention for their work on competition issues. Theoretically, it is unclear if, why and how the EU may also be downloading from global networks as it is often presumed that the EU will be predominantly interested in uploading its rules and best practices to these networks.

The OECD and the ICN have been selected as the main case studies for this thesis, as these are the main global forums in which the EU is active in the area of competition policy. While there are other global contexts where the EU is also active in competition policy, mainly the WTO and UNCTAD, these are deemed less suitable. Progress in the WTO on competition issues has been stalled since 2004, while UNCTAD is mainly a forum for developing countries to which EU participation is limited. While some work has been conducted on the functioning of the ICN, both from a governance and a legal perspective, how the EU behaves in this network remains unclear as there is insufficient empirical work on this specific topic. Regarding the OECD, there has been little research on the competition work of this organization as such, and therefore also on the role of the EU in this context. The available material is limited to smaller contributions that compare the OECD’s Competition Committee to other global competition forums.

In the relation between the EU and global forums, the distinction between hierarchical and networked governance is less relevant than in the country case studies. That is because such global expert forums, in view of their membership and the way they function (both the absence of binding commitments and the focus on expertise rather than power), are expected
Research approach

to have more of a networked governance dynamic. The question is however to what extent this is indeed the case, or to what extent such networks are actually driven by dynamics related to political or economic power rather than by expertise and cooperation. In this context, I will assess to what extent the EU externalizes its internal policy to the global forums under study, i.e. what influence do EU rules and/or implementation practices have on the output of the forum.

The main expectations for the case studies are the following:

• in the OECD context, which is a selective forum of industrialized countries working on a range of issues including competition policy, we would expect the EU to be highly influential as many OECD members are also EU member states. In addition, we would expect there to be much emphasis on export of EU competition policy to the OECD, i.e. the uploading of rules and practices from the EU to the OECD level, as the EU is likely to play a strong role in this forum and may be expected to be in a leadership position. However, both in view of the restricted membership of the OECD and the dynamics of the organization - since it is unclear to what extent this forum is driven by expertise rather than economic or political power - it is more the question if this actually happens in practice, as we would not assume the OECD to be highly influential in shaping best practices in global competition policy;

• in the ICN, which is a highly inclusive forum working only on competition matters, we would expect the EU to be less influential as DG Competition and EU NCAs are only a small part of the membership. While the ICN would therefore be in theory the most suitable forum to globally spread EU competition policy, in particular because of its exclusive focus on competition matters and because participants to the network are competition authorities, the main prediction is that the EU will not be very successful in externalizing EU competition policy through the ICN. Instead, it is more likely that the EU would import of competition policy from the ICN, also in view of the leading role of the US in the network;

• in terms of the main drivers for policy externalization, in view of the existing literature we would expect three main factors to be of relevance: the expertise of the EU in the area of competition policy and the demand in the forum for this expertise; the EU’s structural market power in the forum, compared to that the other participants; and the EU’s institutional setup in interaction with the institutional setup of the forum. In view of these drivers, the main relevant conditions are therefore the membership of the forum in terms of countries but also in terms of expertise (officials from ministries, from competition authorities, other experts) and the EU’s participation to the forum as fragmented or united, both in terms of content and of participants (who participates from the EU side, and are the preferences and expe-


Chapter 2

riences of the EU NCAs and DG Competition mutually reinforcing?).

The chapters on global networks will proceed in three parts. In a first step the membership of the network will be addressed, looking at which countries participate and what actions the forum is undertaking in the area of competition policy (sections 6.1. and 7.1.). A second step is to consider what type of experts participate in the forum and to what extent structural market power rather than expertise is a relevant dynamic in the functioning of the forum (sections 6.2. and 7.2). These sections also specifically address the role of the EU within this forum, focusing on the EU’s participation by the European Commission (DG Competition), in particular the EU’s membership status as the EU is not a nation state and therefore participates in a different capacity than other participants, and on participation of the different EU member states. A third step is the assessment of a specific issue area in order to consider the extent of externalization from the EU to the network takes place, and in particular the extent to which demand for expertise plays a role in this (sections 6.3. and 7.3.).

2.5 Conclusions

This chapter discussed three main perspectives on the externalization of EU governance from the existing literature: the EU external governance literature, the literature on the role of the EU in global governance, and the legal literature on external EU competition law. All bodies of research provide important insights concerning the externalization of EU rules, and some highlight the scope conditions that play a role in this externalization. The common main shortcoming in both the theoretical and empirical sense is that the perspectives focus to a limited extent on the actual implementation of competition rules on the receiving side, and by consequence on the domestic context in which these rules are received.

Regarding the externalization of EU competition policy to non-EU countries, the legal literature closely follows developments in extraterritorial enforcement and bilateral enforcement cooperation but offers less in terms of analytical added value. And while the external EU governance literature provides interesting analytical ideas on export as a form of diffused integration, this literature looks mainly at rule export from the EU side rather than implementation in the domestic non-EU country. Factors that have been identified as important for reception of competition policy in the non-EU domestic context include economic conditionality, administrative capacity, domestic veto players with vested interests, and socialization of enforcement staff in global networks.

Regarding the EU’s engagement in global competition forums, the legal literature has a descriptive value in comparing the substantive focus areas of the different forums that are active in the field of competition policy. But this literature provides little insights in the internal dynamics of these forums, nor on how the EU engages with these forums in practice. The literature on the EU in global governance provides several intuitions on the motiva-
Implementation and coordination realities of EU competition policy beyond the EU are the main focus of this thesis. In view of this focus, the domestic context of the non-EU country and the institutional dynamics at play in the global forum are likely to increase in importance. The focus also implies that in order to study the externalization of competition policy, we will first need to consider the implementation of competition policy within the EU itself (i.e. the EU’s own ‘domestic context’). The next chapter discusses the implementation of the EU competition rules along three dimensions: the rationale of competition policy; the actors involved in implementation of competition policy across the EU; and the toolbox that these actors have at their disposal in implementing the rules. The chapter shows that the implementation of EU competition policy shows more variation than is commonly assumed, which is likely to have a positive impact on policy externalization.
3. COMPETITION POLICY IN THE EUROPEAN UNION
Changing dynamics of implementation

This chapter discusses the implementation of competition rules in the EU. While substantive competition rules are harmonized across the EU, this chapter highlights a shift in implementation from a highly centralized and hierarchical system towards a more diversified implementation spectrum which includes characteristics of networked governance. In addition, it proposes that rather than challenging the coherence of EU competition policy, this diversification offers more opportunities for successful export. However, as these networked governance dynamics complement rather than fully replace the previous hierarchical logics, the question is to what extent this system may be exported beyond the EU, where the hierarchical dimension in all likelihood cannot be replicated.

In this chapter I will show that the application of EU competition policy has become increasingly diversified. While the external EU governance literature focuses foremost on the institutional dimension of the governance modes, this chapter is broader than that and discusses the implementation of EU competition policy along three dimensions. Section 3.1 concerns the goals of EU competition policy and discusses a shift from competition rules as a tool to tackle exclusively private barriers towards increasingly tackling governmental barriers to the internal market. Section 3.2 discusses the institutional dimension, more specifically the EU’s national competition authorities (NCAs) involved in enforcement and their cooperation with the European Commission and each other. Section 3.3 discusses the remedial toolbox that EU competition authorities have at their disposal for the implementation of the rules and highlights an increasing range of ‘alternative’ enforcement measures beyond infringement decisions.

The increased diversity in the implementation of the EU’s competition rules may have several positive implications for the externalization of EU competition policy. While a centralized enforcement system will yield highly uniform results and thereby offer a clear and relatively predictable regulatory framework, at the same time it may impede sensible implementation, either because of resistance against the rules (for example where integration with the EU’s internal market is unlikely), because the rules are not useful in the context
in which they are implemented or because there are little opportunities to effectively remedy behavior that is deemed harmful. A predominantly decentralized and flexible system approach in theory allows for more successful rule-adoptation and implementation because of implementation of the rules allows for the accommodation of multiple policy goals, enhanced possibilities for cooperation and/or tailored remedies.

### 3.1 Competition policy and the internal market

Competition policy plays a key role in the context of EU market integration. Competition law is a tool that has been consistently used to support the construction of the internal market, rather than the regulation of existing national markets. However, while this ultimate goal of market integration has not fundamentally changed, there has been a change of emphasis in the implementation of EU competition rules: from an initial focus on private barriers, competition policy has in addition become a supporting tool to reduce state barriers to competition in the internal market. And while still ultimately at the service of internal market integration, the intermediate goals of competition policy paradoxically seem to have become on the one hand more inclusive (accommodating different horizontal EU policy goals) but at the same time narrower (with a focus on the enhancement of consumer welfare). This diversification of rationales for the application of EU competition policy is likely to have several positive implications for the motivations to export this policy.

#### 3.1.1 The flexible nature of EU competition rules

EU competition law consists of four main elements: a cartel prohibition, an abuse of dominance prohibition, a merger regulation and a state aid prohibition. While the cartel and abuse of dominance prohibition aim to regulate companies, the state aid prohibition limits the possibilities for national and local government administrations to provide state aid. The latter is unique to the EU system of competition law; in other economies, notably the US, China, and South Korea, national and local governments actively provide subsidies to companies in order to stimulate industrial development in the country or a certain region.
### Competition policy in the European Union

<table>
<thead>
<tr>
<th>Article</th>
<th>Type</th>
<th>Details</th>
<th>Enforcement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 101 TFEU</td>
<td>Cartel prohibition</td>
<td>Prohibits most notably agreements between companies that fix prices or geographically divide markets.</td>
<td>Ex post enforcement: procedure starts after the allegedly illegal behaviour has taken place.</td>
</tr>
<tr>
<td>Article 102 TFEU</td>
<td>Abuse of dominance prohibition</td>
<td>Concerns behaviour of a single company: dominance of a company in a market brings a 'special responsibility' to behave in a certain manner. Price squeezes, a refusal to supply, rebates and predatory pricing are the most common categories of abusive and therefore - under circumstances - prohibited behaviour.</td>
<td>Ex post enforcement: procedure starts after the allegedly illegal behaviour has taken place.</td>
</tr>
<tr>
<td>Regulation 139/2004</td>
<td>Merger Regulation</td>
<td>Where a foreseen merger is expected to limit competition in the single market, it may be prohibited or be subjected to conditions.</td>
<td>Ex ante enforcement: approval or prohibition after notification.</td>
</tr>
<tr>
<td>Article 107 TFEU</td>
<td>State aid prohibition</td>
<td>State aid or subsidies by national or local administrations are in principle prohibited, but a number of exemptions apply, such as aid with a social character and aid to less developed regions.</td>
<td>Ex ante enforcement (mainly): approval or prohibition after notification.</td>
</tr>
</tbody>
</table>

*Figure 3.1: Main elements of EU competition law*
EU competition policy therefore consists of a number of legal prohibitions from the Treaty on the Functioning of the EU (TFEU), although more relevant for understanding the role and actual effect of competition policy are secondary legislation and the way the rules are implemented. The legal framework in which EU competition law is applied is in essence relatively open, since Articles 101, 102 and 107 TFEU do not contain exhaustive prohibitions (Warlouzet, 2010: 8-9). Through an elaborate system of regulations (notably merger Regulation 139/2004 and implementation Regulation 1/2003), directives, decisional precedents, case law and ‘soft’ tools like Commission guidelines and notices, a detailed set of rules and implementation practices has evolved over time. The enforcement priorities have also shifted: while the initial enforcement emphasis from the European Commission was on the cartel prohibition, later this emphasis shifted to include mergers, abuse of dominance and most recently state aid.

While EU competition policy is one of the key areas of exclusive EU competence, also the treaties do not provide much explanation on the ultimate goals of the competition rules. Article 3(g) EC Treaty (and before that, Article 3(f) EEC Treaty) stated that the activities of the European Community would include ‘a system ensuring that competition in the internal market is not distorted.’ When the EEC Treaty was signed, competition policy was generally not applied in Europe. Therefore, it is possible that the EEC signatories may have not foreseen the important integrational role competition policy would eventually play in the EEC, as has been suggested by several authors (Gerber, 1994; McGowan, 2007). In the Lisbon Treaty, competition law is no longer explicitly mentioned as an ‘activity’ of the EU. This prompted discussion in the legal literature on the extent to which public policy goals should be taken into account when applying EU competition rules (e.g. Lavrijssen, 2010; Parret, 2010). This discussion has however remained mainly limited to the enforcement level and largely ignored the more normative discussion as to what the role of competition policy should be in complex contemporary economies.

3.1.2 From private to public barriers

In the first decades after the Treaty of Rome was signed, the Commission began to tackle cartel agreements between companies concerning either territorial restrictions or issues that related to parallel imports (e.g. Consten-Grundig). When companies would be able to effectively divide territories within the Community, this would in essence establish a private trade barrier, whereas public barriers (such as customs) had been lifted. If such private

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21 See also Tarullo (2000): 490: ‘Competition law depends on experienced enforcers and judges to apply general statutes appropriately in complicated and differing market circumstances. In this sense, a kind of common-law, case-specific approach prevails, not just in the United States, but also in civil-law jurisdictions.’

22 Case 56 and 58-64 (1966).
barriers were allowed to persist, they would undermine the common market, and therefore the ultimate aim of the EEC Treaty. In this effort of market integration the Commission was backed by an activist European Court, which often ruled not only on the specifics of the case but also made broader statements on principles and values (Gerber, 1994), for example through a teleological interpretation of the competition provisions (i.e. an interpretation of these provisions in the light of the objectives or even the ‘spirit’ of the EEC Treaty).23

Following the impetus given to the internal market by the Single European Act (1986) and the Treaty of Maastricht (1992), enforcement of the EU competition rules saw an increased emphasis on reducing the role of governments in markets rather than companies. In the first wave of liberalization through a set of reform packages in telecoms (1995), electricity (1996) and gas (1998), competition policy was used as a tool to check on incumbents (mainly formerly state-owned companies) in privatized sectors. Dominant market players by definition, incumbents had “special responsibilities” to grant new entrants access to networks (at reasonable prices) and not so squeeze their new competitors in upstream or downstream markets. The Commission also began to actively enforce the state aid prohibition, making it more difficult to support national (or local) companies –to the detriment of other, non-subsidized companies from elsewhere in the internal market. The underlying rationale of competition enforcement became therefore increasingly oversight of previously publicly owned companies and the reduction of state subsidies, which would be followed by the creation of ‘pan-European’ markets where companies from all member states could compete on an equal footing.

The enforcement practice of the Commission’s DG Competition from the 1980s onwards has thus demonstrated an increasing confidence in the working of markets. In the late 1990s, European competition enforcement underwent on a revision known as the ‘more economic approach’ to EU competition law. This economic approach would entail an increased use of economic modeling in the otherwise rather legalistic approach to the competition rules. In theory, this approach also included a changed emphasis in the goals of competition law. DG Competition increasingly began to emphasize consumer welfare rather than European integration as the ultimate aim of competition policy. This is perhaps most explicit in the discussion paper on the application of the abuse of dominance prohibition: ‘the objective of Article 82 [the current article 102 TFEU] is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.’24 While in the literature it has been argued that the more economic approach was part of a ‘neoliberal turn’ in European competition policy, where short-term considerations and a

**Notes**

23 Most notably in Case 6/72 Europemballage and Continental Can v. Commission (1972), para. 22-27. On how in itself ambivalent European court rulings have in turn been actively used for the integration agenda of the legal community, see Vauchez (2008).

Chapter 3

market-based philosophy became dominant to the expense of organized labor (Buch-Hansen and Wigger, 2011; Wigger and Nölke, 2007; Wigger, 2008a), such claims should be nuanced in the light of several factors.

First, the more economic approach was partially inspired by a desire among the expert community to learn from US practice in antitrust law, which was considered to be at the forefront of new developments. In the US, something similar to the European economic approach had set in during the 1970s and 1980s, and the idea was that competition policy in Europe should modernize and update current practices. The more economic approach was also partly inspired by several merger cases that were turned down by the European Court for lack of reasoning; the idea was therefore to strengthen the economic evidence in the Commission’s decision-making. It was also believed that a more economic approach would reduce the chances of -mainly- type I errors (false positives): the use of economics would make sure that only actually harmful company conduct would be addressed. In short, the more economic approach was therefore considered as ‘better’ enforcement in the technical sense of the word.

Second, the increased emphasis on consumer welfare should be considered in the light of increasing citizen concerns about an ever closer and more enlarged European Union. By embracing the concept of consumer welfare, the Commission could use competition policy as a way to show the benefits of European integration. An example of this is mobile roaming, an initiative the Commission has frequently used to demonstrate the advantages of the EU. In a further way to demonstrate the benefits of competition policy to citizens, Commissioner Vestager recently began to tackle tax reductions under the state aid prohibition. The latter is also an example of the flexibility and open-ended nature of the EU competition rules, which do neither explicitly state, nor exclude that tax advantages could fall under the state aid prohibition. Traditionally, state aid was understood as a government ‘giving’ something to a company, but in the current interpretation also includes benefits understood as ‘not taxing.’

Finally, while the more economic approach in competition policy emphasizes consumer

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27 Too frequently, perhaps. From a satirical perspective, see 3 April 2014: ‘EU states agree to end mobile roaming if EU shuts up about it’ (http://berlaymonster.blogspot.be/2014/04/eu-states-agree-to-end-to-mobile.html)

28 Commission decision SA.38724 State aid implemented by the Netherlands to Starbucks (2015); Commission decision SA.38733 Aid to Apple (2017); Commission decision SA.38944 Aid to Amazon – Luxembourg (2017); Opening of state aid investigations into the Netherlands’ tax treatment of IKEA dossier SA.46470 (2017).
welfare in the economic sense (in this context commonly interpreted as lower price, better quality, more choice and innovation), at the same time there is a tendency towards the inclusion of broader public policy goals in EU competition policy. The broadening of EU objectives in general (from the EEC, essentially a project of internal market integration, towards a more political union following the Maastricht and Lisbon Treaties) begs the question to what extent competition policy is made subject to these horizontal goals of the EU. The EU’s ‘Lisbon agenda’ (2000-2010) for example, which included sustainability and social cohesion as well as competitiveness, was a set of horizontal initiatives meant to apply in all policy areas. And in the ‘Europe 2020’ strategy (2010-2020), employment and public interest goals such as climate change were among the main targets set. Although the European Commission is keeping a principled hard stance against cartels, it has been more flexible in the context of more environmental-friendly energy initiatives,29 and in the context of subsidies for (youth) unemployment schemes.30

From the discussion above, the following paradox emerges. While the emphasis was initially on competition policy as a tool to create a common market, later the emphasis seems to have become on the one hand narrower (consumer welfare) and on the other hand broader (to include EU Treaty objectives beyond market integration). This paradox can be explained when we think of the goals of EU competition policy as layered. The main rationale for EU competition policy remains EU market integration, although now in the broader sense of the Lisbon Treaty. This informs the layer of liberalization and consumer welfare which was added to the traditional market integration rationale. The energy union and digital single market initiatives31 are good illustrations of this layered approach: competition policy is clearly at the service of broader market integration goals that have not only an economic dimension that relates to choice and lower prices (consumer welfare), but also have an environmental and geopolitical dimension (energy union); or a privacy/human rights and employment/innovation dimension (digital single market).

3.1.3 External implications

A diversified set of underlying goals may have a positive impact on the rationale for export of EU competition policy to non-EU countries and global forums. The diversification of competition policy goals, specifically the combination of broad internal market goals with an increased emphasis on consumer welfare, in theory provides a powerful incentive for

export from an EU perspective. That is because the extension of such a system of regulation beyond the EU would likely translate into increased access for EU companies to non-EU markets, especially when competition policy results in decreased direct government involvement, thereby creating entirely new markets. When non-EU countries apply EU-style competition regulation, the barriers for EU companies in those non-EU markets are therefore likely to decline, in particular where EU-style competition policy can help to open up previously state-controlled or monopolized markets.

At the same time, it is less clear what would be the motivation for the non-EU country to approximate its competition policy to that of the EU in the absence of an accession perspective. Since the ultimate goal of EU competition policy has remained market integration, it seems highly specific to the EU context. At the same time, the flexibility of EU competition rules to accommodate a variation of ‘intermediate’ goals may nevertheless make it an attractive system. The use of competition policy to support market liberalization in an *ex post* manner may be useful for countries who would like to privatize their industries, for example in order to raise funds or simply because they expect that this will result in better consumer welfare; and the flexibility of competition policy to serve broader public goals can similarly be a motivation for countries who would like to use competition policy to achieve goals such as sustainable production.

### 3.2 A community of competition authorities

A second relevant element in the implementation of EU competition policy relates to the involved authorities. This is the ‘institutional’ dynamic of implementation, which may according to the external EU governance literature be relevant for externalizations of the policy area. Within the EU, we see that the governance of EU competition policy has evolved from a hierarchical mode (vertical, centralized implementation) towards a more networked mode (horizontal, decentralized). The possible implications of this shift in governance are outlined in section 3.2.3.

#### 3.2.1 Proliferation of national competition authorities

The evolution in the goals of EU competition policy has been accompanied by a change in the institutional setup of competition governance from hierarchical towards more networked governance. Policy-making and enforcement of EU competition policy were highly centralized until the early 2000s. At the time of the Treaty of Rome (1957), Germany was the only European country actively enforcing competition law. It was in the 1990s, following the first wave of liberalization in the public sector, that a more active enforcement of national competition laws started in many EU member states and authorities become operational. This was for example the case in Italy (establishment of *Autorità Garante della Concorrenza e del Mercato* and a new national competition law in 1990), Belgium (establishment of
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Raad voor de Mededinging and a new national competition law in 1991) and the Netherlands (establishment of the Nederlandse Mededingingsautoriteit and a new national competition law in 1998).

But while most national competition legislation was more or less directly taken from EU law, formally speaking the application of EU law remained exclusively in the hands of the European Commission - in practice of the Directorate-General for Competition. Regulation 17/62 provided for a centralized enforcement model by giving the Commission an exclusive competence to regulate exemptions in cartel cases. DG Competition or ‘DG COMP’ is the executive part of the Commission implementing the competition rules from the Treaties by enforcement (i.e. directly applying the rules) at the EU level, but also in proposing secondary legislation and by issuing guidance on the implementation of the rules. While formally speaking the enforcement decisions and secondary legislation are Commission decisions and thus have to be adopted by the College of Commissioners, the capacity and experience of DG Competition are such that the terms ‘European Commission’ and ‘DG Competition’ are often used interchangeably when we speak of EU implementation of competition policy. National competition authorities (NCAs) enjoyed limited room for manoeuvre when applying national competition law. The primacy of European (competition) law gives it legally speaking prevalence over national (competition) law: European courts ruled for example that the parallel application of national competition law may not obstruct the uniform application of European competition law.32

This hierarchical implementation dynamic came under increasing pressure due to the proliferation of EU NCAs. The active position of EU NCAs during the liberalization wave of the 1990s, in combination with enlargement rounds in 2004 and 2007 made an enforcement system of EU competition law based on centralized notifications to DG Competition difficult to maintain. Regulation 1/2003 thus introduced an ex post system of control, where detection of cartels mainly occurs through the encouragement of whistle-blowing (leniency policy) instead of notification. It also introduced an obligation for NCAs to apply EU competition provisions alongside their national laws in national cases with a community dimension (cases ‘which may affect trade between member states’), which in most cases creates a double legal basis for NCA decisions.33 Finally, in order to facilitate coordination between the DG Competition and the NCAs, Regulation 1/2003 established a network, the European Competition Network (ECN), in which DG Competition and the NCAs cooperate.

32 Case 14/68, Walt Wilhelm, para. 4. See also: Bender, 2014.
33 Most countries prefer the double legal basis (i.e. a decision based on both EU and national competition law), although the Italian competition authority bases its cases exclusively on EU rules.
DG Competition presented the reforms introduced by Regulation 1/2003 as decentralization, since competition authorities in member states would in most cases start applying EU alongside national competition regulation. This would give NCAs increased responsibilities and allow DG Competition to concentrate on cases with EU relevance. Several commentators argued however that the modernization was actually a disguised centralization, and that DG Competition has been able to centralize power by obliging national competition authorities to apply EU rules - thereby virtually ruling out the possibility of divergence in implementation (Riley, 2003; Wilks, 2005). Especially DG Competition’s power to take over the case from an NCA if it considers that the NCA is not applying the rules correctly, as stated in Article 11 of Regulation 1/2003, was considered an indication of such ‘centralization in disguise’. It has also been suggested that the new network, ECN, allows for peer pressure on competition authorities in new member states after accession and in that sense as a way of post-accession compliance monitoring (Cseres, 2014).

A different interpretation of the institutional modernization of EU competition enforcement is to consider Regulation 1/2003, and more specifically the ECN, an example of networked governance (Kassim and Wright, 2009; Maher, 2006; 2007; 2009; De Visser, 2008; Wilks, 2007), new governance (Lehmkuhl, 2008; 2009), experimentalist governance (Svetiev, 2010) or multi-level governance (Cengiz, 2010). This literature puts more emphasis on the ECN as a horizontal network for the sharing of experiences between competition authorities, allowing for mutual learning and for a sensible coordination of the workload. But even after fifteen years of functioning in practice, the internal workings of the ECN have remained unclear. Below I will discuss both (case-specific) enforcement coordination and the more general discussions taking place in the network.

### 3.2.2 Cooperation through networks

In discussing cooperation between EU competition authorities in networks, it is first of all important to flag that the ECN is not the only cooperation network that relates to the implementation of EU competition policy. The ECN actually deals foremost with the cartel and abuse of dominance prohibitions. For mergers, direct coordination between competition authorities also takes place through a separate and more informal network, ECA (European Competition Authorities). ECA was set up around the same time as the ECN, but provides a more bottom-up alternative in which DG Competition does not have special prerogatives. ECA has worked on a number of specific issues that did, at least initially, not come up in the ECN, such as multijurisdictional merger notifications but also NCA guidelines on fines in competition enforcement. In 2001, a system of merger notification was set up in which ECA authorities are mutually informing each other via e-mail if the notifying parties indicate
that the merger is also under review in other jurisdictions within the network.\textsuperscript{34} Under the ECN, a working group for mergers was set up in 2010. This group has now issued best practices for merger review, which relate to the cooperation between reviewing authorities in the process of the review and therefore builds on and refers to the ECA notification system.

For state aid, cooperation takes place through a high-level forum on state aid modernization in which DG Competition and the member states participate.\textsuperscript{35} While national authorities are to some extent involved in the enforcement of the state aid prohibition, both powers and enforcement practice in this area remain concentrated at the EU level. State aid is traditionally enforced through a centralized system with mandatory notification of national and local aid to DG Competition, also because national authorities are not necessarily unbiased in the screening of national aid schemes. In the context of enlargement however, pre-screening offices were set up in the member states, which help local authorities with their notification to DG Competition and provided an important filter.\textsuperscript{36} A recent state aid modernization resulted in both more responsibility towards national institutions (either NCAs or dedicated agencies) for compliance and more cooperation between DG Competition and member states. Through a block exemption regulation, part of the aid does not have to be notified to DG Competition and can be implemented at the national level.

Having said that, the ECN remains the most institutionalized and active forum for cooperation and coordination of EU competition authorities. The network was intended mainly as a system for enforcement cooperation, but increasingly became also a forum for broader discussions on implementation. Officials from NCAs have indicated that the network provides an important point of reference for national competition officials on policy guidance and best practices, in addition to case-specific discussions (Danielsen, 2013: 90).\textsuperscript{37} To this extent, the ECN has several working groups in different policy areas; these groups can be established and discontinued depending on the needs. The meetings of the working groups are mainly chaired and steered by DG Competition in terms of agenda, location and secretariat.\textsuperscript{38}

The ECN has working groups both for special elements of implementation and for sectoral

\textsuperscript{34} Interviews EU.4; EU.7; NO.3. See for the document: http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf
\textsuperscript{35} http://europa.eu/rapid/press-release_IP-14-2783_en.htm
\textsuperscript{36} Interview EU.11. Blauberger (2009).
\textsuperscript{37} From a group of Scandinavian officials, 51 percent indicated that the ECN is involved in the formulation and discussion of general policy guidelines; 57 percent indicated that the ECN is involved in information exchange and exchange of best practices; 65 percent indicated that the ECN is involved in formulation and discussion of specific cases.
\textsuperscript{38} The working group on Cooperation Issues and Due Process is chaired by NCAs.
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issues. Regarding the first category, there are for example groups on cartels and IT, and
temporary groups to prepare new regulation at the European level. Examples of the latter
include groups that were set up in the context of the 2009 guidelines on enforcement
priorities of abuse of dominance; the 2010 guidelines on horizontal agreements; and the
group on the 2014 TTBER (Technology Transfer Block Exemption Regulation). These
groups are useful for DG Competition to assess national practices when monitoring existing
enforcement and preparing new regulation. The temporary groups thus cater mostly to the
needs of DG Competition (see: Bender, 2014).

Groups have also been set up to discuss sectoral issues (energy, transport, food). In these
sectoral groups, there is most potential for a horizontal discussion, since the issues are
generally related to market dominance rather than hard-core cartels, and therefore these
areas are more susceptible to new implementation tools such as commitment decisions,
market monitoring and advocacy (see section 3.3). In this context, not only the range
of outcomes but also the range of potential actors institutionally broadens, because the
interface with (national) sectoral regulators also comes into play. However, the interactions
can be complicated by different prioritization of the NCAs and lack of experience with the
specific issue under discussion. This limits the possibility of mutual learning and in-depth
discussion. While in theory, the sectoral groups are ‘important in order to develop common
economic and legal principles for the assessment of complicated business practices, which
are taking place in quickly developing markets and which are subject to evolving economic
thinking’, this therefore does not necessarily correspond to the practice.

In the case-specific cooperation of the ECN, mutual notification mechanisms play an im-
portant role. The notifications of the enforcement decisions of NCAs to DG Competition
before adoption in theory provide an important possibility for DG Competition to exercise
control over national decisions. Draft decisions are considered by the DG Competition,
and their recommendations are communicated back to the NCA. While the literature dis-
cussed above has interpreted this as a mechanism for control, it seems that in practice many
NCAs seem to appreciate DG Competition’s recommendations rather than considering
these a limitation to their freedom. The explanation for this, is that the advice is often used

39 With the merging of sectoral and competition authorities in several EU countries like the
Netherlands, the UK and Spain, the oversight seems to become increasingly comprehensive at
least in institutional terms, potentially easier EU cooperation.
41 Article 11(3) and Article 11(4) Regulation 1/2003.
42 These communications are confidential and cannot be invoked in national procedures; see
Article 27(2) of Regulation 1/2003, stating that correspondence between ECN member are
internal documents not accessible to parties.
43 Interviews EU.1; EU.2.
to legally strengthen the case; and since the NCA has an interest in upholding the national case in court, which is bound to the Community courts by primacy of EU law, the experience of DG Competition may be a valuable asset rather than an unwanted intervention.\textsuperscript{44} While DG Competition ultimately has the competence to take over a case from an NCA,\textsuperscript{45} in the period between May 2004 and August 2015 this possibility was only used once, in the \textit{Luxury watches} case.\textsuperscript{46} This case was taken over from the Spanish NCA, which was about to impose sanctions despite an earlier rejection of the complaints by DG Competition. This measure is therefore an ultimate remedy, and certainly not meant for frequent intervention.

To some extent, the NCAs also have the possibility to influence DG Competition’s decisions. This formally happens through the advisory committee, which existed already before the introduction of Regulation 1/2003 but was further codified by the latter.\textsuperscript{47} DG Competition has to formally consult this committee of NCAs before they propose an enforcement decision for adoption to the College of Commissioners and take the ‘utmost account’ of its opinions. However, it seems that the committee is in practice rather a mechanism to express formal objections rather than an actual adversarial instrument leading up to changes in the decision itself. That is because this consultation talks place at the very last moment, just before the planned adoption. While the margin of intervention for NCAs through the advisory committee is therefore limited, a better tactic for member states is to raise objections in an earlier stage of the procedure in an informal manner, following notification by DG Competition to the NCAs in the ECN.\textsuperscript{48} However, following Regulation 1/2003 there is no formalized manner for NCAs to do so.

While ECN in theory has the potential to be a horizontal discussion network that caters not only to the needs of DG Competition but also to those of NCAs, especially in the more sectoral working groups, the latest reform of the ECN (the ‘ECN Plus’ Directive which has been recently adopted)\textsuperscript{49} seems mainly focused on increasing convergence. The prevailing philosophy therefore continues to emphasize the importance of uniformity of enforcement in cartels and abuse of dominance, rather than encouraging local experimentation with the competition rules. At the same time, initial elements of a networked governance structure have emerged in merger policy (through ECA and the ECN merger working group) and even in state aid (through the high-level forum of national authorities). Therefore, to the exist-

\textsuperscript{44} This interest only increases with the newly introduces possibility of private litigation following a competition infringement, since a prohibition decision usually underlies these claims.
\textsuperscript{45} Article 11(6) Regulation 1/2003.
\textsuperscript{46} \url{http://europa.eu/rapid/press-release_IP-11-952_en.htm}
\textsuperscript{47} Article 14, Regulation 1/2003.
\textsuperscript{48} Interviews EU.8; EU.13; NO.4.
\textsuperscript{49} Directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.
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ing dynamic of predominantly hierarchical governance in EU competition policy, a new layer of networked governance has been added which complements rather than replaces the former.

3.2.3 **External implications**

A diversified landscape of competition enforcement authorities in the EU may have several positive external implications for the externalization of EU competition policy. A first set of implications relates to the increased enforcement of EU competition rules at the national level. Because an increased number of authorities now directly deal with EU (as opposed to national) competition rules, the EU's global influence in competition policy is likely to increase. This may especially be the case in global competition networks, where a large number of the participating competition authorities directly applies EU rules and therefore could be expected to bring an EU perspective to the table. NCAs and/or sectoral national authorities may also have their own external agendas and therefore reach out to more non-EU contexts than the European Commission would have been able to achieve on its own. In addition, the enforcement and implementation issues that arise in EU countries are likely to be more similar to non-EU national contexts than to the issues that DG Competition faces, as the perspective is national rather than supranational. The application of EU competition policy in the national context is thus likely to make EU competition regulation more relevant for non-EU countries. The (institutional and economic) diversity of the national implementation context among EU member states could be an advantage as well, since it increases the likelihood that non-EU countries can find a relevant ‘peer example’ among the member states.

A second set of implications is related to the functioning of the ECN, ECA and the high-level forum on state aid modernization, which under circumstances may allow for participation of non-EU competition authorities. This could be the case mainly for countries that have enhanced cooperation frameworks in competition or trade with the EU. Such networked cooperation may enhance the uptake of EU-style regulation in non-EU contexts because it provides the possibility for a discussion of implementation issues on a regular basis, as is for example the case in EU food safety where non-EU countries participate in the EU Rapid Alert System for Food and Feed (Weimer and Vos, 2015). These discussions mutually strengthen EU and non-EU national authorities in their implementation practices where they allow for learning from each other's experiences. An additional dimension at the more individual level is the socialization that may occur in these networks. EU committees and agencies have played an important role in the socialization of civil servants in the EU (Trondal, 2002; 2010): such a dynamic potentially also extends to EU networks, and more specifically where these networks are open to non-EU agencies.
3.3 Alternative enforcement

A third dimension of the implementation of EU competition policy relates to the tools that competition authorities have at their disposal when they apply EU rules. The toolbox of competition authorities in the EU has become increasingly diversified: in addition to traditional infringement decisions that establish a violation of EU law, competition enforcement now includes many so-called ‘alternative enforcement’ tools. This may have several positive implications for the externalization of EU competition policy.

3.3.1 A flexible toolbox

Diversification of both the goals and the number of implementing authorities of EU competition policy was accompanied by an evolution of the enforcement tools that these authorities have at their disposal. The ‘more economic approach’ in EU competition policy not only introduced the use of economic modelling in enforcement, but also increased the flexibility of the supervisory toolbox. That is because an economic approach emphasizes the actual harmful effects of alleged anticompetitive behavior, instead of prohibiting certain types conduct per se (thereby reducing false positives). In terms of the professionals engaged with the implementation of competition policy, the more economic approach introduced economists to the - previously legal - case teams at DG Competition and at many NCAs. These economists tend to be less concerned about legal certainty and are more functionally driven by correctly signaling anticompetitive conduct and proposing an effective remedy.

Regulation 1/2003 provided a formalization of several behavioral supervision tools for competition authorities, in the legal literature often called ‘horizontal’ or ‘alternative’ enforcement (Ottow, 2009). Such alternative enforcement may include supervisory mechanisms such as behavioral remedies, market monitoring and advocacy (all discussed in more detail below). Alternative enforcement is especially relevant in liberalization processes, where competition authorities tend to supervise previously monopolized markets without necessarily engaging in traditional ‘cease-and-desist’ enforcement actions. Behavioral remedies mostly occur in abuse of dominance cases where the market failure is context specific, which often (though of course not exclusively) concern liberalized markets where there is a single dominant company that behaves in an allegedly anticompetitive manner; market monitoring is often used for sectors where competitive problems are suspected, which is also likely in a liberalization context; and advocacy is particularly relevant towards ministries that deal with privatization or with regulation of liberalized sectors.\(^{50}\)

\(^{50}\) An ICN survey from 2002 revealed that most advocacy efforts from the respondents were directed at public utilities – most notably telecom, energy and transport: International Competition Network (2002).
Starting with behavioral obligations as an alternative enforcement tool, remedies in EU competition policy increasingly include ‘positive’ (behavioral) obligations to refrain from a certain kind of behavior. In traditional competition enforcement, ‘negative’ infringement decisions play a central role; in such decisions, parties (companies) are ordered to pay a fine. Behavioral remedies were first formally used in merger decisions, where both structural (mainly divestiture of parts of the company) and behavioral (behavior-related commitments) remedies could be attached to EU clearance. While initially preference was given to structural remedies as a matter of principle, behavioral remedies are now regularly attached to merger decisions. And with an increasing use of the abuse of dominance provision, under the ‘essential facilities’ doctrine companies can be requested to give their competitors access to essential networks, which is also an example of a behavioral remedy. While the range and scope of behavioral remedies as such is open-ended, they formally take the shape of so-called ‘commitment decisions’.

Regulation 1/2003 formalized the use of such commitment decisions by the Commission. The Commission may accept commitments offered by the companies to remedy the Commissions’ concerns, and may thereby close the case with a commitment (rather than an infringement) decision. Note that commitment decisions are different from ‘settlement’ decisions. While a settlement procedure is a negotiation procedure to reduce the fine in exchange for cooperation, a commitment decision does not include the finding of an infringement of EU competition rules in the first place. While a commitment procedure in theory allows for mutual remedial decision-making because the companies may offer suggestions to remedy the allegedly illegal conduct (Svetiev, 2014), in practice there seems to be a considerable degree of nudging from the side of the competition authorities to come up with the ‘right’ commitments. Not only DG Competition, but also most NCAs have a commitment procedure available; the ‘ECN Plus’ Directive even makes it mandatory for member states to have this option for NCAs.

A second form of alternative competition supervision is market monitoring by competition authorities. Monitoring can consist of a market scan to check for market failure if there are indications of such failure. DG Competition for example may start an inquiry under Article 17 of Regulation 1/2003 where the ‘trend of trade between member states, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market’ and it has completed such inquiries in energy, pharmaceuticals and

\[\text{References}\]

51 Interview EU.13.
53 Directive 2019/1, Article 12.
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financial services markets. Monitoring can also take place over a longer period of time, when an authority decides to follow certain problematic sectors over time. Market monitoring can start following privatization, or following complaints from either consumers or competitors. For example, the Dutch competition authority is structurally using consumer complaints to detect possible areas of action.

There are several reasons for a competition authority to engage in market monitoring rather than enforcement. A market study can be useful when a competition authority is unsure whether enforcement would be necessary; that is relevant especially in abuse of dominance cases, where there is no leniency (whistle-blowing) mechanism to detect cases and the anti-competitive behavior is highly context-specific rather than being prohibited per se. Market studies can also be a second-best tool when enforcement is not possible for political or other reasons, for example due to a lack of resources. In that case, the market scan acts as a warning to the companies on that market to behave in accordance with the competition rules. Not only DG Competition, but also most NCAs have the power to carry out sector inquiries.

Market monitoring by competition authorities potentially overlaps with work of sectoral authorities. In theory the role of the sectoral authority is designed to be ex ante and aims to prevent ‘exploitative’ abuses that relate to pricing (e.g. setting tariffs for the use of a network or facility), while the competition authority acts ex post and looks more at ‘exclusionary’ abuses (e.g. abuse of dominance when a network is closed off by one company). However, the distinction becomes increasingly blurred not only because competition authorities engage in market monitoring, but also because they often merge with sectoral authorities, and in addition increasingly tackle exploitative behaviour.

A third form of alternative enforcement is competition advocacy, which has been defined as a way to promote a competitive environment and to create a ‘competition culture’ through non-enforcement mechanisms. A command-and-control type of competition advocacy is the promotion of compliance; advocacy is then understood as making companies aware of prohibited conduct and where possible stimulating them to engage in compliance training for staff to prevent them from engaging in prohibited conduct. This type of advocacy is done both by competition authorities and by law firms. Advocacy can also target end-consumers, who are expected to benefit from competition policy and as such should be made

56 See section 3.2.2 on the interface of the ECN and sectoral regulators; also Vestager (2016).
57 International Competition Network (2002); (2011).
58 See on the role of competition authorities in compliance programmes: Lachnit (2014).
aware of competition policy – more specifically of the benefits of competition law and the rights it confers upon them. Consumers may be also encouraged to come forward with complaints that can be used in the detection of anticompetitive conduct.

A further dimension of advocacy targets parts of the administration. Both in established and emerging competition regimes, competition authorities engage in a form of ‘lobbying’ for the benefits of competition policy towards other parts of the administration. Most typically these are the parts of the administration that deal with industrial policy, but also divisions that deal with energy or telecom (essentially any part of the government that involves state intervention in markets). The process can be either informal, where officials try to influence other officials on an ad hoc basis, or take in the form of a legislative procedure where advice of the competition authority is formally required.

While most competition advocacy in the EU takes place at the national level through NCAs, DG Competition also structurally engages in advocacy activities. As part of the Commission’s inter-service consultation procedure, DG Competition is for example obliged to consult other parts of the Commission ‘with a legitimate interest’ before adopting a decision or legislation – this is the legal service, but may also include DG GROW, DG energy, or DG connect (communications and digital). Conversely, other DGs are required to ask the opinion of DG Competition when adopting decisions and legislation in cases where the latter has such legitimate interest. In addition, DG Competition has been very concerned with advocacy efforts towards EU NCAs: in this sense, the ECN may also be characterized as an example of competition advocacy rather than as an enforcement network.

While on the one hand alternative enforcement is more flexible and arguably more effective in detecting and resolving problematic behavior in markets, it also has several disadvantages. Advocacy and market monitoring may detect or prevent anticompetitive issues in manner that is relatively little burdensome; but behavioral remedies are often costly and complicated to monitor. Commitments may be complex and with long timelines, in some instances lasting more than a decade. Practical issues aside, alternative enforcement also raises the question of checks and balances. In the legal literature, flexible supervisory solutions are often regarded as suboptimal, mainly because of the alleged lack of transparency and lack of court control over the enforcement process. The alternative enforcement tools discussed above only allow court control to a limited extent, because these supervisory mechanisms do not involve an infringement decision that can be challenged. Interestingly, once an infringement decision is issued, the recent introduction of private litigation in the

59 European Commission (2014a); para. 78.
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EU allows for increased court scrutiny. While in some parts of competition enforcement legal checks therefore decrease, court review has been reinforced in others.

From the discussion above emerges that EU competition authorities now have an increasingly diverse toolkit at their disposal to remedy and detect anticompetitive market behavior. Still, enforcement in the form of infringement decisions seem to make up for a large part, if not the bulk, of the work of competition authorities. It is difficult to quantify to what extent alternative forms of enforcement in competition policy are ‘on the rise’ compared to traditional enforcement tools. To an extent, there has been a formalization of existing alternative enforcement, as is the case for commitment decisions. While commitment decisions only became formally possible with Regulation 1/2003, it has been pointed out that they were already informally possible and rather widely used before 2004 (Wils, 2015). The same may be said for market monitoring and advocacy: these tools have gradually entered the supervisory practice over the years, but have only more recently become more formalized in best practices and other output. In any event, alternative enforcement techniques are now increasingly fully and explicitly incorporated in the work of the Commission and EU NCAs, which diversified the existing enforcement toolbox.

3.3.3 External implications

A diversified enforcement toolbox may have a positive effect on the externalization of EU competition policy. A first set of positive external implications relates to confidentiality. Increased emphasis on alternative enforcement in the EU implies that many of the confidentiality issues that have traditionally limited cross-border cooperation with non-EU competition authorities, both bilaterally and in global forums, will diminish. Confidentiality issues – mainly related to legal protection in infringement cases – are very salient in international cooperation that relates to enforcement (specific cases): for example, the exchange of information between authorities in a global cartel case. However, confidentiality is much less of an issue when alternative enforcement practices are discussed because advocacy and market monitoring do not directly involve infringement decisions.

A second set of positive external implications of a more diversified toolbox relates to the diverging needs of new and more experienced competition authorities. An increased focus on alternative enforcement can facilitate meaningful cooperation between established and starting competition authorities. Case-cooperation and related issues often result in highly technical discussions, to which starting competition authorities cannot always meaning-

61 Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. While it is in theory possible to claim damages even without an underlying infringement decision by a competition authority, in practice this will be very difficult.
fully contribute and which may also not be of relevance to them. In the use of instruments such as market monitoring and advocacy, there is potentially much more common ground because the emphasis is on the detection and remedying market failure in general rather than the application of static and complex legal tools to markets in a specific institutional and economic environment.

3.4 Conclusions

EU competition policy shows an evolution from a static, centralized system to a more diversified system of implementation. In terms of goals, these have become broader than (EC) market integration only as they also include more holistic (EU) integration goals. In institutional terms, the Commission’s DG Competition now shares the enforcement of EU policy with EU NCAs, and to an extent, national sectoral authorities as well. In terms of sanctions, more flexible modes of enforcement exist next to static, command- and control mechanisms. Rather than a full shift from hierarchical towards networked governance, I have argued that this development results in an increasingly diversified system of enforcement with a number of possible enforcement rationales, tools and outcomes.

The main question is to what extent the evolution signaled in this chapter poses a challenge or rather an opportunity for externalization of the policy in the absence of full (market) integration. On the one hand, a more diversified structure may challenge the possibilities for externalization because the rules and solutions are less clear and uniform. In such a reading, the diversification of goals, enforcement authorities and tools would result in a less coherent model of EU regulation for export. But as this chapter argues, the diversified nature of EU competition policy is rather likely to enhance the possibilities for externalization precisely because it is more adjustable and thereby allows the EU to lead by example rather than by force. Therefore, multiple intermediate goals, a plurality of national authorities implementing the rules and alternative enforcement may be easier to externalize than centralized, traditional enforcement with a single policy goal. When we conceptualize externalization of EU competition policy as providing a template for emulation by or cooperation with non-EU countries that are setting up competition regimes or for global forums working on competition policy, the EU has potentially a range of goals, experiences and tools that may enhance the externalization to these settings.

However, this diversification does not take place across all dimensions of EU competition policy to the same extent: it is the most prevalent in the area of abuse of dominance where we would therefore expect the best results in terms of externalization. From the literature on the external EU governance literature (section 2.1.2) it became clear that the EU state aid rules have been especially difficult to export to non-EU countries in the absence of an accession perspective. In this chapter, it emerged that implementation of the EU state aid rules still takes place in a relatively hierarchical manner, with relatively little involvement of
NCAs or of alternative remedies and thus little diversity in implementation. In this sense, we would predict that state aid is indeed difficult to extend beyond the EU. At the same time this is also the area where most recently, broader policy goals other than consumer welfare have played a role in the Commission’s assessments; also the involvement of NCAs in this area has been increasing in the recent years. Both may enhance the uptake of state aid rules beyond the EU.

The Norwegian case study, which is the topic of the next chapter, shows a *prima facie* positive combination of hierarchical coercion and networked competition governance that enhances externalization, and extends cooperation even beyond the formal scope of the EEA agreement. However, the Norwegian case study also shows the limits of extending only hierarchical or only networked governance to a non-EU country in the absence of an EU membership perspective.
PART II: EU COMPETITION POLICY IN NON-EU COUNTRIES
4. **COMPETITION POLICY IN NORWAY**

**Externalization in the European Economic Area**

Following the previous chapter on competition policy in the EU, I will now turn to Norway, the first case study of this thesis. Norway is closely associated with the EU through the European Economic Area (EEA), which extends the EU's internal market to a small number of non-EU countries. This chapter will explore the question how EU competition policy influences Norwegian competition policy in the absence of an accession perspective and what are the factors that drive or limit this influence. In view of the asymmetrical relationship between Norway and the rest of the EU in economic terms, the main expectation in the Norwegian context is that the relation between the EU and Norway has a hierarchical dynamic. We would thus expect that the main driver for implementation (or lack thereof) is structural market power, and to a lesser extent the EU’s institutional setup and the domestic conditions in Norway.

Not only does this chapter explain the legal context in which EU-style competition policy operates in Norway, but it also focuses specifically on the implementation of competition policy in the natural gas and food sectors. In addition to being crucial sectors in the Norwegian rejection of full EU membership, these sectors also represent examples that are on the margins of the implementation spectrum. While the natural gas sector shows the limits of hierarchical governance, the food sector shows the potential of networked governance in the absence of EU membership. The examples illustrate not only the limits of approximation by ‘force’ through unilateral enforcement and by emulation and institutional cooperation, but also how rules that look similar on paper may end up being implemented differently in practice.

Unilateral EU enforcement in the Norwegian gas sector was ultimately unsuccessful in fragmenting the power of state-owned companies, while networked cooperation between the Norwegian and EU competition authorities in the food sector has resulted in a more EU-style approach to competition enforcement in this area— even though this development was ultimately not able to open up Norwegian market to EU companies. However, while enforcement in the gas sector has only emphasized direct economic interests between the EU and Norway, the food example brings out a more productive interaction between the EU and the domestic system which is focused on common problem identification and direct
cooperation between competition authorities. Therefore, the networked approach seems more promising in the absence of membership, even in a close association such as the EEA.

The findings of this chapter are relevant beyond Norway. Not only do they provide lessons for other EEA EFTA countries, but the EEA is also one of the main models for a future relationship between the EU and the UK – at least in theory. While not popular in the UK, as this model of association would imply the extension of the EU’s single market regulation, the model – or variations of this model – seem the preferred option from an EU point of view, as it provides a relatively well-working and comprehensive arrangement which does not undermine the fundamental ‘four freedoms’ of the EU’s single market.62

4.1 Integration through the EEA

This section explains how Norway decided not to accede to the EU, and discusses the European Economic Area, which extends the EU’s internal market to several non-EU countries including Norway. After explaining the institutional structure of the EEA, the section also highlights the inherent tensions created by this setup, which has become a permanent form of EU association in the absence of membership.

4.1.1 Norway’s path to non-membership

As we would expect a high level of hierarchy in the relationship between the EU and Norway due to a high level of economic asymmetry, it is important to first consider economic interdependence between the two entities. Norway is economically speaking highly dependent on the EU, which represents around 80 percent of total Norwegian global exports.63 The other way around, Norway is also an important trade partner for the EU, albeit to a lesser extent. The country ranks as the 6th external trade partner in 2018, after the US, China, Switzerland, Russia and Turkey.64 These numbers indeed confirm that the economic relationship between the EU and Norway is asymmetrical.

Despite these close economic ties, Norway has been reluctant to join the EU as a full member and twice voted against EU membership. In a 1972 referendum, 53.5 percent of the population voted against EC membership; in a 1994 referendum, 52.2 percent of the population voted against EU membership. In most EU member states, EU membership has not been subject to such public consultation. In fact, if referenda were to take place today,

62 This is a key point, see for example: “Barnier: EU will not accept any deal that undermines ‘four freedoms’” Financial Times, 13 December 2017.
Competition policy in Norway

many EU member states may be confronted with a similar opposition to membership (Bor-ring Olesen, 2011), as the UK example has effectively demonstrated. Studies that consider Europeanization in EEA countries therefore often suggest that Norway is similar to full EU member states in this and many other respects, and that the reception of EU rules and practices in Norway is comparable to that of EU member states (Egeberg and Trondal, 2009; Trondal, 2011; Danielsen, 2013). This chapter will discuss the latter claim in more detail.

The literature focusing on the Norwegian reluctance to join the EU points at two key sectors in this debate: fossil energy, and agriculture and fisheries. Fossil energy (oil and gas) are a major source of income for Norway: this sector made up for 14% of GDP in 201565 and accounts for a large part of Norway’s export revenues (39% in 2015)66 making it by far the largest export sector of the country. Several gas pipelines connect Norway to the UK and to the EU mainland (France, Belgium and Germany). While agriculture and fisheries are not crucial for Norway in purely economic terms (2% of GDP and 4% of export revenue in 2015),67 Norway’s interests in these sectors are of a more symbolic nature. Farming and fishing are widely held to be part of the Norwegian identity and the 'Norwegian way of life' (see Neumann, 2002; Tanil, 2012a; 2012b). Some authors have pointed out the question of national identity, and more specifically how the Norwegian identity with its emphasis on the simple, rural, outdoor life clashes with the EU identity, which is allegedly more urban and cosmopolitan (Nelsen, 1993; Neumann, 2002; Tanil, 2012a).68

The impossibility to protect farmers and fishermen after EU accession has been considered an important factor for skepticism towards EU membership. Also in economic terms, there are clear benefits to non-membership for these sectors. Norwegian farmers receive more generous subsidies than they would as an EU member state (potentially especially in the light of potential upcoming reforms in the EU’s Common Agricultural Policy);69 fishermen

68 In order to account for the Norwegian reluctance to join the EU, these studies also focus on Norway’s historical struggle for independence, first from the Danish and then the Swedish kingdom, and underline the negative connotation of the word ‘Union’ which was also used for the Norwegian submission to the Swedish crown from 1814 until 1905.
69 Source: OECD statistics in agricultural support: https://data.oecd.org/agrpol/agricultural-support.htm#indicator-chart
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are worried about having to open their fishing territories to EU member states. In the political economy literature it has been proposed that precisely groups benefitting from Norwegian subsidies in these areas successfully mobilized against further European integration, whereas the oil sector would not gain particular advantages from EU membership and therefore remained largely absent in the debate (Ingebritsen, 1998).

Norwegian reluctance to join the EU also has a normative component. When compared to other countries that have considered EU membership, Norway has highly advanced regulatory frameworks. In terms of substantive standards, it seems that Norway considers its own regulation more advanced than EU regulation. This is most markedly so in issue areas like gender equality and democracy, but also in the policy areas of energy and fisheries introduced above. In energy, Norway places much emphasis on environmentally sustainable production, most notably in electricity, which is largely generated by hydropower. Also, the EU fisheries policy (which by the way only relates only to ‘wild’ - not farmed - fish) is arguably less environmentally sustainable compared to the more sophisticated Norwegian solutions in this area.

However, a closer look suggests that many Norwegian policy choices are not so much superior to EU alternatives, but rather that the outcomes of policy-processes remains strongly inspired by a national definition of interests. In fossil energy, the Norwegian position is ambivalent because it is largest source of national income. Strong Norwegian state involvement in the development of this industry is regarded as a positive example of using natural resources for the benefit of the population as a whole. But the ambivalence of the situation clearly surfaces in initiatives like the effort to make oil platforms more climate neutral by providing them with hydropower electricity, or more recently in Norwegian initiatives to further develop technologies that would enable (underground) carbon capture and storage (CCS). In addition, the environmental sustainability of the fast-growing Norwegian fish farming industry is rather contested. Where fish farming takes place in rivers, lakes and at sea (not closed basins) it not only results in health hazards, but is also considered likely to damage local ecosystems. Still, the generally high quality of Norway’s regulatory frameworks and administrative capacity in a procedural sense is relevant in the context of this thesis, as it increases the possibility that the EU will engage in a mutual learning process.

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70 Fish farmers on the other hand expect to benefit from increased EU integration and so do exporters of fish products.

71 Tanil (2012b): 151-152; Interview NO.11.

72 Interview NO.5; http://www.reuters.com/article/us-norway-ccs-idUSKCN0ZK1LW

73 http://www.newsinenglish.no/2013/06/11/pressure-grows-on-farmed-salmon/ In the period 1998-2012, the value of Norwegian fish farming exports increased from 10 billion NOK to over 30 billion NOK (as compared to catch, which remained more or less stable around 20 NOK): Norwegian Ministry of Fisheries and Coastal Affairs (2013).
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4.1.2 Creation and structure of the EEA

When Norway decided not to join the EU, an alternative solution was provided by the EEA agreement, which entered into force in 1994. The agreement can be considered as a comprehensive follow-up to the EFTA agreement. Shortly after the Treaty of Rome establishing the European Economic Community (EEC) had been signed, seven non-EEC countries including the UK, Switzerland and Norway established the European Free Trade Association (EFTA) in 1960. Contrary to the EEC, EFTA was not a customs union and therefore did not have common external tariffs; instead, EFTA was a free trade area, in which tariffs between the member countries were abolished. In the mid-1970s, a number of bilateral free trade agreements were concluded between the EEC and individual EFTA countries, in practice abolishing tariffs for most industrial products between EFTA countries and the EEC as well. When an increasing number of countries acceded to the EC in the 1970s and 1980s, and the internal market was given an impetus by the Single European Act (1986), the need was felt for instruments of further integration for the EFTA countries that were not, or not yet, ready for accession. To this end, the European Economic Area (EEA) agreement was signed in 1992 by the EC, the EC members and the EFTA countries that had not acceded to the EC at that time: Austria, Sweden, Switzerland, Norway, Iceland, Finland and Liechtenstein. Once implemented, the agreement would extend the internal market to the territory of the non-EU countries part to the agreement.

Soon after its entry into force in January 1994, the EEA became the ‘Norwegian model’ of EU integration. While eventually Switzerland never ratified the EEA agreement and remained covered by EFTA only, Austria, Finland and Sweden became full EU members as soon as 1995. Since then, the EEA covers the EU member states plus non-EU countries Norway, Liechtenstein and Iceland. The EEA in its present form is therefore rather marginalized in terms of non-EU members, while EU membership has dramatically increased (from 12 member states in 1994 to 28 member states in 2014 - and to 27 member states in 2019). Compared to the other two EEA EFTA countries, Liechtenstein and Iceland, the Norway is by far the largest in terms of population and GDP. Already in 1997 ‘the agreement [had] to some extent become bilateral, regulating the relationship of Norway and the EU, with the marginal economies of Iceland and Liechtenstein trailing along’ (Sejersted, 1997). A 2012 report from the Norwegian government remarks that the EEA: ‘is the only international organization in which Norway is a superpower, having a certain effect on Norway’s self-image, extending so far as Norway viewing this as a “Norwegian” model, and not always treating its

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74 Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the UK were the 1960 signatories of EFTA. Later members include Iceland (1970), Finland (associated since 1961 / full member since 1986) and Liechtenstein (1991).

75 In Switzerland, especially the issue of freedom of people was a problematic issue that blocked further integration.
two fellow EFTA partners as fully equal cohorts in a common endeavor.\textsuperscript{76}

The EEA was thus initially conceived as a way towards further European integration and also potentially towards EC membership (Delors, 1989) but has become a semi-permanent mode of association. The current EEA EFTA countries explicitly choose not to accede the EU, although they would probably fulfill the EU’s accession criteria: Iceland put EU accession negotiations on hold in 2013 and eventually withdrew its membership application in 2015,\textsuperscript{77} while Liechtenstein never applied for membership. Since the agreement has been in force for 20 years now, a recent discussion took place on a potential revision. The European Commission,\textsuperscript{78} but also Norway\textsuperscript{79} and Liechtenstein\textsuperscript{80} published reports on the functioning of the EEA on that occasion (see also Frederiksen and Franklin, 2015). Eventually, it was decided continue relations within the current legislative framework, despite increasing frictions in the current setup.\textsuperscript{81}

As a semi-permanent engagement model, the EEA also frequently emerged in the debate about the future relationship between the EU and the UK as a model of association after Brexit. In conceptual terms, the EEA agreement is therefore a relevant model for countries that consider leaving the EU (see on the transferability of the Norwegian experience: Fossum and Graver, 2018). Main alternatives include the ‘Swiss model’ of association through a range of bilateral agreements. This option is considered suboptimal from the EU perspective, because of it may allow for cherry-picking; the solution is increasingly also problematic for Switzerland itself, because if a single clause of the arrangements is broken, the entire economic relationship with the EU comes under pressure. A further alternative is association through a customs union, as is the case for Turkey. This model of association is extensively discussed in chapter 5. A further alternative would be a variation on these association models, or an extensive Free Trade Agreement. The EEA is the most comprehensive mode of association with the EU.

\textsuperscript{76} Norwegian EEA Review Committee (2012): chapter 27. Decisions in the EEA are taken by the EU on the one side, and the EEA countries (together) on the other side.

\textsuperscript{77} http://www.euractiv.com/section/enlargement/news/iceland-officially-drops-eu-membership-bid/

\textsuperscript{78} European Commission (2012b). See also Council of the European Union (2012).

\textsuperscript{79} Norway EEA Review Committee (2012).

\textsuperscript{80} Centre for European Policy Studies (2013).

\textsuperscript{81} EEA Joint Parliamentary Committee (2013).
The EEA extends the EU’s internal market – i.e. the former “first pillar” of EU law, before the Lisbon Treaty - beyond the EU but without full membership. In practice this means that the four freedoms of the EU’s internal market (freedom of labor, capital, goods and services) (part II and III of the EEA agreement), competition policy (part IV of the agreement), and a number of horizontal policies in the area of social policy, consumer protection, environment, statistics and company law (part V of the agreement) are extended to the EFTA countries that participate in the EEA.

Despite this extension of the four freedoms, the EEA is not a customs union (figure 4.1) and therefore does not provide for common external trade policy or common external tariffs. In this sense, the EEA deviates from more classic theories of economic integration, that argue that economic integration proceeds in incremental stages from a free trade area, to a customs union, to a common market and eventually to complete economic integration (see most notably Belassa, 1961). Although EEA EFTA countries cannot impose tariffs on EU
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products, they may impose tariffs to products from outside the EEA. However, several areas are explicitly exempted from the agreement. Agriculture and fisheries do not fall within the scope of the EEA, although several parts of the agreement (mainly protocol 3 and 9) deal with trade in these sectors. While a number of specific agreements have been concluded in agriculture and fisheries, beyond those agreements Norway, Iceland and Liechtenstein therefore remain free to impose tariffs on agricultural and fisheries products both from the EU and amongst each other.

When new EU regulation falling within the reach of the EEA agreement is adopted, the EEA joint committee transposes these rules to the annexes and protocols of the EEA agreement, at which point they become applicable to the EEA EFTA countries as well. However, the EEA Joint Committee cannot revise the text of the EEA agreement itself. That can become problematic when treaty articles are revised, since many articles from the EEA agreement fully mirror the treaty articles as they were at the time of signature (i.e. May 1992). The setup also results in structural delays in the transposition process. A Commission report estimates that the transposition from EU to EEA legislation normally takes around a year (exceptionally up to five years) and points out a large backlog in transposition.82 Elsewhere, it has been suggested that delays are used tactically by national governments to ease national political pressure.83

The extension of the internal market to EEA EFTA countries via the EEA agreement also raises a number of questions on how such an extension plays out in practice, i.e. what the implications of this ‘internal market only’ approach are, and how these tensions are accommodated in practice.

First of all, the EEA realizes a common internal market, but without formal supranationality of EU law (see: Sejersted 1997; Graver, 2002). This creates an inherent tension within the agreement: whereas the EU is a separate legal order in which EU law is prioritized over national law, the EEA agreement is an international agreement in which the status of EEA law in the EEA EFTA countries depends on national law. That is because for the current EEA EFTA countries, (partially) giving up sovereignty was considered politically and sometimes constitutionally unfeasible. Therefore, provisions from the EEA agreement need to be transposed to national law and cannot be directly invoked in national (Norwegian, Icelandic or Liechtenstein) courts.

Since the EU courts do not have jurisdiction over EEA EFTA countries, in the EEA context a special EFTA court was established to play a similar role. For example, there can be state liability of the EEA EFTA countries for failure to implement, or to failure to implement cor-

82 European Commission (2012b) section [B III].
83 Norwegian EEA Review Committee (2012), chapter 27.
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Directly via the EFTA court (see Mendez-Pinedo, 2009: 145-175). This situation raises the question to what extent the EEA EFTA countries are ultimately bound by the EFTA courts, and in turn to what extent the EFTA court can be bound by the EU court. In practice, it seems that the EFTA court risks being sidestepped, since Norwegians prefer to relate directly to the European Court of Justice (Fredriksen, 2012a; 2014).

What is more, the influence of EEA EFTA countries on the EU rules, and thereby on the EEA rules, is limited. The role of the Joint Committee is reactive, and cannot go beyond the transposition of the relevant EU legislation in the EEA context. This means that EEA EFTA countries are relatively one-sidedly 'downloading' the EU's internal market rules without the same formal input in the decision-making process as full member states. To partially accommodate this issue, EEA EFTA countries have been given an enhanced role in the consultation period when legislation is drafted by the European Commission.84 EEA EFTA countries also participate quite successfully in the EU’s Open Method of Coordination and in several EU agencies, such as Frontex and the European Environment Agency (Lavenex, 2015a; 2015b). Because the Lisbon Treaty has shifted the emphasis in decision-making from the Commission towards the Council and the EP, possibilities for participation and input are understandably an issue of concern for the EEA EFTA members, who have no formal links to these institutions.85

Ultimately, EEA EFTA countries can veto EEA legislation under article 102 of the agreement if it concerns a ‘serious problem (...) in an area which, in the EFTA states, falls within the competence of the legislator’. Such a situation results in the suspension of that part of the EEA agreement. It is not completely clear what this would mean in practice, because it has never happened: still, this is considered to be a highly unfeasible situation for all parties to the agreement. Although Norway initially refused to implement the third postal directive (2008/6/EC) completing liberalization in the postal sector, by the beginning of 2014 the country eventually seemed prepared to accept the inclusion of the directive in the EEA agreement. Norway was also reluctant to implement the third energy package of 2009, but ultimately agreed to do so in 2018 (see on this further below); similar opposition was raised in Iceland, which still has to decide on this matter.

A third issue relates to the increasingly blurred distinction between the internal market and the ‘non-internal market.’ Since the Maastricht Treaty, the EU’s competences have broadened and deepened. Also, the EU’s approach to policy-making has become increasingly holistic, meaning there is a spillover from the ‘non-internal market’ issues to the internal

84 Articles 99-101 EEA Treaty.
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market. The EU increasingly pursues not only internal market objectives but also social and environmental goals: in legal terms, the horizontal goals of the treaties have evolved. This was also discussed in section 3.1 on the goals of EU competition policy, where it became clear that in the implementation of the state aid rules, environmental and employment considerations can be taken into account as well.

Since this is a gradual process of interpretation, it is not always so clear how and where these changes take place, and especially not to what extent these changes extend to the EEA. An example is the concept of citizenship, which was introduced by the Maastricht Treaty and is not included in the EEA. In practice, it has proved difficult to assess to what extent the ECJ takes this concept into account in cases on free movement of persons. Therefore, while it has been pointed out that there is a widening gap between the EEA agreement and the EU treaties on paper, the actual extent of this gap remains unclear. This raises the question to what extent the EFTA court can and should try to identify and bridge this gap (Fenger, 2006; Fredriksen, 2012b). Doing so seems risky from a legal perspective, as it may result in ‘second guessing’ the ECJ’s teleological interpretations in the light of horizontal EU treaty goals.

4.2 Competition rules in Norway

This part of the chapter discusses the Norwegian competition rules, with a focus on the question of how competition policy is exported to Norway in the absence of EU membership and therefore without formal supranationality of EU competition law. In addition, a less successful example of unilateral EU export of the competition rules to the Norwegian gas sector is discussed.

4.2.1 Layered enforcement

Competition law is, as part of the EU internal market acquis, incorporated into the EEA agreement. Article 53 contains a cartel prohibition, Article 54 the abuse of dominance prohibition; Article 57 concerns mergers; Article 61 treats state aid.86 All mirror the relevant EU treaty provisions except for Article 57 on mergers, which refers to the relevant EU merger regulation (4064/89, now replaced by 139/2004) instead. Implementing legislation, such as regulations and directives, are extended to the EEA via Article 102 through Annexes and Protocols (most notable Annex XIV on competition, Annex XV on state aid, and Protocols 21-26). To ensure further homogeneity between EU and EEA law, EEA law has to be interpreted in conformity with ECJ case law that dates from before the signing date of the agreement (which is May 1992); case law after that date has to be taken into ‘due’ account.87

86 Article 59 EEA agreement mirrors Article 106 TFEU concerning public undertakings.
87 Article 6 EEA Agreement; Article 3(2) Agreement on the establishment of ESA and the EFTA court.
Inherent delays in the transplant of secondary legislation are a challenge to homogeneity, which in turn is considered to potentially disturb the ‘level playing field’ within the extended internal market. This is because when the rules are not identical, this could result in different treatment of similar conduct which would be unfair for the companies that participate in the internal market. The implementation of Regulation 1/2003 for example entered into force in mid-2005 for the EEA, i.e. a year later than for EU member states, which may have affected the possibility for to close a case with commitment decisions. A more direct example is where transposition of a block exemption on motor vehicles had not been realized in the EEA agreement. This exemption would have allowed an otherwise prohibited practice regarding car dealerships under the cartel prohibition. The EFTA court however ruled that the exemption could not be relied upon, since it was for the Joint Committee to implement the community legislation.

Competition law has an exceptional position in the EEA legal framework. That is because EFTA Surveillance Authority (ESA) is competent to rule on competition complaints in a similar manner to DG competition in the EU, directly and without having to follow the ‘failure to implement’ trajectory. In other words, ESA is directly competent to deal with cases against companies in competition cases, and therefore not only against infringements of the agreement by the contracting parties (i.e. the EU and EEA EFTA countries). State aid is enforced by ESA vis-à-vis the EEA EFTA countries in a way that mirrors the enforcement of state aid by DG Competition vis-à-vis EU member states. There is thus something of a de facto direct effect of EEA competition law without formal supranationality of EU law.

There are therefore three institutional layers in the enforcement of competition policy in Norway: DG competition, ESA and the Norwegian competition authority (figure 4.3). When cases have an EU dimension (i.e. when there is an effect on trade between EU member states), DG competition is normally competent to deal with the case. When the case has an EEA dimension (when the infringement only affects the EEA EFTA states, or more than 33% of the EEA turnover is realized in EFTA states), ESA is competent. When the case is Norwegian in scope (when trade in the EEA is not affected), the Norwegian competition authority is competent and will apply either Norwegian competition law or EEA law. In practice, this means that most of the cases relating to Norway - except for state aid, which is

90 Cf. Graver (2002): 85 – ‘realities certainly resemble the Community situation where the right to compensation follows from community law, and that individuals are entitled to invoke this right before their national courts.’
91 Regulation 1/2003 was incorporated to the EEA agreement; as a result, according to article 5 of protocol 4 to the Surveillance and Court Agreement (“Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice”), EEA EFTA NCAs may apply EEA law.
enforced by ESA - are dealt with either by either DG competition or the Norwegian competition authority. The scope for ESA jurisdiction is quite small in non-state aid cases, because would be cases that specifically have an EEA EFTA dynamic (but not an EEA EU dynamic).

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<th>EU competition law</th>
<th>EEA competition law</th>
<th>Norwegian competition law</th>
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<tr>
<td><strong>Provisions</strong></td>
<td>Art. 101 &amp; 102 TFEU and Regulation 139/2004</td>
<td>Art. 53, 54 and 57 EEA agreement</td>
<td>Art. 10, 11 and 16 Norwegian competition act</td>
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<td>State aid:</td>
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<td>Article 107 TFEU</td>
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<td>State aid: Article 61 EEA agreement</td>
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<tr>
<td><strong>Enforcing</strong></td>
<td>DG Competition with EU competition authorities</td>
<td>EFTA Surveillance authority (ESA) with EEA competition</td>
<td>Norwegian competition authority (KT)</td>
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<td>DG competition</td>
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<td>State aid: ESA</td>
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<td><strong>Relevant</strong></td>
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<td>National EEA EFTA courts and EFTA court (for EEA EFTA</td>
<td>Norwegian courts (with possibility to refer questions to</td>
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<td>Justice</td>
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92 All EEA competition authorities, meaning competition authorities in EU member states, in EEA EFTA states and DG competition.

93 Formally, the competition authority of Norway is formed by the Konkurransetilsynet (KT) the parent ministry and the King together.

94 For EU member states: national EU courts and European Court of Justice.
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<table>
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<tr>
<th>When applied?</th>
<th>“EU dimension” (effect on trade between EU member states)</th>
<th>“EEA dimension” (effect on trade between EEA EFTA states)</th>
<th>“Norwegian dimension” (trade between the EEA states is not affected)</th>
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<td>State aid from EU member states</td>
<td>State aid from EEA EFTA states</td>
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Figure 4.2: Layered enforcement of competition law in the EU, the EEA and Norway

4.2.2 Challenges to extending the competition rules

While the current Norwegian competition act in substance mirrors legislation from the EEA agreement and thereby indirectly the EU treaties, the Norwegian competition act was significantly different from EU competition law in several ways at least until 2004. The divergences were mainly procedural in nature and related to the rules stemming from EU Regulations and Directives. Most notably, the Norwegian regulatory framework from 1993 did not provide for penalties for abuse of dominance or a mandatory system of merger notification. In 1999 a reform process was initiated to make the Norwegian competition act of 1994 more compatible with the EEA rules. The process was initially led by the Norwegian competition authority and resulted in a revised competition act in 2004. This new act introduced penalties for abuse of dominance and a merger notification system, but did not adjust to the recent new realities introduced by the EU merger Regulation 139/2004 (most notably the new substantive test for merger review) and Regulation 1/2003 (most notably on the available remedies, such as settlement and commitment decisions).

Therefore in 2014 and in 2016 a number of additional changes were made which further ensured homogeneity between the Norwegian system and EU practice. The 2014 revisions include increase of the merger thresholds, inclusion of leniency (formerly dealt with by a separate regulation), a marker system, dawn raids and remedies (mainly the formalization

95 In the application of Article 53 (cartels), ESA is competent when only trade between EEA EFTA states is affected, or when 33% of the EEA turnover is realized in the EEA EFTA states. In the application of Article 54 (abuse), ESA is competent when the abuse occurs only in the territory of the EEA EFTA states, or when 33% of the EEA turnover is realized in the EEA EFTA states. In the application of Article 57 (mergers), ESA is competent when the relevant thresholds are fulfilled in the EEA EFTA states. (See Article 56 and 57 EEA agreement.)

96 See on this process: OECD (2005a).
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of commitments).\textsuperscript{97} The 2016 revisions adjusted the substantive merger test and introduced the possibility for cartel settlements, in both cases also bringing the Norwegian act in line with EU practice. In addition, the 2016 revision included the introduction of an independent appeals board that will handle merger appeals, previously handled by the Ministry of Trade.

The issue of adjustments in the light of changing EU Regulations and Directives in the area of competition policy however remains highly salient. This is in particular the case as EU competition policy in increasingly involved in the procedural elements that regard the implementation of the rules. An example is the recent EU directive on private damages in competition cases, which has an impact on national civil law to the extent it aims to give safeguards in national procedures. While competition policy is part of the EEA, EEA EFTA states have argued in their comments to the Commission’s legislative proposal that the provisions relating to civil procedures are not. Discussions on the Norwegian side on the implementation of this adopted directive suggest that Norway considers using the (non-)implementation of the directive as leverage to secure full access to the ECN for the EEA competition authorities (Franklin et al., 2016). A similar situation occurred in the context of the EU’s ECN Plus Directive, which is currently in the process of adoption and where EEA EFTA states again lobbied for full access to the ECN.\textsuperscript{98}

A more theoretical concern is the extent to which horizontal substantive EU policy goals, such as considerations relating to the environment and employment, transpire in the application of EU and eventually EEA competition law. Not only may horizontal EU/EEA legislation ultimately be rejected by EEA EFTA states on legal grounds where provisions strictly speaking reach beyond the internal market \textit{acquis}, as is the case with many of the procedural rules; but in addition the homogeneity between EU and EEA law in competition policy can be challenged when the relevant treaty provisions change, since the competition articles from the EEA agreement mirror the treaty articles as they were at the time of signature. Although treaty articles in competition have very rarely been adjusted, the relevant article on state aid has been amended to include the promotion of culture and heritage conservation as a separate exemption. In the EEA context, the new provision is not applied by analogy, but instead culture and heritage conservation continue to be assessed under the old EEA exemptions (Fenger, 2006).\textsuperscript{99}

\begin{footnotesize}
\begin{itemize}
\item[97] Schjødt (2013); OECD (2013a).
\item[98] E.g. BusinessEurope (2017) includes a specific part on EEA EFTA NCAs and access to the ECN.
\item[99] E.g. Decision 114/99/COL of 4 June 1999 (on the film industry Iceland); Decision 380/00/COL of 18 December 2000 (film industry Iceland); Decisions 32/02/COL and 169/02/COL of 18 September 2002 (film industry Norway).
\end{itemize}
\end{footnotesize}
4.2.3 Enforcing competition rules in the market for natural gas

In this section, I will discuss the limits of a hierarchical extension of the EU competition rules to the Norwegian context by looking at the market for natural gas in the Norwegian context. Where natural gas is concerned, the EU has not fully been able to impose the internal *acquis* to the Norwegian context in a hierarchical manner. The absence of domestic Norwegian implementation of competition policy in this sector precludes potentially more fruitful networked cooperation mechanisms.

When we first of all assess the level of mutual dependence between the EU and Norway in this specific sector, the level of interdependence is higher than for general trade volumes. From the EU perspective, Norway is the second largest supplier to the EU, after Russia.100 And, at a time when EU-Russia relations are increasingly problematic, Norway gained importance as an EU gas supplier and therefore potentially increased its degree of leverage in energy affairs vis-à-vis the EU. At the same time, the EU is by far Norway’s most important customer for natural gas. Export mainly takes place to the UK, Belgium, France and Germany, which are connected with Norway through submarine pipelines.101 Because pipelines are still the main mode of transport for natural gas, it is highly difficult to Norway to diversify its customers beyond the EU. For example, for a country like Russia it is much easier to export gas to other parts of the world due to its direct geographical access to several continents. Norway does not have this option – at least until liquefied natural gas (LNG), which can be transported also by sea, becomes a viable alternative. Currently LNG is much more expensive than natural gas that is transported via pipelines, because of the combined production, storage and shipping costs involved. Because of these logistical dynamics, interdependence between the EU and Norway in the natural gas sector is therefore relatively stable and unlikely to change in the short run.

Considering the rules that apply to the market for natural gas, in addition to the competition rules Norway’s energy sector is in principle covered by the EEA agreement. However, the EU’s *acquis* in the energy area was little developed at the time of signature. Since then, several EU liberalization packages aimed at a gradual privatization of the sector set in motion a process of integration towards a single energy market to which competition policy is increasingly applied (see on the EU’s energy policy Claes, 2002; Eberlein, 2008; and more specifically on gas: Andersen and Sitter, 2009). Progressive liberalization of the electricity and gas markets took place through three legislative packages in 1996-1996, 2003 and 2007.

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In 2015 the Energy Union was launched, which has as one of its goals the establishment of a fully integrated internal energy market. Integration of the EU's electricity and gas markets is therefore very much a work in progress.

Considering the role of competition policy in the liberalization of the energy sector in the EU itself, the energy sector is one of DG Competition's enforcement priority areas. In 2007, the Commission presented an energy sector inquiry and continued to actively pursue cases in the sector afterwards. The cases in the gas sector have been mainly concerned with market access, and more specifically with access to infrastructure and long-term supply contracts. First, relating to access to the network, the high infrastructure costs that are involved in the transport of natural gas, either in the form of pipelines or LNG terminals, make that duplication of the facilities is often not viable. This means that in order for market opening to work, existing networks will have to be shared with new players. Second, the inflexible gas infrastructure also results in inflexible ‘take or pay’ contracts, where importers of gas agree to buy a certain amount of gas for a period from a given supplier. These contracts are also under circumstances prohibited under EU competition law, more in particular when containing resale restrictions or when the contracts are concluded for a very long term.\(^\text{102}\) DG Competition's enforcement priorities in the gas sector therefore mainly relate to secure pipeline access for market entrants. This is generally resolved through behavioral remedies in the form of commitment decisions, for example a commitment to make part of the transmission network available to newcomers.

In view of these developments in the EU, the main question in relation to Norway is what happens when an area of regulation progressively develops in the EU, which was nor or only partially foreseen by the EEA. To what extent can Norway participate in the energy union, and to what extent does the country play by the EU's energy and competition rules?

Starting with the implementation of competition rules to the gas market, a first important observation is that Norwegian NCA does not apply competition policy to this sector. That is because natural gas is predominantly an export market – the domestic energy consumption is almost completely based on electricity. And as there is no domestic dimension to the case, the Norwegian NCA will not pursue cases under Norwegian competition law.

On the import side, DG Competition has not refrained from enforcement vis-à-vis Norway, providing a 'hard edge' to energy integration (Goldthau and Sitter, 2015). This most notably happened in a major export cartel: in 2002 DG Competition closed a case with Norwegian gas producers Statoil and Norsk Hydro regarding the joint sale of Norwegian gas into the EU. Following the statement of objections, Statoil and Norsk Hydro committed to market...
their gas individually, to open up more than 5% of total Norwegian gas sales to new customers over a period of four years and to not introduce sales restrictions into their contracts.

While this may look like a successful example of unilateral pushback towards Norwegian buyer power by EU enforcement, this hard stance seems to have been discontinued later. Several years after the finding of the export cartel, DG Competition allowed the same companies to merge their businesses following a notification under the EU merger regulation. In that case, DG Competition ruled that the merger would not be anticompetitive, since market shares of the new entity would be relatively low in the EEA. Although market shares were significantly higher when broken down to individual countries, the commission still ruled that the merger was admissible.103 This is remarkable as, just a few years earlier these companies had to commit to sell their gas separately under EU pressure. Therefore at a second reading, the Commission is actually not very successful in tackling state ownership in the energy market, most likely due to the increasing dependence on Norwegian gas.

The Norwegian government has traditionally played an important role in the development of the country’s oil and gas resources, and these markets are highly concentrated. While this role has changed over the years, mainly through the privatization of Statoil (Austvik, 2012), state involvement in the fossil energy sector remains considerable. The Norwegian government currently owns a majority share (67%) of Statoil ASA,104 which is the main supplier of petroleum and gas. The network company Gassco AS, which is in charge of the distribution of gas, is even fully owned by the Norwegian state. The ownership in both the production and the distribution of gas is therefore both highly concentrated and controlled by the central government. Much of the revenues of the Norwegian oil and gas export are managed and invested domestically and internationally through the Norwegian petroleum fund, established in 1991 (called the ‘Government pension fund’).

While the EU has an important material incentive to apply EU competition rules to the Norwegian gas market, as this may fragment market power and ultimately lower prices for import of natural gas, it is at the same time very much reliant on Norwegian gas imports. Therefore it is difficult for the EU to unilaterally impose liberalization of energy markets. Norway on the other hand has a material and strategic interest not to align with EU rules in the gas sector, as this will allow the country to keep control over this strategic resource, while at the same time unilaterally set prices. In the area of EU rules concerning liberalization of the natural gas sector, there has been limited implementation on the Norwegian side.

Due to this lack of domestic implementation, Norway also has limited participation in EU

103 Case COMP M.4545 Statoil/Hydro (2007).
networks relating to energy regulation. In gas matters, the Norwegian NCA does not participate in the ECN energy network. The NCA does not participate in the competition network of the EU energy community either, to which Norway has observer status. The Ministry of Petroleum and Energy represents Norway in the Madrid forum for gas (bringing together national regulators, market actors and stakeholders); and Gassco, the Norwegian gas transmission operator, has observer status in ENTSOG (the network of gas transmission operators). However, Norway is not yet represented in the board of regulators of ACER (Agency for the Cooperation of Energy Regulators), which will become the new EU oversight body in the energy union. Therefore, Norwegian involvement in EU networks relating to gas matters is currently at a low level.

A further illustration of the difficult dynamic in the energy sector is the implementation of the third energy package in the EEA. While implemented in 2009 in the EU, it took Norway until 2018 to accept any future implementation of transposed EU rules (through the EEA) in a national context. The main issue in this case were actually related to electricity. That seems remarkable, as Norwegian ownership in electricity has been historically diffused, since it was mainly in the hands of local communities. Generation of electricity largely takes place through hydropower facilities: although there is a national incumbent (Statkraft), ownership of the facilities is more diffused than in most continental EU-countries. Norway and the UK were also among first European countries to liberalize the electricity sector in the 1990s, and Norway was able to provide significant national experiences in the context of EU liberalization plans. Because of its experiences in the generation of electricity through hydropower, Norway could also contribute its expertise in renewable energy to ongoing policy debates, both in general and more specifically in competition matters. However, when it comes to export, and in particular the ownership of the networks, the Norwegian parliament was willing to support further liberalization in this area.

In conclusion, the EU and Norway are mutually dependent for gas supply and gas sales respectively, because of the reliance on pipeline infrastructure in the current market. The Norwegian energy sector is both largely state managed and highly concentrated, while EU gas markets have become progressively liberalized. DG Competition has tackled the issue of pipeline access in a number of EU cases: remedies in these cases are often behavioral commitments. However, relating to Norway, the only competition case in the gas sector was an export cartel; while commitments were imposed, the Commission allowed the companies to merge several years later. This shows the limits of such a unilateral approach to

105 The energy community consists of EU countries plus Albania, Bosnia and Herzegovina, Serbia, Kosovo, Macedonia, Montenegro, Ukraine and Moldova. Norway has observer status.

106 http://www.euractiv.com/sections/energy/leak-names-acer-energy-union-supervisor-312309


108 Interviews NO.5 and NO.13.
enforcement, as DG Competition apparently has had to reconsider its earlier concerns and allowed a further concentration in an already concentrated market. The Norwegian NCA is not involved in enforcement in the gas sector, and Norwegian institutions are only partially represented in EU gas networks. Therefore, although there is progressive EU integration in this sector, vis-à-vis Norway we see the limits of hierarchical governance, both through EU enforcement and increasingly by obligations under the EEA agreement, which is not complemented by a more networked approach in the absence of national implementation.

4.3 **Domestic implementation of competition policy**

This section discusses the domestic implementation of competition enforcement in Norway and considers in more detail the possibilities for the Norwegian NCA to cooperate in European networks. In addition, a successful example of cooperation on implementation of competition policy in the absence of EEA rules in the food sector is discussed.

4.3.1 **Institutional structure**

In addition to a strong tradition of state involvement in the economy, Norway also has a tradition of relatively independent agencies. The government’s involvement in industry is significant, not only in fossil energy sector but also more in general, with the government actively engaging in all kinds of economic sectors (Norway as example of ‘state capitalism’\(^{109}\)). Agencies had broad integrated roles in this context, and acted for example as both regulator and owner (Christensen and Laegreid, 2004). While after the Second World War, Norwegian agencies came increasingly under ministerial control, since the late 1990s the agencies have gained independence again, and have also become more differentiated in terms of tasks. Mainly inspired by the OECD’s regulatory agenda, industrial state ownership has become more indirect, as corporate aspects formerly covered by agencies were privatized with state as shareholder\(^{110}\).

The Norwegian competition authority is called the *Konkurransetilsynet* (KT). Staff numbers of the KT fluctuate around 100, this number varying in the period 2000-2014 between 90 (2008) and 135 (2001).\(^{111}\) In comparison, the NCAs of Denmark and Finland, Scandinavian countries with populations similar to that of Norway, employ around 250 and 130 staff respectively. While that is more staff than the KT, these authorities also include consumer affairs, like an ombudsman, for which Norway has a separate authority (the *Forbrukertilsynet*). The KT’s staff numbers can be therefore considered as a normal capacity level for

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\(^{110}\) OECD (2003b).

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an NCA in similar conditions. Also like many EU NCAs, the KT is composed of a number of sectoral and a number of horizontal units. The sectoral units concern finance and communications; construction, industry and energy; and food, trade and health. The KT also has a special KOFA division (Klagenemnda for offentlige anskaffelser), which functions as an advisory body for public procurement complaints. Unlike a trajectory in court, KOFA advice on procurement procedures is open to everyone, and not limited to parties that are directly involved in the procedure. While KOFA falls administratively under the KT, the board is formally fully independent from the KT in its decision-making.112

The KT’s parent ministry is the Ministry of Trade, Industry and Fisheries.113 Like in most EU member states, the KT is in charge of the daily enforcement practice, while the Ministry plays an oversight role. With the aim of safeguarding and strengthening the independence of the KT from the ministry, the KT was moved from Oslo to Bergen in 2007. Whether agency autonomy and agency location are correlated, remains a matter of debate (see for a discussion of the Norwegian context: Egeberg and Trondal, 2011). However, in terms of formal tasks allocated to the Ministry it is clear that their role in the enforcement process is in decline. Most importantly, until 2004 the Ministry was the main appeal body for the KT’s decisions - only since 2004 fines have to be appealed in courts. In merger cases, the Ministry even remained responsible for appeals until 2016. Following continuing critique on this issue – mainly from the side of the OECD, a working group was set up to create either an independent appeal board or let the appeals be handled by existing appeal board.114 The issue has been controversial in Norway, and the necessary amendment to the competition act passed with a narrow minority in the Norwegian parliament.115 Even after the amendments, the KT can be instructed to take up a case by the Ministry; also, in exceptional cases, the decisions of the KT can be overridden.116 In practice the latter has only happened in one case - in the egg sector - which will be discussed in more detail in section 4.3.3.

The next section discusses to what extent direct cooperation takes place through EU networks of competition agencies, shaping implementation in a way that is potentially more powerful than the relatively static checks from the parent ministry.

4.3.2 Cooperation in networks

As the literature suggests that EU networks can play an important role in the implementa-

112 Informant NO.f and interview NO.8.
113 Previously the KT fell under the ministry of Government Administration, Reform and Church Affairs.
115 http://www.nordiccompetitionblog.com/?p=544
116 Article 13 and 21 Norwegian competition act.
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Competition policy in Norway takes into account the implementation of EU rules and the participation of the KT in the ECN and other European networks.

The EEA EFTA competition authorities – including the KT - and ESA are formally part of the ECN. The ECN is in practice even the most relevant international point of reference for the KT, and through the network the EU context has had an important influence on the implementation of competition policy in Norway. The KT participates in the ECN and other European networks.

The other way around, next to the input that the EEA EFTA states can give in their capacity as EEA member when EU legislation is proposed by the European Commission, ESA and EEA EFTA competition authorities can directly give input on implementation through the ECN. While traditional ways of involvement in decision-making take place by national ministries or representations to the EU, in the competition area this is supplemented by structural cooperation with both EU NCAs and DG Competition through the ECN (Danielsen and Yesilkagit, 2014; Laegreid and Stenby 2010).

But while KT may participate in the policy discussions in the ECN, their participation is limited to ‘horizontal’ discussions only. This means that the KT cannot participate in the case-related elements of the ECN. However, as was highlighted in section 3.2, the ECN increasingly plays a role in policy discussions and development rather than in case coordination (for which it was originally intended). In practice, the KT indeed participates successfully in the ECN. Following a number of amendments to EEA Protocol 23 in 2007, the KT can even receive case-related information when is relevant for a policy discussion. And while EEA EFTA members do not have a vote in the advisory committee, their NCAs can attend the meetings. The KT actively participates in ECN working groups on topics such as hydropower and electricity liberalization in the energy group and the food group, which will be discussed below. The KT is also involved in the social activities in the ECN, such as the ECN football tournament. Finally, under the EEA agreement Norway can second officials to DG competition and makes frequent use of this possibility.

References:
118 Article 99-101 EEA Agreement; interview NO.1.
119 Interview NO.3.
120 Article 58 EEA agreement and Article 6 of Protocol 23 on cooperation between the surveillance authorities.
121 Interview NO.3; NO.4; NO.7. See also Laegreid and Stenby (2010).
122 Informant NO.a.
123 Informant NO.f and interview NO.8; https://www.efta.int/EEA/EFTA-National-Experts-753
Although apparently Norwegian civil servants are not keen on coming to Brussels (See interviews NO.11 and NO.12).
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case. The most notable differences with full EU member states in terms of ECN participation therefore mostly occur in the area of practical case cooperation, most notably in dawn raid assistance and the exchange of confidential case information.

In addition to the ECN, there are a number of other international networks in which the KT interacts with EU counterparts. Most importantly, these are the ECA, the Nordic cooperation, the OECD and the ICN. ECA was discussed in section 3.2 and used to be the main network of EU NCAs before the ECN was set up. ECA has a notification system for mergers to which Norway participates. In addition, the KT participates in the Nordic network, a cooperation forum for the Nordic countries that has existed since the 1950s. Members include EU member states Denmark, Sweden and Finland. In the context of the Nordic network, competition authority staff from the Nordic countries meets annually to discuss topical policy and enforcement issues in a plenary and workshops; the Nordic network also publishes an annual substantive report on relevant competition issues in the Nordic countries. In addition, there is an agreement between Norway, Iceland, Denmark and Sweden for case cooperation which covers notification and exchange of confidential information but not dawn raids and other means of collecting information (i.e. more limited scope than Regulation 1/2003). Similarly, the KT interacts with many ECN members in the OECD and in the ICN, which will be further discussed in chapters 6 and 7.

4.3.3 Implementation of competition policy in the food market

Compared to the natural has market, the extension of EU competition policy to the Norwegian food sector is a relatively successful example of regulatory export. This is not the case because the KT is such a successful enforcer in the domestic context on this market, but rather because the issue of market opening has been successfully raised by the KT in a European context, even in the absence of EEA rules applicable to this sector. While most is foodstuffs are exempted from the EEA agreement and are therefore not covered by the EEA or EU competition rules, the KT has been very active in highlighting issues of concentration in the food sector.

By contrast to the energy sector, agriculture and fisheries are exempted from the EEA agreement. The exemption means that Norwegian (rather than EEA or EU) competition policy is applied in these markets. Since ESA and DG competition are normally not competent to

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124 Interview NO.4.
125 Article 12 and 22 of Regulation 1/2003 (respectively the exchange of confidential information and the possibility to request dawn raid assistance) are not extended to ESA and the EEA EFTA states.
deal with cases that relate to agriculture and fisheries, there have been a number of merger referrals from DG competition to the KT where DG Competition handles the EU dimension of the merger while the KT handles the Norwegian dimension (i.e. the case is ‘split’). This happened for example in Orkla/Rieber, where the Norwegian part of the takeover of Rieber by Orkla (both Norwegian companies in the food sector) was cleared by the KT after a referral request.\(^\text{127}\) In the area of fish feed and fish processing respectively, both the Bain Capital/Altor/EWOS merger and the Austevoll/Kvefi joint venture were assessed by DG competition for the EU part, in Norway for the Norwegian part and subsequently cleared by the KT.\(^\text{128}\)

The exclusion of agriculture and fisheries from the EEA agreement means that custom tariffs can be charged for most foods entering Norway. While Norway and the EU have concluded tariff reductions for fruit and vegetables,\(^\text{129}\) tariffs remain in force in the dairy and meat sectors. Tariffs are abolished mainly for fruit and vegetables that Norway does not produce itself (e.g. for nuts and exotic fruits) or in periods that Norway does not produce them (e.g. for different kinds of berries).\(^\text{130}\) As a result, consumers ironically may end up paying less for products that come from outside Norway off-season than for local, seasonal products. High tariffs can also indirectly raise entry barriers. The complex tariffs structure can be problematic for retailers, when they sell composed products such as ready-made meals: the failure of Lidl to accede the Norwegian retail market has been attributed to this reason.\(^\text{131}\) Sometimes recipe or stock adjustments are necessary in order to keep prices competitive: high taxes on cheese -including quark- resulted in an adjustment by Danone of the Danonino recipe in order to remain competitive on the Norwegian market.\(^\text{132}\)

Complex tariff structures further reinforce the already concentrated Norwegian food market. The high level of concentration of the food sector goes hand in hand with relatively high prices and limited consumer choice. The Norwegian dairy sector is particularly concentrated with the main player, Tine, having a market share as high as 95\%. This led to a crisis in 2011, when milk production in Norway had decreased while demand was rising, resulting in high prices and empty shelves – in turn resulting in a (temporary) decrease in

\(^{\text{127}}\) Interview NO.7. See DG Competition’s decision of non-opposition to the Danish and Swedish aspects of the merger, case COMP/M.6753 (2013).

\(^{\text{128}}\) Interview NO.12. See DG Competition’s decision of non-opposition to the EU aspects of the respective mergers, case COMP/M.7017 (2013) and case COMP/M.7035 (2013).

\(^{\text{129}}\) Article 19 of the EEA agreement foresees for progressive liberalization of agricultural trade through the conclusion of separate agreements. A recent agreement was concluded in April 2017. Norwegian Customs tariff 2018, available online at: https://tolltariffen.toll.no/pagefiles/510079/Nor-CustomsTariff-2018.pdf

\(^{\text{130}}\) Interview NO.11.

\(^{\text{131}}\) Interview NO.11; confirmed by Danone upon request.
import tax.\footnote{http://www.theguardian.com/world/2011/dec/14/norwegian-butter-crisis-shortage-christmas} The KT unsuccessfully tried to challenge Tine’s bargaining power in the cheese segment: after imposing a fine for abuse of dominance in 2007, the decision was ultimately overturned by the Supreme Court in 2011.\footnote{http://www.konkurransetilsynet.no/en/news/archive/Tine-upheld-by-the-Norwegian-Supreme-Court/} In the retail sector, the KT remains vigilant as well.\footnote{In 2014 the Norgesgruppen / ICA joint purchasing agreement (buyer power of supermarkets) raised objections by the KT: \url{http://www.konkurransetilsynet.no/en/news/archive/ Warns-that-the-agreement-between-Ica-and-Norgesgruppen-may-be-blocked/}; also in 2014/2015, the KT looked into a proposal of Coop to acquire ICA that was eventually approved: \url{https://konkurransetilsynet.no/coops-acquisition-of-ica-norge-cleared-with-remedies/?lang=en}}

Concerns about concentration in (retail) food markets are not unique to Norway. In recent years, competition in food markets has become an issue for many EU NCAs as well. Although problems that occur on markets highly differ per product and per country, there are a number of common problems that competition authorities face. A first main concern is the issue of abuse of dominance and unfair trading practices in food markets: these mainly relate to the buyer power of supermarkets vis-à-vis their suppliers in this ‘two-sided’ market. In such cases there are no clear-cut enforcement scenario’s, since the buyer power of large retail chains may in the short run result in lower prices for end consumers, but in the long run squeeze retail competitors out of the market, jeopardize the quality of the product and put the producers under a competitive pressure that will not be sustainable.\footnote{Recent example: commitment decision in Italy concerning the setup of a purchase supercenter by supermarket chains (\textit{Centrale italiana}) (2014); see also UEA Centre for Competition policy annual meeting, Norwich 2014 on problem markets (session: Competition with divergent public policy concerns).} The latter is especially a problem for private label tenders, which may be so competitive that the price paid by the retail chains is actually lower than the production costs.\footnote{See on private labels and EU competition policy: Daskalova (2012).} A further shared concern relates to the relationship between competition law and sector-specific exemptions in agriculture. The European Commission is currently in the process of reforming the common agricultural policy (CAP) and reconsidering the extent to which competition policy is applicable to agriculture.\footnote{http://europa.eu/rapid/press-release_IP-15-3322_en.htm?locale=en} In Norway, which has more protective agricultural markets than the EU, this is an equally relevant issue. Therefore, there is much uncertainty throughout the competition community on the enforcement of competition policy to food and agriculture markets.

However, compared to competition authorities the rest of Europe, the KT has been very early in identifying problems in the (domestic) food market and in flagging these issues both
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in Norway and abroad. The authority issued a report on shelf space in supermarkets as early as 2005, and was thereby one of the first to do so (see appendix II). In the same year, the Nordic competition authorities selected food as the topic for their annual report. The report concluded that compared to continental Europe, the Nordic food markets remain relatively concentrated. Also many other EU NCAs picked up the topic. Most are or have been engaged in cases in the food sector in recent years and many of them have issued reports on this sector. Norway has been particularly active in the food sector at the ECN level, mainly by participation in the ECN working group on food. The fact that the Nordic countries, and Norway in particular, have been early in identifying competitive problems in this sector has therefore allowed the KT to provide relevant input and experiences to the ECN. The exemption of food products from the EEA agreement may have paradoxically triggered Norwegian expertise in this area by reinforcing concentration levels in the domestic food market.

While the KT has thus been able to help shape the EU agenda, the authority has arguably been less successful in challenging market players under Norwegian competition law. An example is a prohibited merger case that was overturned on the basis of Norwegian agricultural policy to protect the revenues of producers. It concerned a merger in the Norwegian egg production sector (Prior/Norgarden) where a decision of the KT was overturned by the Ministry in 2006. Since the merger took place in an upstream (production) market, the KT expected that the effects of the merger would be felt negatively downstream (i.e. by consumers). The Ministry argued that the merger was at the same time expected to allow higher revenues for the producers vis-à-vis the grocery chains; also, producer Prior had a role as market regulator in setting average wholesale prices and had to be large enough to effectively do so. The Ministry found that agricultural interests should in this case be given priority over competition concerns. A recent study of the case suggests that the consumer prices actually did not rise after the merger, which would suggest that in certain food markets upstream concentration may counterbalance concentration at retail level, instead of negatively affecting consumer price (Nilsen et al, 2013). Therefore, while the emphasis on the Norwegian agricultural policy was likely contrary to EU competition practice, the same (approval) decision may have also been reached on the basis of economic modelling, and the outcome itself is therefore not a priori contrary to EU law. The Prior/Norgarden case shows both the uncertainty regarding the regulation of food markets and the connection with agricultural policy.

In conclusion, the KT has been active in putting the food sector on the international (EU)

139 Interview NO.6; see also Nilsen et al (2013): 4.
141 Ministry of government administration appeal decision of 6 February 2006 (in Norwegian).
142 Note that in the EU special exemptions for production associations apply as well: see the 2012 ECN report mentioned in Annex II.
agenda and contributed to this debate in the context of the ECN. That is remarkable, since agricultural products fall outside the EEA agreement and therefore are treated under Norwegian (not EU/EEA) competition law. Therefore, the food example can be regarded as a successful spill over from the EEA agreement and the ECN participation following from it. Ironically, precisely the exemption of agriculture from the EEA and the resulting tariffs may have caused the problem and concentrated Norwegian food market even more than would have been the case otherwise. From an EU perspective it has been a highly positive development that the KT is increasingly trying introduce more competition in Norwegian food markets, thereby also potentially opening these markets more to EU players. The extent to which the KT has been successful at achieving this remains an open question. However, the problems that the KT faced did result in the authority being one of the first NCAs in Europe to discuss competition problems and solutions in food markets.

4.4 Conclusions

The overarching regulatory framework for EU-Norway relations in competition policy is the EEA agreement, which provides the most comprehensive form of EU association that is currently available and allows participation in the EU’s internal market without EU membership. This extension of the internal market without externalizing the full acquis creates a structural tension, since there is a risk that the EU and EEA systems are drifting apart. Cleavages may occur in particular in cases of changes to treaty articles, the introduction of new horizontal treaty objectives that are relevant for the implementation of the single market rules and changes in procedural law. In particular the latter can be problematic in the area of competition policy, as the EU increasingly attempts to regulate powers of the EU NCAs and thereby arguably moves beyond what may be exported through the EEA agreement.

In practice the EEA agreement creates a layered implementation regime with EU, EEA and Norwegian enforcement. EEA and Norwegian competition rules are generally in line with EU rules. In addition, the Norwegian competition authority participates in the EU’s networks, most notably the ECN and ECA, and also interacts directly with EU NCAs in the Nordic cooperation, the OECD and the ICN. While there are limits to participation in the ECN for EEA NCAs, in practice the KT enjoys almost the same level of access as EU NCAs in practical terms. Therefore the limits to its participation are in practice much less extensive than we may have expected in advance.

The Norwegian gas market shows the limits of a unilateral enforcement approach, where the Commission attempted to control the sale of Norwegian gas into the EU but eventually was not successful. EU rules in the area of energy liberalization have not been fully extended to Norway, and also in view of the lack of implementation of competition policy to the natural gas sector, Norway only participates in gas-related European networks to a
limited extent. The example shows an unsuccessful attempt of rule export: the Norwegian market has not been successfully opened by unilateral EU enforcement, while the domestic competition authority does implement competition policy in this sector, and also does not participate in EU networks on this issue.

The implementation of competition policy to the Norwegian food market shows some promising results of enhanced participation in European networks. The KT attempted to create more competition in the domestic food market, thereby moving implementation of competition policy to a sector that falls outside the EEA, and potentially opening up this market for EU players. The KT also brought this discussion to the EU level, both through the ECN and the Nordic cooperation. However, the NCA has been less successful in opening the market in practice, both because of the domestic context in which it operates (with exemptions, ministerial intervention) and because it cannot change the underlying tariff structure.

These examples also show that while unilateral EU enforcement in gas markets makes tensions explicit and emphasizes direct economic interests between the EU and Norway, cooperation in the ECN brings out a more productive interaction between the EU and the domestic system, which is focused on common problem identification and problem solving. Therefore, the networked approach seems more promising in the absence of membership, even in a close association such as the EEA where we would have initially expected a mainly hierarchical governance dynamic.

The limits of exporting EU competition policy to a non-EU country in the absence of membership become more pronounced in the Turkish case study, which discussed in the next chapter. Competition policy in Turkey shows a prima facie less successful example of policy export, where the adoption of EU-style rules is conditioned by a decreasing perspective of EU accession and implementation is not supported by participation in EU networks. However, this situation also allows for more flexible solutions by the Turkish competition authority in addressing domestic problems.
5. **COMPETITION POLICY IN TURKEY**

Externalization in the EU-Turkey Customs Union

The second case study that will consider the export of EU competition policy beyond accession is Turkey. While the engagement with the EU is less strong than under the EEA agreement, Turkey is associated with the EU’s single market through the EU-Turkey customs union, which governs economic relationships in the absence of an accession perspective. This chapter will explore how EU competition policy shapes Turkish competition rules and their implementation in the absence of a realistic accession perspective. The main expectation is that the relationship between the EU and Turkey will be characterized by networked governance; that is because compared to Norway and other countries with a close institutional association to the EU in the context of accession and/or the ENP, Turkey is a relatively large country, both in terms of population and in a geopolitical sense. We would therefore expect that the main driver for implementation is the domestic context, and to a lesser extent the EU’s institutional setup and structural market power.

The chapter will discuss the context in which EU-style competition policy was exported to Turkey in view of an increasingly unlikely accession perspective and the implementation of the rules in the domestic setting. In doing this, the chapter will first outline the EU-Turkey customs union as a driving force in the adoption of EU-style competition rules. The chapter will focus in detail on Turkish state aid rules. This example illustrates the difficulties of implementation in the absence of an EU membership perspective. In the accession context, which is formally speaking still the main dynamic under which cooperation takes place, further cooperation in institutional terms on all competition matters is stalled until further progress is made in state aid. This rather static system is therefore blocking rather than enabling further networked, ‘under-the-radar’ cooperation between Turkish and EU NCAs.

The chapter will then set out the institutional domestic and international context in which the Turkish competition authority operates, and discuss implementation of competition policy in the Turkish telecom sector. This example illustrates a relatively successful opening up of the mobile telecom market by using EU-inspired competition regulation. While several external drivers not necessarily related to EU accession contributed to the progressive liberalization of this sector, the example shows that promising results on implementation in line with EU practices can also be made in the absence of direct cooperation with EU
NCAs. While the Turkish competition authority has demonstrated the capacity and flexibility to navigate the domestic economic and institutional landscape, this influence is subject to the domestic political landscape and therefore potentially vulnerable. Due to the inflexible nature of accession negotiations, it seems the EU has missed out on what could have been an interesting possibility for direct influence in competition matters in the context of rapidly decreasing perspectives for EU accession.

The findings of this chapter are relevant beyond the Turkish context. First of all, the export of EU competition rules to Turkey provides lessons for a future relationship between the EU and the UK, in particular in view of the comparable sizes of both countries in terms of population and therefore of the relative expected importance of the domestic context for implementation. But also more in general terms Turkey can be considered as a key example of EU association without membership or without extension of the internal market, and therefore this case study is also relevant in the context of the new generation of EU FTAs which combine the abolition of tariffs with conditions on regulatory approximation.

5.1 Integration through the EU-Turkey customs union

This section discusses the increasingly unlikely perspectives of Turkish accession to the EU, and the framework of the EU-Turkey customs union which currently regulates economic relations.

5.1.1 An increasingly unlikely accession candidate

While Turkey is formally a candidate for EU accession we expect a certain degree of EU policy influence on domestic rules and implementation, but for a number of reasons it is difficult to predict what this influence will look like. That is first of all because Turkey is a very large country, and therefore is likely to have a less asymmetrical relation to the EU than other candidate countries. But it is also because accession of Turkey to the EU has always been rather controversial and has become increasingly unlikely over time. The EU-Turkey customs union, which was supposed to be an intermediate step towards full membership, is the main framework that governs the economic relations in the meantime. Therefore, unlike other accession candidates or other countries in the EU’s neighborhood, in the Turkish context it is unlikely that the EU is able to unilaterally impose its internal rules. We would expect networked, rather than hierarchical governance dynamics; the conditions driving implementation are rather the domestic structures, and to an extent the EU’s institutional setup and structural market power.

EU enlargement may be perceived as a ‘take it or leave it’ dynamic, with a non-negotiable framework of rules that has to be incorporated in the national context if a country wants
Competition policy in Turkey

to become a member of the EU. However, it is unclear to what extent this also holds for larger countries, who are potentially in a better bargaining position. Turkey is larger than any other country that has acceded the EU before, at least in terms of inhabitants (around 80 million as compared to around 500 million for EU28). Turkey’s economy is large (GDP around 800 billion compared to around 18.500 billion for EU 28)\textsuperscript{143} and the level of economic interdependence between the EU and Turkey is high as well. When considering trade statistics, Turkey is the EU’s 5\textsuperscript{th} important trade partner, representing 3.8 percent of EU imports and 4.5 percent of EU exports.\textsuperscript{144} The EU in turn is Turkey’s most important trade partner, accounting for around 47 percent of the country’s exports and 36 percent of the country’s imports.\textsuperscript{145}

In addition, EU enlargement is also increasingly also discussed as a more dynamic and flexible process (Tulmets, 2010). It is flexible, in the sense that EU conditionality is actually an obligation to achieve a certain result: it does not usually specify exactly how policies have to be implemented. Therefore, much depends on implementation and enforcement by national administrations, leaving open a number of choices at the national level. This discretion often lies in institutional and procedural choices or enforcement priorities rather than in the substantive rules. EU accession conditionality is dynamic in the sense that both EU policy and the EU membership change over time. The Turkish case demonstrates that such changes over time can further decrease, rather than increase, the likelihood of accession.

Accession conditionality was a main dynamic in the relationship between Turkey and Europe since the 1960s, since Turkey applied for EEC membership as early as 1959. The Ankara agreement between Turkey and the EEC (1963) provided for the preparation, transition and implementation of a customs union, which was intended as an intermediate step towards full EEC membership. Eventually, Turkey became an accession candidate in 1999; but soon after accession negotiations were opened in 2005, the accession process came to a halt again. This was due to another EU enlargement that has taken place in the meantime: the accession of Greece and Cyprus to the EU. As Turkey refused to extend the EU-Turkey customs union to the republic of Cyprus, the Council decided that no negotiation chapters can be closed until it does.\textsuperscript{146} Changes in the EU membership therefore directly affected Turkey’s association process.

Currently neither the EU nor Turkey considers EU accession a realistic scenario. From the EU side, there has historically been skepticism about Turkish EU membership for both

\textsuperscript{143} International Monetary Fund (2015) World Economic Outlook database.


\textsuperscript{145} In 2017. Source: Turkish statistical institute – under ‘main statistics’.

\textsuperscript{146} Council of the European Union (2006).
cultural and economic reasons. There is also increasing domestic skepticism for membership in Turkey itself, which saw its aspirations to become a full EU member continuously disappointed. A further hurdle to membership negotiations followed increasing concerns over freedom of expression and Turkey’s track record on human rights and minorities. This is particularly problematic in an accession context, because the EU considers stable institutions guaranteeing democracy and human rights as key criteria in the context of enlargement (the ‘Copenhagen criteria’ of 1993). The ‘positive agenda’ of 2012 was a recent attempt to improve EU-Turkey relations and get the accession process back on track. However, following an internal coup in the summer of 2016, the Turkish government has fired thousands of government employees based on their alleged support to the Gülen movement (see section 5.1.3.). National governments in the EU are divided on how to deal with the situation in Turkey, also because they have strong incentives to keep the EU-Turkey deal on migration and refugees intact.\textsuperscript{147}

5.1.2 The EU-Turkey customs union

While EU accession has become an unlikely scenario, economic relations between the EU and Turkey have remained regulated by the customs union agreement that was established by Decision 1/95 of the EU Turkey Association Council, and entered into force in 1996. The customs union was initially designed as a first step towards full membership; a 1970 protocol to the Ankara agreement provided a 22-year timeframe for such a customs union to materialize. The only other non-EU countries that have a separate customs union with the EU are microstates Monaco, Andorra and San Marino (figure 5.1). Turkey is therefore the largest and economically most relevant country to have a customs union with the EU. EEA EFTA countries are not a part of such a customs union; as explained in chapter 4, EEA EFTA countries are part of the EU’s internal market without common external tariffs. Like the EEA agreement however, which was also designed to be an intermediate step in the accession process, the customs union with Turkey has taken a more permanent dimension over time.

The customs union abolishes tariffs on goods between Turkey and the EU and establishes a common external tariff for industrial products from countries outside this union. Agriculture, coal and steel are excluded from the agreement; services are excluded as well - although the Ankara agreement initially provided for this, they were not included in the final agreement. On top of the abolition of tariffs for many consumer goods, the customs union agreement foresees approximation of laws that relate to customs and to several other policy areas - mainly competition law, intellectual property and taxation. Requirements in the

\textsuperscript{147} During the Council meeting from 19-20 October 2017, no consensus could be reached on the issue of Turkey; the Commission was however charged to investigate in what ways EU accession aid could be stopped.
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The functioning of the customs union is increasingly under pressure for various reasons. First, the customs union is undermined by the (D)FTAs that the EU concludes or plans to conclude with other countries, such as recently the FTA with Canada (CETA).\textsuperscript{149} While Turkey faces an influx of products from non-EU FTA countries because of the common external tariff, this is not counterbalanced by free access for Turkish companies to these non-EU markets. Second, enlargement of the EU itself has had a direct impact on customs union by de facto significantly enlarging it: Turkey is for example at a competitive disadvantage with some of the new member states in high-tech markets.\textsuperscript{150} As mentioned above, enlargement also had a political spillover, since Turkey explicitly refused to recognize Cyprus to the customs union agreement.

Since the possibility for Turkey to have input in EU decision-making under the customs union is limited, it is difficult to address these and other issues in the current legal setup. Various attempts have been done to upgrade the customs union, both on the initiative of the Turkish government and of Turkish, EU and American business organizations.\textsuperscript{151} The European Commission presented a modernization proposal in late 2016 with the aim of including amongst others public procurement and services in the scope, but no decision has yet been taken at EU level due to political divisions between member states. Broadly speaking, Eastern European member states are in favor of enhanced relations with Turkey (most notably Poland and Hungary), whereas Western European member states (most notably France and Germany) are more reluctant. Therefore, it seems that not only accession but also the upgrade of the customs union will remain in an impasse for the time being.

\textsuperscript{148} Article 39, Association Council Decision 1/95.
\textsuperscript{149} Interview TR.21; World Bank (2014): 24-30.
\textsuperscript{150} World Bank (2014): 10.
\textsuperscript{151} Interviews TR.1 and TR.5; see the letter of 16 March 2018 by the American Chamber of Commerce to the EU and various EU industry groups - 'Industry groups call for action to upgrade the EU-Turkey customs union'; Hurriyet daily news 5 August 2018 'Turkey should insist on updating the EU-Turkey customs union, says TÜSİAD chief'; and BusinessEurope 8 June 2016, reply to EU public consultation on the future of EU-Turkey trade and economic relations.
5.2 **Competition rules in Turkey**

This section discusses the competition rules in Turkey and highlights the approximation between the EU’s and Turkey’s competition rules even in the absence of recent legislative approximation. Section 5.2.3 looks at the state aid rules in the Turkish context. State aid indeed turns out to be a difficult case for export in the absence of accession. While some of the rules are in place, implementation remains at a low level.

5.2.1 **Dynamics and incentives in the adoption of competition rules**

A key factor in the adoption of the final legislation was EU (EC) conditionality in the context
of the customs union. Competition policy was included in the 1963 Ankara agreement and the 1970 protocol to this agreement, requiring further action by the EU Turkey Association Council to determine rules of implementation in the context of the association (Misrahi, 2012). Regulatory approximation in competition policy was only realized in the mid-1990s, just before key negotiations on the EU-Turkey customs union were expected to take place. Since several drafts for earlier competition legislation in Turkey did not materialize in the 1970s and 1980s, the adoption of the Turkish competition act has been directly linked to conditionality from the customs union, and thereby indirectly to accession conditionality (Aydin, 2012b).

Since the literature on external EU governance places much emphasis on the domestic context, more specifically on the role of domestic veto players that block the adoption of EU rules, we will have a closer look at this potential blockage to rule adoption. In the context of competition policy, we should point out that impact of this policy is rather unclear in advance. This was especially the case at the time when the EU-Turkey customs union was negotiated, and also many EC member states only just started to adopt and implement national competition rules. As I argued in chapter 3, EU competition policy may serve different policy goals for administrations and has done so over time. For example, it can be used a tool to reduce the role of the state in the economy and support liberalization processes, but also as a tool to support broader policy goals. This flexibility makes the impact of competition policy difficult to predict in advance. If companies and other actors, including the administration and the judiciary either did not realize what the consequences are or thought to gain benefits from the law, they may not have perceived the installment of the competition authority and the enactment of competition legislation as a threat.  

It is therefore the question however to what extent domestic actors actually tried to block the adoption of competition law, since many potential veto players had no clear idea of what competition policy entailed. EU competition policy may play out advantageously for SMEs and negatively for larger companies, because in general it is meant to curb market power. But in the context of EU accession, larger domestic companies may value the potential of increased business with the EU market larger than the negative effects that competition policy might have for their businesses. The Turkish economy is characterized by small, largely informal businesses on the one hand, and large family conglomerates on the other. While the small businesses remain to an extent unaffected by competition law, large conglomerates may – understandably – try to obstruct the enactment of a competition law, and according to several Turkish sources that this was indeed the case with the draft law that would ultimately be adopted (Aydin, 2012b). From this perspective, the conditionality of the customs union was used to overcome resistance from domestic veto players.

152 Interviews TR.4; TR.5; TR.9.
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In the context of accession, and thereby indirectly in the context of the customs union, the EU had a clear incentive to export competition policy to Turkey. That is because of the underlying single market rationale of competition policy as discussed in section 3.2. In the absence of an accession perspective, the export of competition policy is still relevant for the EU to the extent that it may support liberalization and thereby create more opportunities for EU companies. In the area of state aid, export remains also key as (Turkish) state supported companies are likely to have an unfair advantage over non-state supported (EU) companies.

5.2.2 Approximation with EU competition rules

According to the negotiating framework for Turkish accession from 2005, the EU requirements in this area are full acquis implementation including all legal instruments, including new legislative EU developments (Gok, 2013). However, in the first stages of alignment the EU focused more on the adoption of the main principles of competition law.154 The Turkish competition act entered into force in 1994 and provides for provisions that are similar to the EU rules in wording and logic. Article 4 prohibits agreements that restrict competition (cartels); article 6 prohibits abuse of dominance; article 7 establishes a regime for merger control. Secondary legislation is formulated through regulations, communiqués and guidelines: most notably the regulations on fines and on leniency (both 2009), the communiqués on merger notification (mainly n. 2010/4 and n. 2012/3), and the guidelines on market definition (01.10.2008). Major revisions to the act took place in 2003, 2005, 2008 and 2013.

When the accession process got blocked it became unclear whether developments in the area of competition policy can still be explained by pressure from the EU side, or if is it more a matter of other external pressure, domestic structures, institutional path dependency or epistemic learning (Aydin, 2012b). The EU has been generally positive on the developments in Turkish competition policy, with the exception of state aid. There are a number of areas in which Turkish competition policy at present is not fully compatible to the current EU system: most of these issues relate to developments of the EU system following Regulation 1/2003 which have not been translated in the Turkish system.

- Commitments decisions: while there is no formal possibility for a settlement or a commitment procedure in the Turkish system, Article 9(3) of the competition act has been used to apply commitments in practice, although this is not unproblematic.155 The Article states that prior to the infringement decision, the Board informs the companies how the infringement may be terminated.

154 Interview TR.5.
155 Interviews TR.5 and TR.7.
• **Private damages**: Turkey had a possibility for claiming private damages in court even before the EU, in Article 57 and 58 of the competition act. This provision is modeled on the US example and allows for the compensation of “treble damages” (threefold compensation). The provisions have not been used much in practice (Bagis-Akkaya, 2013; Sanli and Ardiyok, 2011). While this was previously also the case in most EU member states, this has changed significantly since the adoption of the private damaged directive in 2014.156

• **De minimis and leniency**: Turkey has no de minimis rule and still has a notification procedure for cartels, which results in a significant workload for the competition authority. Although there is a system for leniency, this system is not working well since companies are hesitant to come forward and denounce a cartel in which they are or have been involved (Bagis-Akkaya, 2013).157 This could be due to the business mentality, but may also be an indication that the remedies are too light, or that detection and thus the risk of getting caught is insufficient.

• **Merger test**. The RK still works with market tests that are mainly based on structural market power.158 DG Competition went in the direction of an effects-based enforcement regime, where market structure is an indication of dominance but is not considered a determinant factor (Regulation 139/2004). This ‘more economic’ approach to mergers is not (yet) applied in the Turkish context.

The Turkish competition law is therefore mirroring the EU competition rules pre-2004, but seems to be ‘stuck in transition’. A recent draft competition draft law was aimed at addressing most divergences and would further align Turkish competition law with recent EU implementation. It introduced a settlement procedure (there is none at present) and a more formalized commitment procedure; a new merger test (less static/dominance-based) and a de minimis rule.159 The draft law was discussed in the relevant parliament committees in the first half of 2014, but not adopted. After the general elections in June 2015, pending laws from the previous parliamentary period have been cancelled. This suggests that EU accession conditionality is a necessary condition to overcome national obstacles to further reform; indeed, there are no clear material motivations to further adjust the Turkish law in the absence of accession. It is therefore very unclear if alignment to EU rules in competition policy will continue in the future, in particular also in view of the recently adopted ‘ECN Plus’ Directive which involves the powers of NCAs in the EU. The example of commitment decisions however shows that there is a certain level of flexibility for alignment in the in-

156 Directive 2014/104. See on Turkey interview TR.5.
157 Interview TR.5.
158 Interview TR.6.
159 Interviews TR.5 and TR.6.
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terpretation of the rules.

A final question is to what extent the application of competition enforcement has been implicitly or explicitly adjusted to the Turkish context. Turkey has competition issues that are different from the cases DG Competition and many of its member states are faced with, most notably the informal nature of Turkish economy and the presence of conglomerates. Although there are no indications that Turkish competition policy is specifically tailored to address problems in the domestic markets, the competition authority in practice went their own way compared to EU and US systems. For example, they are historically more willing to tackle pricing abuses; sometimes they give their own ‘spin’ to a concept, such as ‘affected markets’ in the merger regime which allows the competition authorities to avoid unnecessary notifications (Bagis-Akkaya and Erdogan, 2011).

5.2.3 State aid rules in the absence of EU membership

As was discussed in chapter 2, the advantages of EU-style state aid policy in the absence of EU accession are often unclear, while the short-term disadvantages seem significant. A state aid prohibition limits the possibilities for governments to engage in industrial policy and development the possibility to influence electorates by the possibility of granting aid; companies that receive state aids will be afraid of losing this source of income. While granting state aid may negatively affect competitiveness in the long run, the direct advantages of a state aid regime may therefore be difficult to see in a domestic context (Zahariadis, 2008). An accession perspective is therefore considered crucial for progress in this area (see section 2.1.1). Aside from the interests at stake, in practical terms it will be difficult for any country to apply state aid in absence of clear short-term accession prospects, as this would imply that you would control your own government. Such a scenario is only viable when supranational oversight by DG Competition is imminent.

The uncertain accession trajectory of Turkey thus presents an unfavorable scenario for state aid adoption. And indeed, while Decision 1/95 states that state aid affecting trade between the EU and Turkey is ‘incompatible with the proper functioning of the [EU-Turkey] customs union’, the adoption and implementation of state aid rules in Turkey have been significantly delayed. The EU did not impose trade sanctions on Turkey in the context of the customs union, although there was the possibility to apply trade defense mechanisms. Nevertheless, this lack of progress had a direct implication for cooperation in (general) competition mat-

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160 But for example in food retail markets, the informal economy is decreasing: Bagis-Akkaya and Erdogan (2012).
161 Interview TR.5. Where there is no coincidence between the parties horizontally or vertically, there is no ‘affected market’ and merger notification is not necessary.
162 Interview TR.12.
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ters, since the systematic (case) cooperation as foreseen by the customs union was blocked
because of the lack of progress in state aid matters.163

Lack of progress in state aid would also prevent the opening of the competition chapter in
any future accession negotiations. Opening benchmarks for the competition chapter in-
clude an inventory of existing aid, the adoption of implementing state aid legislation, the
establishment of an independent state aid authority and an action plan for state aid. The
benchmarks also explicitly address Turkish state aid issues in steel. Although the EUs rules
in state aid are highly detailed, the requirements relating to the opening of the negotiation
chapter are in itself relatively broad, and do not (yet) require the full adoption of the EUs
regime in this area.

The Turkish Law n. 6015 on the monitoring and supervision of state aids was finally adopt-
ed in 2010. The Belgian EU presidency that year openly sought to open negotiations with
Turkey on accession chapters that had not been blocked due to political reasons on the EU
side.164 However, problematic aspects of the Turkish state aid rules remain. First of all, it is
limited in scope – the law excludes not only fisheries and agriculture but also services. In
addition, it only covers aid affecting EU-Turkey relations.165 State aid to the Turkish steel
industry - included in the opening benchmarks of the competition negotiation chapter–is
not explicitly excluded from the scope of the law, which seems positive from an EU perspec-
tive. But implementing legislation has so far not been adopted, and therefore the state aid
law is not operational. Currently, Turkey is mainly working on the monitoring of existing
aid, which is also mandatory for EU accession. However, there are significant problems in
collecting the data on aid from the relevant ministries.166 The deadlines for the monitoring
of existing aid from the EU side have passed several times.

The undersecretariat of Treasury -and within that, a directorate general- is charged with
drafting the legislation and the monitoring of the existing aid. Ultimately, the undersecre-
tariat would also be in charge of enforcing state aid law and drafting enforcement decisions.
The directorate general had a staff of around 45 team members in 2013.167 While initially
there has been some discussion on whether the Turkish competition authority should en-
force state aid legislation, the task eventually was given to the undersecretariat of Treasure
and a separate body.168 The latter state aid monitoring and supervision board consists of

164 Misrahi (2012).
165 World Bank (2014): points 61-64. See also interview TR.21. Article 1(2) and 2(b) of law 6015.
166 Interviews TR.7 and TR.12.
167 Annex to state aid law 6015; Interview TR.12.
168 Interviews TR.7; TR.12; TR.21.
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7 members. One of these is from the competition authority; the other members are from ministries, including the ministry of finance, industry & trade and state planning. Because these are also the main ministries granting the state aid, they cannot vote for a draft of their ministry.\footnote{Article 4(9) state aid law 6015.} Still, putting a board of state aid granting ministries the ultimate responsibility to enforce state aid prohibition does not seem a viable setup to decrease aid - in the EU this task is performed by the College of Commissioners.

The limited scope of the state aid law and lack of implementing provisions do not imply that EU state aid policy does not have an impact on the Turkish system. Domestic investment incentive schemes have become increasingly horizontal, with for example more focus on R&D and regional aid rather than giving aid to a specific company or a specific sector.\footnote{Interviews TR.12; TR.14; TR.21.} In addition, the undersecretariat continues to engage in capacity building. In the past, there have been a number of short EU capacity building missions (TAIEX)\footnote{Technical Assistance and Information Exchange instrument: for example, a TAIEX mission on state aid in Turkey took place in December 2011 (by Romanian and Hungarian experts).} on state aid where Turkey has participated in; the undersecretariat continues to send officials to DG competition as Seconded National Expert (SNE) to work on state aid matters.\footnote{Interviews TR.1; TR.2; TR.7; TR.12.} Therefore, despite the difficult position it has in the monitoring of state aid in relation to the different Ministries, the undersecretariat has been able to make some modest progress on this area, though insufficient to account to full implementation or satisfy the key EU criteria that are necessary for further accession negotiations in the competition field.

### 5.3 Domestic implementation of competition policy

In this section I will further discuss the implementation of competition policy in Turkey focusing on the institutional domestic context in which competition policy is applied and cooperation with competition authorities abroad. I will also discuss implementation of competition policy in the mobile telecom sector, where the Turkish competition authority has rather successfully sought for ways to open up a highly concentrated domestic market.

#### 5.3.1 Institutional structure

Differently from more recently acceded EU member states (CEECs) and current candidate countries (SEEs), Turkey is both a centralized state and has a large institutional capacity. It is unclear how we would expect EU-style regulation to be domestically implemented in such a context. Institutional capacity combined with solid statehood in theory may allow for successful implementation, because when statehood is contested and institutions are
not functioning, a proper implementation of complex regulation will be highly challenging. At the same time, a centralized state may cause difficulties in an area like competition policy, which in the EU not only has a supranational component but is (at least on paper) applied by independent agencies rather than directly by governments.

In Turkey, the concept of a fully independent agency is unconstitutional, as it conflicts with the constitutional principle of a ‘unitary’ state in which all agencies are attached to a ministry (Ozel, 2012). The introduction of several independent agencies in the 1990s and early 2000s thus created significant uncertainty regarding their legal position. These regulatory agencies were ‘related’ or ‘affiliated’ to a ministry, but it was difficult to say in advance how these agencies would develop and how much de facto independence they would have. Several authors argue that actual institutional reform in this area has never taken place, and that the country always remained highly centralized (Celenk, 2009; Cetin and Yilmaz, 2010). In practice, much depends on the leeway the agency is allowed (or is able to carve out) by its related ministry, by other agencies and by the judiciary. There are indications that Turkish agencies are being increasingly stripped of their powers, especially since 2011 (Ozel, 2012).

The Turkish competition authority (Rekabet Kurumu - RK) became operational in 1997 and is relatively independent. Formally, it is the board of the RK that adopts the decisions: this board consists of seven members, one of which is recruited from among the RK staff. Two other board members are from the Ministry of Customs and Trade, to which the RK relates. While the ministry can ask the RK to start an investigation, it has no role in the investigation process and no say in the outcome of the case, except by the final decision to approve or disapprove the final decision by their board members. The RK does not depend upon the ministry for its budget, since this is directly generated from companies. In practice, the RK seems to be relatively independent in the domestic context. This was also generally confirmed by EU progress reports that mention the RK upholds a satisfactory

173 Interview TR.17.
174 Interviews TR.14 and TR.15.
175 Article 26 Turkish competition act.
176 Previously the RK related to the Ministry of Commerce and Industry but this does not seem to make much difference in practice: interview TR.5.
177 Article 9(1) Turkish competition act: interview TR.5.
178 Article 39 Turkish competition act. Ministry contributions and publication revenues are also mentioned in the article, but these are not used in practice: OECD (2014c) under 100. This system is probably unique in the world. Previously the funding was generated through fines, but this was considered to create too much of a bias in enforcement.
179 Article 20 Turkish competition act.
level of administrative and operational independence.\textsuperscript{180} Although a decree-law from 2011 made it possible for a ministry to intervene in the dealings of related agencies, concerns regarding the independence of the RK have not materialized so far.

The RK is one of the most ‘elite’ agencies in Turkey.\textsuperscript{181} The authority quickly built up capacity in terms of staff members and case output since its establishment: staff numbers increased from 259 in 1998 to 352 in 2013. (By comparison, the German NCAs employs 330 staff members.) The authority concluded 191 cartel and abuse of dominance cases in 2013. The staff of the competition authority also seems to be well equipped to deal with the content of the cases. While compared to many EU NCAs, the RK staff employs relatively low numbers of lawyers and economists compared to other backgrounds, such as management and political science; in 2008, professional staff included 33 economists, 11 lawyers and 63 ‘other’ professionals (OECD 2009). However, RK runs an intensive internal training programme, which includes both a general part on public administration and a specific competition part.\textsuperscript{182} Staff is encouraged to study abroad and writes a thesis on a competition issue.

In the domestic context, the RK not only issues competition decisions but also plays a relevant role in privatization processes. Privatization of state-owned companies is handled by a separate authority (the privatization authority);\textsuperscript{183} the RK delivers both an opinion on the bidding process and an authorization for the privatization. The relation between the two authorities is regulated by a Communiqué.\textsuperscript{184} The opinion of the RK is authoritative, and the authority played for example a proactive role in the privatization process of energy and ports, and continues to do so.\textsuperscript{185} The RK therefore has more influence than one would expect based on the formal mechanisms of consultation. Vis-à-vis sectoral authorities in telecom and energy, who took charge of sectoral regulation after privatization, the RK has an advisory role as well. According to telecom regulation, both the RK and the sectoral regulator ICTA are required to ask each other’s opinion when drafting a decision that relates to competition issues in the telecom sector.\textsuperscript{186} In the field of energy, the RK has a general

\begin{itemize}
  \item \textsuperscript{180} Interview TR.11. European Commission (2014b).
  \item \textsuperscript{181} Interviews TR.10 and TR.17.
  \item \textsuperscript{182} Interviews TR.6 and TR.17.
  \item \textsuperscript{183} Interview TR.14 and TR.16. See Article 4 of Privatization law n. 4046 (1994).
  \item \textsuperscript{184} Privatization Communiqué 2013/2 (previously Communiqué 1998/4).
  \item \textsuperscript{185} Interviews TR.3; TR.16; TR.18.
  \item \textsuperscript{186} Article 7(2) of the Electronic Communications Law states that the RK has to take into account the view of the ICTA in decisions concerning the telecom sector; article 6(1) of the ECL states that the ICTA has to take into account the view of the RK when this is ‘specified by law.’ The latter provision is unclear. See also the Cooperation Protocol between the Competition Authority and the Information and Communication Technologies Authority (2011).
\end{itemize}
competence to provide an opinion on draft regulations by sectoral regulator EMRA.\textsuperscript{187}

Several changes have been made to the appeal process for RK decisions. Previously decisions were appealed to the Council of State (Danistay), which had little experience with competition cases and was reluctant to take them up. For this reason, a special chamber was set up within the Council of State to review competition decisions in 2005.\textsuperscript{188} Such a situation is not unusual in EU member states; in the Netherlands for example, competition appeals are handled by a special chamber of the Rotterdam court. Since 2012, appeals no longer take place before this special chamber, but before Ankara’s administrative first instance courts.\textsuperscript{189} There is a significant risk that these courts do not have the required expertise or capacity to engage in an in-depth review of competition cases.\textsuperscript{190} In practice this seems to have translated into a reinforcement of the RK’s domestic position: one of these courts stated for example that the RK is able to contest secondary legislation if it is conflicting with competition legislation.\textsuperscript{191}

In the context of the Turkish institutional framework in which the RK operates, it should be noted that following the alleged coup attempt in Turkey in July 2016, a large number of civil servants was fired by the government. The main groups that were targeted came from the judiciary, the military or education. According to a group of anonymous journalists collecting data on these events via the governmental decrees that were issued, 31 officials from the RK were inflicted in these indictments and lost their job.\textsuperscript{192} It remains difficult to assess what direct or indirect impact this has had on the functioning of the RK. The number of staff concerned is relatively low compared to other ministries and agencies, which suggests that the impact has been limited in comparison to other parts of the administration. At the same time, the institutional context in which the RK operates has significantly changed. Not only has the informal leeway of the administration vis-à-vis the government likely decreased, but also a large number of companies have been seized by the government and thereby effectively nationalized, which will likely make enforcement of competition rules in the domestic context more sensitive.

\textsuperscript{187} A general competence to provide opinions on draft regulation by the RK is Article 27 of the Turkish competition act n. 4054. An obligation to ask for the RK’s opinion in draft regulation can be found in the electricity law.
\textsuperscript{188} Article 34 of law n.5183 (2004).
\textsuperscript{189} Article 55 of the Turkish competition act n. 4054, as amended by law n.6352 (2012) on judicial reform.
\textsuperscript{190} Interview TR.4.
\textsuperscript{191} Interview TR.5.
\textsuperscript{192} https://turkeypurge.com/purge-in-numbers-2
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5.3.2 International cooperation

As discussed in chapter 3 and 4, the internal EU competition network ECN is only open to competition authorities from EU and EEA members. Many EU NCAs consider the ‘check’ of their decisions by DG competition in the ECN as a way to reinforce their decisions in the light of courts controls on supranational legislation. While such a system does not make sense in the absence of a supranational logic, exclusion of the RK from the ECN deprives the Turkish authority both of the possibility to use this control mechanism in order to remain in line with EU enforcement practice, and to use this control mechanism to reinforce their position in the domestic system. In addition, the RK is also deprived of participation in the horizontal ECN groups that do not relate to direct enforcement. Although the RK temporarily participated in one of the horizontal working groups (forensic IT),193 this cooperation seems to have been driven by personal interests and contacts, and was consequently discontinued. In the absence of direct cooperation between competition authorities, it is rather DG NEAR on the EU side and the Ministry of EU affairs on the Turkish side who are the main links of communication. EU accession progress reports are not very specific on the issue of competition, and are drafted by DG NEAR not on the basis of direct contact with the RK, but based on input from the EU delegation.194

Previously, a number of EU capacity building mechanisms have been in place. The RK initially received rather extensive training programmes from the EU side. In 1999 a special competition law training was provided for RK staff at the ‘College of Europe’ in Bruges.195 This was welcomed from the Turkish side, since it seems there was no clear preconception of what the work of the competition authority’s staff would entail at the beginning.196 The RK also participated in a number of short-term capacity building projects on competition policy (TAIEX).197 Although twinning programmes did not take place, Turkey can send national experts to DG competition, and has done so a more or less continuous basis in the state aid area (see section 5.2.3 above). Increasingly the RK provides training to other competition authorities, for example in Central Asia and more recently in the context of the Organization of Islamic Cooperation. Short term training courses by RK staff were organized in Indonesia, Albania, Pakistan, Bangladesh, Sudan. Cameroon, Gambia, Azerbaijan and Saudi Arabia in 2013 and 2014.198 Therefore the authority is increasingly also spreading best

193 Interviews TR.4 and TR.20.
194 Interviews TR.1; TR10; TR.11.
196 Interviews TR.5 and TR.9.
197 There were a number of TAIEX competition law missions involving Turkey in 2003 and 2005: Yanik and Ekdi (2005). The most recent TAIEX mission related to competition law in Turkey took place in 2008.
198 Interview TR.19. See also http://www.oicvet.org/competition-authorities.php
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practices in the competition area.

Several authors have pointed at continuing regulatory alignment in Turkey towards EU frameworks even in the absence of accession conditionality, and partially account for these changes by participation in international rather than EU networks (Oguzli, 2012; Zaras, 2013; Aydin and Kirisci, 2013). Indeed, while there may be no material interest to further update Turkish competition rules in line with EU policy, RK competition officials will have a more ‘epistemic’ interest to either emulate best (EU or international) practices to the extent that these can either help them solve the implementation challenges they face or strengthen their position in the domestic institutional context. In addition, from conversations beyond the formal interviews it seemed that many of the RK staff remained committed to eventual EU accession, and to updating domestic implementation in line with EU policy in case the accession process may pick up.

In the absence of ECN membership, the OECD has become the most important forum for RK to connect with EU NCAs. The RK also participates in some of the ICN events (e.g. part of the unilateral working group) where it meets with EU authorities. The OECD and the ICN will be further discussed in chapter 6 and 7. As we will see in chapter 6, it is not unusual that OECD peer reviews are used by competition authorities to strengthen their domestic position. The timing of the last in-depth peer review of Turkey (OECD, 2005b) also suggests strategic use of OECD reviews, both with a view of EU accession and in the light of the RKs domestic position.

5.3.3 Implementation of competition policy in the telecom market

In the area of telecoms the EU acquis significantly evolved since the 1990s, when the customs union entered into force. Not unlike the situation of the progressing energy liberalization in the Norway case study, several EU liberalization packages and increased enforcement of competition law created some uncertainty on the application of the abuse of dominance provision and the division of labor between competition authorities and sector-specific agencies, especially at the member state level. The European Court of Justice ruled that directions from a sector-specific regulator cannot be an excuse for not complying with EU competition rules. Therefore, the existence of sector-specific legislation does not prevent EU NCAs to act.

Liberalization of the Turkish telecom market was initially driven by IMF conditionality in a period of economic crisis. Following the domestic financial crisis in 2000-2001, there were

199 Interviews TR.19 and TR.20.
several external drivers to engage in economic reforms. In different loans to Turkey in the late 1990s and early 2000s, the IMF recommended liberalization of mainly the telecom and banking sectors. Privatization of state operator Turk Telekom was a main condition for these loans, also because of the income it would generate for the Turkish government.201 This IMF conditionality coincided with other international appeals for liberalization, mainly the WTO guidelines to liberalize basic telecom services202 and the perspective of possible future EU accession. Reforms started with the adoption of telecom law n. 4502 in 2000, was replaced by the Electronic Communications Law n. 5809 in 2008. The latter changed the name of the Telecommunications Authority to Information and Communication Technologies Authority (ICTA) and updated the law to be more in line with the latest developments in EU telecom regulation.

Although privatization of Turk Telekom has effectively occurred and the telecom sector is subjected to regulation, as in many EU member states the sector remains relatively concentrated. There have been doubts about the independence of the ICTA, as the regulator has a close relationship to the related Ministry of Transportation. Part of the agency’s staff came from the Ministry and had been professionally involved with incumbent operator Turk Telekom, the company that the authority was supposed to regulate (Ardiyok and Oguz, 2010; Ozel, 2012).203 There are also doubts about the quality of decision-making by the ICTA in terms of expertise and professional capacity: Atiyas and Ogan (2010) refer for example to the (very) low ranking of the ICTA on the scoreboard of the European Competitive Telecoms Association, which is a pan-European trade organisation. This means that national economic interests are expected to prevail over market opening. However, at the same time telecom is one of the sectors in which the highest and most fines are imposed under Turkish competition law.204

The exact formal relation between the application of competition law and telecoms law in Turkey is unclear. While the Turkish competition law applies in principle to all industries including telecom,205 the Turkish telecom law applies to this sector as well and is therefore a lex specialis, which may prevail over general competition provisions. By contrast, in the EU the relation between telecom and competition regulation is generally decided in favor of the competition provisions. The relationship between the RK and the RK/ICTA was problematic especially in 2004-2005 despite an existing cooperation protocol between the

201 See the letters of intent from that period: http://www.imf.org/external/country/tur/index.htm?type=9998#23
203 Interview TR.16.
204 Interview TR.5.
205 Although the RK has declared not to intervene in some sectors (agriculture) or issued opinions against price fixing that were not followed in other sectors (professions and public transport).
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authorities (Ardiyok and Oguz, 2010; Atiyas, 2011). More recently the relations have normalized: the RK gives opinions on ICTA decisions and legislative initiatives and vice versa, and there is even some level of mutual training. Domestic courts also emphasized the importance of following EU case law and by doing so reinforced RK intervention in telecom markets.

Landline voice and broadband services are still vastly dominated by Turk Telekom although the RK has challenged its position in several instances. At the start of the privatization process, the RK advised to divest Turk Telekom’s TV cable network; Turk Telekom would only be allowed to keep the ADSL structure. While the cable network was indeed eventually divested, it was not privatized and has not been able to develop as an alternative to Turk Telekom’s ADSL line in the internet market (Atiyas, 2011). Following complaints from service providers seeking access to the TV cable network, RK has been relatively unsuccessfully trying to change this situation. The RK did tackle Turk Telekom’s ADSL dominance on the internet market, most notably in two infringement decisions concerning a prize squeeze and predatory pricing in the ADSL line.

The mobile telecom market is more open, although it has oligopolistic features that have been challenged by both the ICTA and the RK. The position of Turk Telekom is radically different in this market segment; while it is dominant in the fixed lines, it is actually a newcomer in the mobile sector through its subsidiary Aycell. In the mobile market, especially Turkcell enjoyed a significant first mover advantage and was able to exploit this advantage over time. Following complaints from new entrants both at the RK and the TA/ICTA, despite attempts of both to limit the power of Turkcell the market remains oligopolistic (figure 5.2). Possibly a result of its relation of its links to Turk Telekom (and a wish to attract foreign investments in this market), the TA/ICTA has been quite active in addressing competition concerns in the mobile segment (Atiyas and Dogan, 2007) but has not been successful in making this market more competitive. The RK more successfully pursued cases against the

206 Interview TR.6.
207 Interview TR.5.
208 Interview TR.7.
209 Interview TR.6.
210 In TTAS decision of 10 February 2005 with number 05-10/81-30, the RK found abuse of dominance but did not charge a fine, leaving it to the TA to start a further investigation. In Turkcell / Superonline decision of 8 September 2005 with number 05-55/833-226 the RK concluded that the case would have to be pursued by ICTA.
211 Turk Telekom/TTNET decision of 11 July 2007 with number 07-59/676-235 (TTNET/Turk telecom - interim) and decision of 19 November 2008 with number 08-65/1055-411 (TTNET/Turk telecom - final).
212 Interview TR.20.
incumbent operators from the early 2000s onwards, most notably a refusal to deal case against Turkcell and Telsim (refusal to allow roaming on the network);\textsuperscript{213} a case of exclusive dealing by Turkcell;\textsuperscript{214} and most recently a refusal to supply by Turk Telekom related to access to the mobile network.\textsuperscript{215}

<table>
<thead>
<tr>
<th>Year</th>
<th>Turkcell</th>
<th>Telsim</th>
<th>Aria (Is-TIM)</th>
<th>Aycell (Turk Telekom)</th>
</tr>
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<tbody>
<tr>
<td>1994</td>
<td>Turkcell</td>
<td>Telsim</td>
<td>Aria (Is-TIM)</td>
<td>Aycell (Turk Telekom)</td>
</tr>
<tr>
<td>2001</td>
<td>Turkcell</td>
<td>Telsim</td>
<td>&gt; Vodafone (±30%)</td>
<td>&gt; Avea (±20%)</td>
</tr>
<tr>
<td>2015</td>
<td>Turkcell (±50%)</td>
<td>&gt; Vodafone (±30%)</td>
<td>&gt; Avea (±20%)</td>
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</table>

Figure 5.2: The Turkish mobile telecom market

The RK has been able to assert its position within the domestic system vis-à-vis the ICTA, the ministry and the incumbent operator. This has been most successful in the mobile market, where the incumbent operator in the fixed lines, Turk Telekom, is actually a newcomer and therefore has an interest in a fair level playing field. The relationship between RK and ICTA is however potentially unstable, in particular in the absence of further political and economic approximation to the EU. The relation may be jeopardized when the independence of one or both authorities declines; ICTA may for example assert itself more strongly with backing of its related Ministry, leaving less leeway for the RK to operate in practice. Such developments would allow less leeway for EU influence on the implementation of the competition rules, which has been stronger on the functioning of the RK than on the ICTA.

5.4 Conclusions

While EU accession has always been relatively problematic for EU-Turkey relations due to the size of Turkey and perceived cultural differences, in the last decade relations have become increasingly locked-in. EU enlargement to Greece and Cyprus has effectively blocked all accession progress, triggered by a refusal from the side of Turkey to update the customs union to include Cyprus. While Turkey is increasingly unhappy about the terms of the current customs union, on the EU side, a revision is not feasible also because of current developments in the area of human rights on the Turkish side. The progressive broadening of EU ‘actorness’ to include topics relating to democracy and human rights is therefore stalling progress not only on political issues, but in more market-based areas as well.

\textsuperscript{213} IS-TIM v. Turkcell and Telsim decision of 9 June 2003 with number 03-40/432-186.
\textsuperscript{214} Turkcell decision of 23 December 2009 with number 09-60/1490-379.
\textsuperscript{215} Turk Telekom decision of 9 June 2016 with number 16-20/326-146.
Competition policy in Turkey

While the competition negotiation chapter is in itself not structurally blocked, the lack of an accession perspective delays state aid reforms, which in turn blocks the opening of the competition chapter. Institutional cooperation under the customs union is also blocked because of this impasse in state aid. Thus in competition policy we clearly see a “negative spiral” of integration because of the setup of the association process. The layered policy structure of enlargement and the customs union makes that when one element of this system is blocked (state aid) the entire system blocks and cannot open on other areas (telecom). Therefore the framework of enlargement, which was intended to enhance domestic change in Turkey, actually rather endangers progress and cooperation at this point in time on sector-specific issues that could potentially be much more successful.

In the area of state aid, the overriding logic of the process is EU accession conditionality. The state aid prohibition in EU competition law makes sense in an EU internal market context, where it may avoid that governments undermine the level playing field for companies. In cases where supranational oversight and membership are not extended to the non-EU country, such as Turkey, countries have little incentive to adopt these rules. This is in particular the case because EU state aid regulation directly touches upon the domestic leeway for industrial policy. The progress of state aid rules and practices in Turkey has been accelerated at times that progress towards EU membership could be made, and delayed when EU membership seemed unlikely. Progress and alignment in this field are currently low. This precludes further cooperation on competition matters in the enlargement policy framework, since the chapter on competition cannot be opened until state aid rules are implemented.

In the telecom sector, liberalization has been realized although the market remains oligopolistic. Alignment with EU rules and practices in this area is relatively high. Not unlike in many EU member states, the telecom market is regulated both by the competition authority and by a sectoral regulator. However, because of the lack of EU supranational oversight, which resolved the tension between sectoral and competition oversight in favor of the latter in the internal market, the exact competences of the two oversight bodies in Turkey are mainly established by informal practices. Because the Turkish competition authority cannot participate in the ECN or engage in direct cooperation with the EU NCAs, there is also no possibility to get an informal EU opinion to reinforce its domestic position. Nevertheless, the Turkish competition authority has been able to actively tackle problems in the mobile telecom market, and has been able to assert a strong position vis-à-vis the telecom regulator.

In the absence of an immediate accession perspective, the implementation of competition policy in Turkey has not come to a standstill: the competition authority is relatively independent compared to other Turkish agencies and took the opportunity to assert itself in domestic context even in the absence of close EU cooperation. There are no clear indications
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of backsliding; rather, the RK seems to have tried to informally keep the implementation of the rules close to EU practice. However, the more remote accession becomes, the more likely it becomes that competition systems may diverge in the absence of more open EU cooperation possibilities. A more directly cooperative approach from the EU side in the area of competition policy could have supported a constructive dialogue during a period of domestic turmoil in Turkey. While the Turkish competition authority has demonstrated that it is capable of operating in the domestic economic and institutional landscape, due to the inflexible nature of accession negotiations the EU has missed out on an important opportunity for cooperation and influence.

After discussion of EU influence on competition policy in non-EU countries Norway and Turkey, the next part of the thesis will turn to the EU’s influence on global competition networks. The first of these networks is the OECD, which will be discussed in Chapter 6. While in the country studies the emphasis was foremost on the implementation of competition policy in the domestic context, the network studies will focus more on the EU’s influence on the operation of the network and the regulatory outputs that it produces.
Competition policy in Turkey
PART III: THE EU IN GLOBAL COMPETITION FORUMS
6. **COMPETITION POLICY AT THE OECD**

Shaping global best practices

This chapter discusses the EU’s influence on the competition work of the OECD. This is currently one of the main global forums dealing with competition policy, and both the European Commission and EU member states contribute to its work. In considering the practical realities of EU engagement with the OECD’s Competition Committee, this part of the thesis makes an important empirical contribution to the existing literature, where the OECD’s work on competition policy and more specifically the role of the EU in this area have remained underexplored. While several authors discuss the role of the EU in the OECD’s competition committee, they tend to explore the comparative strategies of the EU in different networks, rather than looking into the outcomes of the networks individually (Aydin, 2012a; Botta, 2014; Damro and Guay, 2016). In view of the OECD’s membership, which includes many EU member states, we would however generally expect the EU to successfully influence the competition work of the OECD.

Chapter 2 provided a number of intuitions about the drivers of regulatory EU influence in global governance. The EU’s institutional setup, the EU’s experience, and the EU structural market power may matter for successful uploading to global forums; and since I will be looking also at the influence of the global forums on the EU, also the institutional setup of the forum, and the structural market power and experience of the other participants are likely to be relevant as well. It is unclear to what extent structural market power is a relevant factor in global expert networks. While this may trigger an ‘automatic’ global adjustment of domestic rules to the largest import market, expert networks are expected to function in a horizontal manner where expertise rather than power plays a key role. It is particularly unclear to what extent structural market power matters in the context of the OECD, which works through national governments rather than being a direct discussion forum for interested experts.

This chapter finds that DG Competition and EU NCAs indeed relatively successfully shape deliberations in the OECD’s Competition Committee. That is because the committee works in a technical, demand-driven manner and is includes relatively many participants from the EU. The increase of EU NCAs enforcing EU competition rules increased the EU’s influence on the committee, even when it is not deliberately steered by DG Competition, as is demon-
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...trated by the workstream on impact assessment. In this specific example, EU NCAs also seem to be the major target audiences and make use of the OECD output. While both DG Competition and EU NCAs actively participate in the Committee, their main motivation for doing so seems to be the relevance of the output for their own work, rather than a desire (either as professionals or out of material interests) to spread their own implementation practices globally.

6.1 Competition policy at the OECD

This section introduces the OECD and the different elements of the OECD’s competition work. This mapping exercise is necessary in the light of the relatively scarce literature on competition policy at the OECD.

6.1.1 A multifaceted organization

The Organisation for Economic Co-operation and Development (OECD) is a cooperation forum for mainly Western countries. It is the successor to the Organisation for European Economic Co-operation (OEEC), established in 1948 to coordinate economic policies in Europe in the context of the US-sponsored European Recovery Programme. More commonly referred to as the ‘Marshall plan’. While the allocation of aid was ceded to the US administration, the OEEC developed as a transnational European forum in which national policymakers could meet and discuss policies. Following the termination of the Programme and the establishment of the European Economic Community in 1957 and EFTA in 1960, OEEC was transformed into the OECD in 1961. The new organization included the US and Canada as members, and soon also Japan joined as well (1964). Following rapid economic growth in Latin America and Asia, the OECD has struggled to keep its membership representative as organization of industrialized countries. After accession of Mexico (1994) and South Korea (1996), enhanced engagement programmes were set up with China, Brazil, India, Indonesia and South Africa. But membership still predominantly consists of Western countries, exposing the OECD’s transatlantic legacy.

The OECD works on a broad range of topics, initially most notably trade, development and agriculture (Woodward, 2009; Carroll and Kellow, 2011). It is probably best known for its economic outlook, which is issued twice a year and provides economic forecasts for G20 countries, and for its comparative country reviews in policy areas ranging from tax transparency to good governance. The OECD works essentially on developing and promoting good governance practices to increase economic growth. In some areas, the OECD acted as an incubator to develop concepts for address novel policy challenges. This is for example the case for environmental policy, where the OECD has been credited with introducing the ‘polluter pays’ principle. The OECD also gave a major impetus to fighting tax evasion, mainly by fo-
Competition policy at the OECD

cusing on increased transparency. It publishes blacklists of tax havens and also developed a model agreement on exchange of tax information. Alternatively, the OECD has functioned as a facilitating body to proceed with policy issues that had been deadlocked in other international forums, such as trade and climate issues (Verschaeve and Takacs, 2013). Finally, the OECD also supports the work of global forums operating without a secretariat, such as the G7/8, and more recently the G20 (Woodward, 2009; European Parliament, 2015).

Despite being a well-known and respected organisation, the OECD traditionally received little academic attention. A number of practical reasons may account for this moderate level of interest. First of all, the OECD is a highly multifaceted organization. The organization works through committees and semi-autonomous bodies with different operational dynamics while at the same time, the OECD’s influence on national policies is uneven as well, both in terms of issue areas and over time. Mahon and McBride (2009) even suggest that there is a degree of ideological variation within the OECD: a more neoliberal paradigm in the jobs strategy, and a more inclusive form of liberalism in its project on the balance between work and family life. Considering these levels of variation within the OECD, it is arguably difficult but also not very insightful to provide comprehensive statements about the OECD as whole. A further complication to the assessment of the OECD’s work is the rather private character of the proceedings. OECD meetings are difficult to access, and the lack of on-the-spot discussions may make it difficult to identify the positions of the participants and to see how these change over time.217

In recent years, there has been a renewed interest for the role of the OECD in global governance.218 These contributions map the work of the OECD either in terms of issue areas or over time. The volume edited by Mahon and McBride (2008) for example considers the OECD in the context of transnational governance and offers detailed case studies in various policy areas following different theoretical approaches. The volume edited by Martens and Jakobi (2010) more systematically emphasizes the underlying governance mechanisms through which the organization proceeds in various policy areas in the absence of binding output. Finally, Carroll and Kellow (2011) offer a historical perspective on the development of the OECD as an organisation.

A number of contributions have also analytically characterized the OECD. Marcussen (2001, 2004) considers the OECD as an ‘ideational artist’ and ‘ideational arbitrator’ i.e. an organization creating and shaping new ideas, while creating a platform for deliberation about these ideas between members. Woodward (2009) provides an overview of the OECD’s working practices and issue areas with an emphasis on the ‘normative governance’ of the organization, understood as shaping attitudes of the participants through continu-

217 Interview INT.2.
218 See also book reviews on recent OECD literature by Eccleston (2011) and Verschaeve (2013).
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ous knowledge exchange: ‘[…] consultations do not lead to overnight resolutions but over a long period of time the values, ideas and principles agreed at the OECD become norms which percolate the national and international policymaking circuitry.’ Up- and downloading of regulation to and from the OECD is in this understanding a process, rather than a matter of standard setting at a certain point in time followed by compliance.

The extent to which the OECD is steered by its members however remains somewhat of a black box. From the studies that are available, most focus on the impact the OECD has had on either a specific transnational policy area or on the national policies of the member countries (e.g. Mahon and McBride, 2008; Woodward, 2009, Martens and Jakobi, 2010), and not on the influence members have on the OECD. In addition, only Verschaeve and Takacs (2013) analyse specifically the role of the EU in the OECD. They find that the EU has different identities in different policy areas. In analysing the role of the EU however, they remain close to the issues of competence and institutional representation without combining this with the governance mechanisms and procedures through which the OECD works. While they contribute practical insights to the issue of representation and coordination, such as how the EU delegation coordinates EU presence at OECD meetings, the analysis therefore does not discuss the actual interaction between the EU’s representation and OECD governance mechanisms.

In the light of the recent interest for the OECD, it is also remarkable that the competition work of the organization has not been examined in a more comprehensive manner. The OECD was one of the first international organizations that started working on competition policy in a multilateral context, but academic attention for the newer competition networks ECN and ICN (and previously in the context of the WTO) has not been matched by a similar interest for the competition work of the OECD. While several authors address the OECD as an international competition forum, this is usually done in a comparative context where several international networks are discussed (e.g. Tarullo, 2000; Damtoft and Flanagan, 2009; Dabbah, 2010; Maher and Papadopoulos, 2012). The EU’s influence on the OECD’s Competition Committee has been previously highlighted as well, but similarly comparing EU participation in different global fora, of which the OECD is just one amongst several others (Aydin, 2012a; Botta, 2014; Damro and Guay, 2016).

However, in competition policy the OECD in theory has an important advantage vis-à-vis other international forums because OECD member countries to an important extent determine the global governance agenda in this policy area (Woodward, 2009: 69). In addition, not only is it a suitable case to study EU influence for the purposes of this thesis because of the strong representation of EU member states, but there are also clear indications that both EU NCAs and DG Competition prioritize the OECD in their international coopera-
Competition policy at the OECD

Competition, at least compared to the ICN and UNCTAD. With this in mind, it should be considered why this is the case and what are their motivations for participation to the OECD.

This chapter will provide details and insights in the workings of the OECD’s Competition Committee – both with respect to the work that is done in the committee, and with regard to the role of the European Commission and the EU member states. The next section of the chapter clarifies the main dimensions of the OECD’s activities in the area of competition policy in order to set the stage to consider the role the EU plays in the work of the OECD’s Competition Committee.

6.1.2 The Competition Committee

While the OECD has worked on competition policy since its establishment in 1961, only fairly recently that the organization really began to thrive as a multilateral forum for competition issues. Competition work in the OECD especially gained traction in the shadow of the WTO discussions on the inclusion of competition policy in anticipation of the Doha Round. One of the OECD’s working parties conducted trade and competition discussions in parallel to, and in support of, the work conducted in the WTO group in that same period. The OECD’s Competition Committee and the WTO’s Working Group on the interaction between Trade and Competition Policy were even chaired by the same person, Prof. Frederic Jenny. Such a supportive role is in line with the role the OECD played for example in the context of the G7/8 and the G20, as outlined in the section above. Currently, the OECD works on competition policy on a number of different issues and configurations.

The work of the OECD proceeds through a large number of committees and semi-independent bodies, in which national delegations and OECD staff come together to discuss policy issues. The steering group of these committees is called the ‘bureau’ and is composed of a chair, several national delegates and experts from the OECD secretariat. Competition policy has an appropriate OECD Competition Committee, which is supported by 10-15 specialized staff members from the secretariat. The committee meets twice a year. The meetings last several days and include a general Competition Committee meeting and meetings for the different working parties.

Committee meetings consist of roundtables on different competition topics for which the secretariat prepares a background paper. Participants from the member delegations may send in their contributions in reaction to this paper in advance, and are asked present their point of view during the meeting. After the roundtable, the secretariat drafts a summary

219 Interviews INT.1; NO.3; Danielsen (2013); Hollman and Kovacic (2011): 67.
220 Interview INT.4.
221 Interview INT.4.
of the positions which eventually is made public. The competition committee meetings tend to be static, with little discussion taking place on the spot.222 Delegations prepare not only their contributions, but also their questions to others (and their answers to questions of other delegations) in advance. This because the delegates have a limited margin of discretion (since they present the position of their country as OECD member), but also because for many countries it is not feasible to send different experts for the substantive competition roundtables. Since the meetings are attended by a large number of participants, there is also little time for spontaneous discussions.

In addition to the Competition Committee meeting, ongoing work proceeds through two active working parties: a working party on competition and regulation (WP2) and a working party on enforcement issues (WP3). The working parties also include roundtables, but on a specific set of issues. Some sectors re-emerge in roundtables over the years, because the issues are particularly problematic for competition authorities. This has been for example the case for pharmaceuticals and financial markets. In 2012 it was decided that in addition to the roundtables on more ad hoc issues that could be handled in a single meeting, the working parties would have a work stream on a long-term topic. This would allow for more in-depth and more comprehensive work on several sets of issues, and result in a number of outputs for each issue in the form of products that competition agencies may use. In addition to publishing background papers and summaries, the working parties are aimed at producing either recommendations or more informal outputs such as best practices, guides and manuals.

In practice, not all topics are suited for a long-term work stream in a working party, which implies that there is a ‘bandwidth’ of topics that the OECD Competition Committee can work on in an in-depth manner. A number of factors play a role in this. Not only should be enough interest from the participants to contribute to the project, but also there should be a possible output, and the ‘size’ of the project should be fitting.223 In the case of intellectual property for example, the issue was considered too broad and difficult to delineate, but also rather controversial, meaning that it would be difficult to reach to a consensus output. It would also difficult to see what the added value of an OECD output in that area would be in view of existing work on competition policy and intellectual property.224 In the latter case, the exclusion of the topic therefore related to matters of size, level of controversy and added value. The first work stream of WP2 has focused on evaluation of competition enforcement; while the first work stream of WP3 has focused on international cooperation.225 Section 6.3 will look in more detail at the work from WP2 on evaluation.

222 Interviews INT.2; INT.3.
223 Interviews INT.4; INT.5.
224 Interviews INT.4; INT.5.
225 Both work streams ran from 2012-2016.
In formal terms, the members of the OECD are national governments. Participation in the OECD Council (which sets the priorities for the OECD’s work) and in the committees is always done in a national capacity. The OECD also works with a restricted number of civil society interlocutors, mainly with industry and unions organised through the BIAC and TUAC committees (Woodward, 2008; Carroll and Kellow, 2011: 167-191). Formal OECD instruments, such as a decision or a recommendation, are voted on in the OECD Council. Informal OECD products on the other hand, such as manuals and guides, do not require approval by the OECD Council, and can be approved by the members of the respective committee. The discussion in such instances may be expected to be more expert-based, and the outputs easier to adopt.

Participation in the work in the Competition Committee includes delegations from the EU, but also from other OECD members like Canada, Korea, Japan and Australia and most notably the United States. The United States historically have the oldest system of competition (antitrust) rules, and traditionally play a strong role in the OECD both ideationally and financially - initially as donor of the European Recovery Programme and currently as the largest OECD contributor. In that respect, it has been argued that the OECD frequently operated as a vehicle for ‘Americanization’ of policies globally (Mahon and McBride, 2009). Therefore, both specifically with regards to competition policy and in the general OECD context, the United States are expected to be a prominent presence. In case of diverging (competition) policy preferences the EU therefore potentially faces an opponent of significant size and statue.

However, the work of the Competition Committee is not limited to OECD members, since the working parties can include non-member participants as well. The working parties of the Competition Committee have 52 members, including 1 associate country participant, 16 non-member participant countries and 4 international organisations participating as observers.226 Therefore, the number of participants that are not OECD member includes a rather large number of countries from different parts of the world, including Brazil and India but for example also Egypt, Peru, and Indonesia. The work of the committee can therefore not only be expected to have influence beyond the OECD’s membership, but may also be based on input that is broader than membership alone.

Beyond the membership to the working parties, the OECD’s global strategy is to make internal working products available to a wide audience beyond membership. In the area of competition policy, the OECD has a number of initiatives that are specifically aimed at ex-

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226 Bulgaria, Croatia, Lithuania and Malta are no OECD members, but participants the competition committee. Romania is an associate. Retrieved on 29 December 2017. See for an up-to-date composition of the committee: http://webnet.oecd.org/OECDGROUPS/Bodies/Listbynameview.aspx?book=true
tending the reach of the work of the Competition Committee to non-members. The Global Competition Forum takes place in Paris on an annual basis and is open to all competition authorities worldwide. This forum therefore explicitly allows for a dialogue on competition issues between OECD members and non-OECD members. A main driver behind the launch of the global competition forum was the launch of the ICN in 2001. The latter being an inclusive, non-binding US alternative to competition rules in the WTO context, it also indirectly posed a threat to the more inclusive aspirations of the OECD’s Competition Committee, and especially the secretariat seemed concerned that the ICN’s establishment might pre-empt the OECD as a competition platform.227

In addition to the global competition forum, the OECD also has a number of regional activities in competition policy that reach beyond the OECD’s membership. In 2003 a Latin American and Caribbean Competition Forum was established, which is annually organized in a country in Latin America. While in this context we might expect the United States to have more of a strategic interest, the EU has relevant experiences catering to domestic demand in the competition area that may be transferred through the OECD. In the Latin American context EU members Spain and Portugal have direct advantages because of the linguistic connection. These countries also participate to the Forum. The OECD also has two regional centres for competition policy in Hungary and Korea. These centres are cooperation projects between the OECD and the Hungarian and Korean competition authorities respectively, and are meant to function as a regional point for capacity building and policy advice in the wider region. Both centres annually organize training sessions and workshops on competition topics for local authorities and judges.

Therefore, in addition to OECD member states, also many non-OECD members currently participate in the working parties of the Competition Committee. The OECD also tries to make the outputs of the Competition Committee widely available for a global audience beyond membership. The next section will discuss in more detail the EU’s engagement with the OECD’s competition work.

6.2 The role of the EU in the Competition Committee

In view of the existing literature, two main sets of questions emerge regarding EU participation in the OECD’s work on competition policy. A first set of questions relates to what extent structural market power plays a role in the OECD’s Competition Committee, or to what extent it may instead be regarded as an expert-driven forum focusing on technical enforcement matters (discussed in section 6.2.1). A second set of questions relates to the governance of the OECD and the position of the EU, a non-country participant, in an organization formally steered by national governments (discussed in section 6.2.2).

227 See chapters 1 and 7 on competition policy at the WTO and the establishment of the ICN.
6.2.1 Market power or expert interests?

In this section, I will consider to what extent the OECD’s Competition Committee is driven by structural market power or rather by expert interests relating to regulatory experience. Following from the literature, one way through which the EU may influence global regulation is through the power of its internal market (Drezner, 2007; Bach and Newman, 2012; Damro, 2012). While this market power is argued to trigger an automatic adjustment of rules in domestic contexts to the regulatory framework of the entity with the largest ‘buyer power’, to what extent such market power plays a role in the functioning of global networks or policy forums remains unclear.

Rather than being driven by market power, multilateral expert networks could be expected to mitigate such power though the expertise-driven nature of their work (Slaughter, 2004). The heavily institutionalized and government-driven nature of the OECD in this sense creates ambiguous expectations, as it is dissimilar to less formalized and bottom-up enforcement networks like the ICN, discussed in chapter 7. Botta (2014), based on the work of Damtoft and Flanagan (2009) for example notes that participants to the OECD are generally not competition specialists and that ‘consequently, considerations of national interest might filter into the work (...) making achieving a consensus on technical competition standards more difficult.’

However, a first important observation in this context is that Competition Committee meetings and working parties on competition are mainly attended by competition authority staff. Depending on the country in question, also staff of national ministries involved in competition issues attend. That is a change from before the 1990s when, in the absence of national competition authorities, the Competition Committee was often exclusively attended by representatives from ministries. While for the bureau and the committee meetings, it is mostly the head of the competition authority that is attending, in the working parties there usually is senior staff from competition authorities, for example from the international unit of the authority, sometimes also accompanied by staff members of the relevant ministry. Much depends in practice on how much budget the authority has made available for OECD participation; it is rare to find either junior or highly specialized enforcement staff at the committee meetings. But in any event, participants are mainly competition authorities (i.e. enforcers), rather than policy-makers.

The substantive support of the Competition Committee and the working parties is in the hands of the OECD secretariat. The secretariat plays an important role, since it frames issues and prepares the background papers for discussion, edits and distributes the roundtable...
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... outcomes and the (formal and informal) instruments and other outputs. The designated secretariat has in-dept knowhow about competition matters, and therefore plays a key role as the ‘content moderator’ of the committee’s work. The secretariat also closely works with consultants engaging in country peer reviews and commission academic work if it does not have the necessary in-house knowledge or capacity.

The OECD works on the basis of consensus. While the OECD has produced a number of formal outputs in the area of competition policy, such as a recommendation on international cooperation, an increasing number of working products in the committee are of a more informal nature (e.g. manuals, guides), and therefore only require approval at the committee level. A practical advantage of these more informal outputs from the perspective of the committee members is that they can be realized far more quickly than formal recommendations, the adoption of which in the OECD Council can be slow and cumbersome. A further disadvantage of formal products is that these to be of a general nature, thereby potentially reducing their usefulness for the committee participants, i.e. competition authorities.230 This seems to indicate that expert demand determines the works of the Competition Committee to an important extent.

While an expert-driven dynamic may facilitate proceedings in the Competition Committee, since authorities share the same vocabulary and may face similar enforcement problems, a risk of such an expertise-driven emphasis is that there is less interest for more ‘horizontal’ topics, like competition and the environment or competition and healthcare.231 A further example is state aid, which seems to be excluded from discussion in the OECD Competition Committee because most of the participating competition authorities have no experience with the implementation of state aid rules.232 Elsewhere, it was proposed that the added value of the OECD lies in the possibilities for cross-sectional work (Woodward, 2009), because the OECD works on a large number of topics in the area of regulation and trade. Hence, the OECD is in theory a suitable forum to explore and address for example links between trade and competition policy or links between industrial policy and competition policy, which can both be expected to be of particular relevance for the European Commission. But in practice the Competition Committee is currently not exploring these links, which is likely to limit DG Competition’s engagement with this forum.

The Competition Committee is thus attended by competition experts; but this does not mean that the endorsements made by the Committee have an impact that is limited to experts. On the contrary, the Committee’s endorsements may very well extend to national governments. For example, the OECD can push more specialist issues on the agenda of

231 Interviews INT.3; INT.4.
232 Interview INT.4.
national governments through the OECD Council, so it may put technical issues on the political radar. But more importantly, it can also more directly provide reinforcement and legitimacy for national competition authorities in the domestic context.\textsuperscript{233} The OECD plays this kind of legitimizing role in several areas, such as structural policy (structural reforms to achieve economic growth, e.g. with the aim of increasing labour productivity) and environmental policy (Woodward, 2009: 83, 92). The OECD can thus increase legitimacy by reinforcing the ‘power’ of this expertise to the political level. Therefore, both in terms of idea formulation and in terms of legitimizing these ideas, the OECD works in an expertise-driven but at the same time top-down manner.

An example of this are OECD country reviews in competition policy. The OECD’s peer review mechanism is one of the most characteristic processes of the organization. It is a procedure in which economic policies of OECD member countries are reviewed by other members on a more or less regular basis.\textsuperscript{234} For competition policy, such reviews can be carried out either in the context of an OECD accession procedure, in the context of a specific work programme, or at the explicit request of country (not necessarily an OECD member). While for accession reviews the report has more of an aspirational dimension and looks at compliance with OECD norms, voluntary reports consider the country in the light of general governance standards.\textsuperscript{235} Reports in the context of a work programme, such as the programme on regulatory reform launched in the late 1990s, are of a comparative nature. They allow for the mapping of OECD member state policies on a certain issue and a comparison between practices in the different member states.

While the OECD’s competition reviews are expert-based, in the sense that they formally involve a peer review, they are at the same time very political, in the sense that they often result in domestic change or are intended to do so, in particular when carried out on a voluntary basis. The research is often carried out by an OECD consultant under supervision of the secretariat.\textsuperscript{236} During a Competition Committee session, an examination committee of selected OECD member delegates asks questions on the proposed report. These questions (and the answers to these questions) are generally prepared in advance, while the meetings themselves follow a strict scenario with little time for spontaneous discussion. While the peers can ask questions, and the committee has to approve of the report, much of the content-related work lies with the secretariat or external consultant. This does not imply that peer pressure is absent from the reviews, but rather suggests that peer involvement is used to enhance the legitimacy of the expert-driven work carried out by the consultant.

\textsuperscript{233} Interview INT.4.
\textsuperscript{234} OECD (2002a).
\textsuperscript{235} Interview INT.3.
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Since the work OECD’s Competition Committee is mainly driven by experts from competition authorities, direct material interests do not seem to play an important role in this context. Also, due to the expert-driven nature of the Committee cross-disciplinary topics are generally not addressed. This likely limits the interest of DG Competition for this forum, as such horizontal work includes for example links between competition policy and industrial policy. However, the EU has many relevant implementation experiences to share in the OECD Competition Committee, and potentially also an interest to download practices that the OECD has developed in the area of competition policy to the extent these may improve EU implementation. The next section addresses the extent to which these experiences and demands translate into EU engagement with the work of the Competition Committee.

6.2.2 Governance and EU influence

A further important driver of EU influence in a global setting is said to be the institutional structure of the EU and the EUs experience in the policy area at hand. As Chapter 3 explained, the EU has a wide range of experiences both in terms of instruments and in terms of both national and supranational implementation experiences that it can bring to a global context, and an increasingly networked institutional setup which in theory may have a positive impact on the EU’s global influence as well. In the global setting on the other hand, the institutional setup of the forum and the demand for EU experience can be considered as important factors that determine how the EU’s influence is received. It is unclear to what extent the institutional setup of the OECD’s Competition Committee allows for the EU’s influence to materialize in practice, and to what extent demand for the EU’s experience plays a role in the influence the EU might have.

The EU has a special status in the OECD, since it is not a full member. However, it does not seem that the lack of full membership impedes the European Commission from participation in the Competition Committee. The EU is an ‘observer plus’ to the OECD which implies that the European Commission can attend all OECD meetings and proceedings (except the ones on budgetary matters). In practice also some other EU institutions, most notably the European External Action Service and the European Central Bank, are involved in the OECD’s work (Verschaeve and Takacs, 2013; European Parliament, 2015: 35-36). In the Competition Committee, DG Competition participates on behalf of the European Commission. Representation by DG Competition is relatively unproblematic at the EU level, since it is the European Commission (and not other EU institutions, most notably the Council and the Parliament) that is both in charge of competition policy and has institutional access to the OECD’s work. As a non-member, the European Commission is not allowed to vote. This should however not be much of an impediment to participation, in view of its consensus-based approach and the ideational influence of the OECD beyond (in)formal instruments.
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The European Commission actively encouraged OECD membership of EU member states, most notably when many countries in Central and Eastern Europe initiated EU accession procedures. Most of these eventually became OECD members. There is sometimes even a direct link between EU and OECD accession: the OECD’s ‘Partners in Transition’ project facilitated not only the transition for the Central and Eastern European Countries to market economies and accession to the OECD, but also accession to the EU. In the EU neighbourhood, the EU and the OECD cooperate in the support programme SIGMA (Support for Improvement in Governance and Management) for EU enlargement countries, ENP east and ENP south countries, though not specifically on competition matters.237

Currently, of the 35 OECD member states, 22 are also EU members.238 While the EU is represented by both the European Commission and a large number of member states, these are not necessarily in agreement. In the context of trade and agriculture policy at the OECD, EU member state governments regularly demonstrate preferences that are different from those of the European Commission. Also in several other issue areas that are less internally harmonized at EU level, such as migration and economic policy, internal EU tensions can play out at the OECD level. While the EU attempts to promote a coordinated OECD participation of its member states through weekly meetings organized by the EU delegation to the OECD, these efforts are not very structured and occasionally overridden by national interests of the EU member state governments (Verschaeve and Takacs, 2013).

While it may be assumed that internal fragmentation weakens the position of the EU in global forums, at the same time more positive expectations arise in the same issue areas when we compare the EU governance structure to the structure of the network. For example, the EU Open Method of Coordination (OMC) shows at least superficial similarities to the OECD peer review process (Schäfer, 2006). While the common goal setting in the OMC differs from the composition of an OECD peer review report, the deliberation of peers and the obligation to explain policy choices is rather similar. In those cases, the OECD’s working methods may reflect or even reinforce the EU’s internal processes.

In the OECD’s Competition Committee, all EU member states except Cyprus are currently involved in the working parties, and more than half of the country participants are in fact competition authorities from EU member states (27 out of 52). The European Commission encouraged the few non-OECD EU member states to participate in the OECD’s competition work as well.239 In purely numerical terms, the EU therefore dominates the Competition Committee.

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238 This number includes the UK.
239 Interview INT.4.
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In addition, DG Competition and the EU NCAs operate in a relatively coordinated manner. There is seldom an explicit disagreement between DG Competition and the participating EU NCAs in the competition committee, and EU member state delegations will generally not challenge the Commission in this area.²⁴⁰ That is also an issue of competence, since DG Competition is formally competent to represent the Union in external competition matters (exclusive competence).²⁴¹ The role of the EU in the Competition Committee therefore seems to follow a different logic than several other OECD committees, where the relationship between the EU and the member states is often more polarized. The EU’s participation in the Competition Committee could be regarded as a continuation of sorts of the EU’s internal governance model in competition policy: the relation between DG Competition and the EU NCAs largely follows the same logic, which includes a range of variation within hierarchical margins.

Despite this strong presence of the EU in numerical terms, Falkner, Müller and Kudrna (2014) propose that the preferences of other participants in a network, mainly the United States, can be a hurdle for successful EU policy export. Open conflicts between the policy preference of the EU other participants are not likely to surface directly, as the OECD, and specifically the Competition Committee, operates in a consensus-based manner. It is therefore more likely that either the agenda setting or the policy outcomes of the respective committee are framed in such a way as to prioritize certain issue areas or policy choices, and thus different policy preferences, over others. In a competition context, from the United States we would expect a strong focus on mergers and economic modelling and a preference for non-binding outcomes (see chapter 1).

The numerical advantage of EU participation in the Competition Committee translates in influence thanks to the demand-driven dynamics of the Committee’s work. That is because it means that the main users of the Committee’s work are effectively EU members. While the potential for cross-sectional work often does not materialize due to the expert-based nature of the committee’s work, the EU still has an important voice both in steering the agenda and in the contribution of EU and member state experiences. In other words, while the expert framing of the committee prevents the EU to a certain extent from influencing the committee’s work in the direction of their own agenda, at the same time it also limits US influence because EU participants may direct the discussion towards their own needs.

Contributing to the EU’s influence in a practical sense is also the location of the OECD. The closeness of the European Commission and the EU member states to the OECD headquarters in Paris allows EU participants to frequently bring in specialists for different roundta-

²⁴⁰ Interview INT.2; INT.4.
²⁴¹ See Article 3 TFEU. Competence in external matters is derived from this explicit internal competence.
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bles, something that is often not possible for competition authorities that are further away. DG Competition is generally represented by the Director-General in the bureau, by an official from the international unit, a head of policy unit, and sometimes more specialized staff for substantive discussions.242 Also other EU member states, mainly France, Belgium, and the Netherlands have a clear benefit from their geographical proximity to Paris, which allows for engagement of specialized staff in the meetings. This is in itself not so relevant for participation in the roundtables, which as we have seen follow a rather scripted scenario with positions that have been prepared in advance, but rather for the deliberation that takes place outside the meetings.

The OECD also provides an opportunity for downloading new policy ideas and concepts in the competition area for DG Competition. Mahon and McBride (2009) for example suggest that in social and labour policy, it is ‘the [European] Commission that looks to the OECD rather than the reverse.’ In earlier sections, the concept of the OECD as a ‘normative’ or ‘ideational’ actor was introduced (Woodward, 2008; 2009; Marcussen, 2001; 2004). Therefore, we could expect that the OECD’s work on novel topics in the competition area will be useful for DG Competition in their daily enforcement work. At the same time, the OECD is unlikely to provide guidance in areas that only DG Competition engages in and is not a matter of concern for national competition authorities, such as most notably the area of state aid.

The increased participation of newer EU member states in the Competition Committee actually suggests that this committee may be a tool for the EU to foster internal coherence in a way not unlike the internal competition network ECN, for example in the context of EU enlargement. The difference with the ECN is of course that the influence of the OECD also extends to non-EU countries in the immediate neighbourhood. The regional OECD competition centre in Hungary for example caters mainly to the most recent EU members (Bulgaria, Romania, Croatia) but also to accession candidates and countries covered by the ENP east.243 Also, a number of countries aspiring EU membership have commissioned an OECD competition review, as was the case with Turkey (2005). And in Norway, it was the OECD that advocated for the handling of merger appeals by an independent review board (see section 4.2.2).244

The numerous and coordinated presence of EU competition authorities allows for extensive influence in the OECD’s competition work because the committee mainly caters to the demand of the members therefore de facto to the EU membership. The OECD’s Competition Committee provides a platform where both DG Competition and EU NCAs can not only upload, but also download ideas and practices.

242 Interview INT.4.
244 OECD (2016b).
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6.3 The OECD in practice: evaluation of competition enforcement

This section focuses on a specific part of the OECD’s competition work in order to see if the dynamics introduced above function in practice. I have chosen to assess in detail the evaluation of competition enforcement, which was the main work stream in WP2 (competition and regulation) from 2012 until 2016. Such work streams allow for a more in-depth analysis of a certain topic, especially compared to the more ad hoc roundtables; also they represent the focus areas of the Competition Committee and are therefore arguably the most relevant for an analysis. As for the specific choice of evaluation of competition enforcement, this allows for a comparison with the ICN’s work in this area, which will be discussed in the next chapter.

Increasingly, competition authorities engage in an *ex post* evaluation of their enforcement activities. This is done for example in the annual report of the authority. While presenting the number of enforcement decisions is a relatively simple exercise, competition authorities increasingly look for more sophisticated tools to evaluate their performance. Probably the most important factor contributing to this increasing demand in performance evaluation has been the rise of competition enforcement in the national context. Performance review can be an important tool for competition authorities to legitimize their operations. Evaluation is thus a relatively new topic, where many competition authorities were unsure of the appropriate methodology.\(^ {245} \) In addition, it was not so controversial as to prevent effective consensus-based outcomes.\(^ {246} \) Therefore, the ’bandwidth’ of the topic made it a suitable project for the OECD’s working party on competition and regulation.

Evaluation of competition enforcement also fits well in the context of broader OECD work programmes in the area of regulation. Providing tools for the evaluation of decisional practices is a form of providing members with tools to ensure effective market regulation, which is highly relevant in the OECD’s agenda on regulatory reform. This agenda was launched in the 1990s to provide OECD members assistance in national reforms to ensure effective regulatory oversight. The topic is also characteristic for the OECD’s work in that it is a technical issue. This requires sophisticated outputs where the know-how of the OECD’s secretariat - traditionally in economics – is an advantage.

In terms of approach, the OECD’s competition secretariat first launched a survey to which almost all participants to the working party replied, including the non-OECD participants.\(^ {247} \) The survey identified three types of enforcement evaluation: evaluation for ac-

\(^ {245} \) OECD (2013c) under 32 and 45.
\(^ {246} \) Interview INT.5.
\(^ {247} \) OECD (2013c).
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countability, evaluation of the broader impact of competition policy, and ex-post evaluation of specific interventions. For these three types of evaluation, OECD working products were prepared. A guide on the expected impact of competition decisions\textsuperscript{248} provides parameters for competition authorities to use when they want to assess the likely impact of their decisional practice, including estimates to calculate expected consumer benefits. A factsheet on the broader impact of competition policy\textsuperscript{249} presents a review of economic literature to explain the positive effect of competition on economic growth. Finally, a guide on ex-post evaluation\textsuperscript{250} provides guidance and offers different possibilities and examples with regards to more in-depth ex-post assessment of specific interventions.

The demands raised by participants to the Competition Committee, i.e. mainly competition authorities in this context seem primarily motivated by a desire to use evaluations for advocacy purposes in the domestic context. In one of the workshops, an example related to mergers of US hospital is discussed. While not identified as an explicit example of advocacy, the related paper explains that \textit{ex post} quantification has allowed the Federal Trade Commission to roll out a ‘very active prospective merger enforcement programme’ in the hospital sector.\textsuperscript{251} Also in the related guide on ex-post evaluation, emphasis is placed on the increasing accountability of competition authorities.\textsuperscript{252} In that sense, the output of the work stream seems motivated by demand for products that competition authorities can use to reinforce their position at the national level and to overcome potential domestic opposition. Therefore, it can be expected that many newer competition authorities will be interested in using these instruments as well in order to take advantage of the OECD’s recommendations to strengthen their domestic position. Unlike the system of peer reviews, outputs in this area is thus are more aimed at \textit{indirectly} enhancing legitimacy of competition authorities.

The OECD’s work on evaluation of competition enforcement first of all illustrates the role of the secretariat in guiding the work of the competition committee. Rather than a bottom-up exercise, the survey that was conducted by the secretariat at the beginning of the work stream was effectively a directed effort to gather members’ experiences in three areas that had been delineated in advance (evaluation for accountability, evaluation of the broader impact of competition policy and ex-post evaluation of specific interventions).

When looking at the guide on the expected impact of competition decisions, the five select-

\begin{itemize}
\item \textsuperscript{248} ‘Guide for helping competition authorities assess the expected impact of their activities’ (OECD, 2014a).
\item \textsuperscript{249} ‘Factsheet on how competition policy affects macro-economic outcomes’ (OECD, 2014b).
\item \textsuperscript{250} ‘Reference guide on ex-post evaluation of competition agencies’ enforcement decisions’ (OECD, 2016a).
\item \textsuperscript{251} OECD (2015): 1-6.
\item \textsuperscript{252} OECD (2016a): 11-12.
\end{itemize}
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ed competition authorities that were taken as the starting point for the model actually not appear directly from the survey. Rather, these countries seem to have been identified on the basis of an OECD-commissioned academic report.\textsuperscript{253} Therefore, a selection has taken place by the secretariat following input not only from the committee participants, but also on the basis of OECD-commissioned work. A similar dynamic can be identified for the factsheet on the economic impact of competition policy, where a selection of the evidence to support the positive effects of competition policy took place by the secretariat on the basis of academic work. The guide on ex-post evaluation relied on academic work as well, although additional member input was provided through workshops in April 2015 and April 2016.\textsuperscript{254} This suggests that while the secretariat uses input from the committee members, it can operate rather independently when it concerns the development of more technical outputs such as these.

While the secretariat has an important role in framing the issue at hand, it can of course only manoeuvre in the space that it is allowed by the members. In the example of this particular work stream, this was reflected in the form of the outputs, which consist of two guides and a factsheet rather than more binding or formalized instruments. Indeed, several working party members seem to have resisted such binding solutions; that was either because these members did not want to change their existing systems, or did not want to be obliged to start performing evaluations.\textsuperscript{255} The non-binding nature of the outputs eventually made them acceptable for the more reluctant participants in the committee. This opposition shows that the difference between binding and non-binding outputs matters to the participants, which in turn confirms that the OECD does have considerable influence in the area of competition policy. It also underlines that consensus is indeed an important dynamic for the functioning of the OECD’s competition work.

In order to assess specifically the input of DG Competition and EU member states on this workstream in more detail, I will focus a bit more on the guide on expected impact of competition enforcement. The guide offers suggestions based on OECD member practices, and in that sense illustrates the influence of participants on the output of the working party. The guide provides standard assumptions based on an average from a number of competition authorities already involved in this kind of impact assessment: the United States, the EU, the UK and the Netherlands. The fact that two EU NCAs plus DG Competition were among the selected examples clearly influenced the outcome of the assumptions, in that sense that the recommendations are quite similar to the current practice by DG Competition. An exception is impact assessment for abuse of dominance, where DG Competition has been reluctant to perform impact assessments. In this case, the guide takes an average

\textsuperscript{253} OECD (2013b).
\textsuperscript{254} OECD (2015).
\textsuperscript{255} Interview INT.5.
between the UK and US practice.  

A further question is to what extent DG Competition and EU NCAs are ‘downloading’ practices from this guide. The case of evaluation of enforcement is particularly interesting in this respect especially because this issue has not been harmonized within the EU itself: EU NCAs are free to decide how they decide to assess their performance. What is more, the position of DG Competition is rather ambivalent on this topic. Although since several years DG Competition performs expected impact calculations in merger and cartel cases, there is much internal debate on the relevance and necessity of such exercises, especially in abuse of dominance cases – for which DG Competition actually does not perform these assessments.

While in most EU countries, *ex ante* calculations related to the impact of enforcement decisions are not performed in a structural manner, many EU NCAs seem interested in guidance on this issue. Hungary, Italy, Portugal and Lithuania indicated that they started doing impact assessments along the lines of the OECD manual. The Netherlands, which already was estimating the effects of their enforcement before the guide was out, now follows the new OECD indicators. This confirms the earlier intuition that the OECD’s competition committee is at least partially a forum to spread best practices within the EU: in this case, while the issue was interesting for EU NCAs, it was not addressed in the ECN. The outputs on evaluation of enforcement are actively exported to non-OECD countries as well. Impact assessment is on the agenda of the Latin American Competition forum, and the guide on expected impact of competition enforcement has been translated in Spanish.

The workstream on the evaluation of competition assessment shows the Competition Committee as a forum for the development of new models of technical measurement - which can however be used for legitimizing purposes in a domestic context. The example confirms that the OECD’s Competition Committee is dominated by its EU membership, working mainly with and for EU NCAs and to a lesser extent using the experiences of DG Competition. The example shows that EU NCAs and their enforcement experiences can influence the OECD’s output, rather than undermining the EU’s internal coherence, but also that DG Competition was in this specific instance not explicitly interested in influencing the outcome.

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256 The guide takes as default assumption in dominance cases 5 percent of the affected turnover over 3 years, while the UK NCA takes 10 percent over 6 years and US Department of Justice takes 1 percent over 1 year; OECD (2014a).

257 Interview INT.5.

258 Interviews INT.2; INT.5.

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6.4 Conclusions

In order to see what the influence EU competition policy has on the competition work of the OECD, this chapter first shortly introduced the history and membership of the OECD and the different aspects of the competition work of the organization. The second section further discussed how the OECD's Competition Committee works in practice, characterizing it as an expert-based and demand-driven forum mainly attended by competition authorities. Around half of its members are also EU members, which puts the EU in a favourable position to influence the forum. Finally, the chapter analysed the specific workstream on evaluation of competition enforcement in order to further illustrate the dynamics of the Committee's work.

Based on the literature, the main expectation was that the EU would use the OECD to upload its competition policy to a global context. However, a first question was to what extent the EU would have an interest in doing so, as it was unclear to what extent the OECD would have global influence on its participants in the competition realm. A second question is whether the EU would be successful in externalizing their policy to the OECD Competition Committee in the absence of a fully-fledged membership to the OECD and the strong position of the US in the organization. In practice, the participation to Competition Committee and its working parties is much more expert-driven, but also more inclusive than we might have expected in advance. Also non-OECD members can actively participate in the Committee's competition work. The work of the Competition Committee is authoritative and often increases the domestic legitimacy of national competition authorities. Therefore, in theory the OECD is a suitable forum for both the EU and the US to spread their models of competition policy globally.

However, DG Competition nor the EU NCAs seem explicitly interested in using the OECD to bring EU practices to the global level. Rather, their incentive for engagement seems mainly driven by the extent to which the output of the Competition Committee is relevant for them. Since actually half of the participants to the working parties are from the EU itself rather than from non-EU countries, the OECD also plays a role in the EU's internal context – for example by providing guidance in areas where the ECN is not active, such as in the *ex ante* evaluation of competition enforcement. The chapter shows an active interest in downloading the OECDs output by EU NCAs. An important factor in this is the experienced OECD secretariat, which has the available capacity to produce sophisticated outputs based on participants’ input and academic work.

Importantly in the context of this thesis, the application of EU competition rules by EU NCAs in the OECD context seems to have contributed to the EU's influence rather than fragmented it. Since a large number of members from both the OECD and the Competition Committee are also EU member states, EU competition authorities are the largest group
of requesting parties. That all EU competition authorities work with the same regulatory framework has therefore allowed the EU to channel its demand in this global forum. While traditionally the United States play an important role in the functioning of the OECD, in competition policy we see that it is rather EU authorities that have de facto been able to influence the direction of the work.

The next chapter will discuss EU participation in a second global competition forum, the ICN. This network was established on the initiative of the United States and has a highly inclusive global membership. As a direct network for competition enforcers, the ICN received much attention in the academic literature on the proliferation of global expert networks (e.g. Slaughter, 2004b). However, as I will show in the next chapter, the diversity of its membership and the flexible working methods also risk undermining the relevance of the ICN’s activities, making it in practice a less pertinent point of reference for EU competition authorities.
7. THE INTERNATIONAL COMPETITION NETWORK

Limitations of inclusiveness

This chapter discusses the EU engagement with the International Competition Network (ICN). The ICN was set up on initiative of the United States in 2001, and is currently one of the most inclusive networks where competition policy is discussed. In looking at the realities of engagement of DG Competition and EU NCAs with the work of the ICN, this chapter does not only consider the influence of the EU on this network, but also poses several critical reflections on the limits of what the network may achieve.

Several authors have formulated specific expectations both about how the ICN functions (e.g. Slaughter, 2004b; Yoshizawa, 2012; Svetiev, 2012) and about the role of the EU in this network (Botta, 2014; Svetiev, 2015; Damro and Guay, 2016). Based on this literature, we expect the ICN not only to be a successful network for experience sharing between competition authority staff, but also to be the preferred global policy forum of engagement for DG Competition. In the context of this thesis, the main expectation is that the EU will likely use the ICN as a forum to download or import best practices, rather than exporting or uploading to this network. That is due to the expected informal and practical nature of the network’s outputs, combined with its inclusive membership which in theory allows for mutual learning.

In terms of underlying drivers for uploading (export) of EU policy, chapter 2 identified the EU’s institutional setup, the EU’s experience, and the EU’s structural market power as potential key drivers for global EU influence. As I also consider the context in which the network operates, the institutional setup of the network, the experience of the other participants in the network and structural market power vis-à-vis the EU are expected to be relevant. Structural market power is however expected to play a less important role in the ICN than in the OECD, as this is a direct, bottom-up network between competition experts where economic power is likely to be mitigated. For the same reasons, experiences of the participants are expected to be a main driver of the ICN’s work.

The chapter proposes that the ‘competition only’, inclusive and virtual nature of the ICN can make it in practice difficult to engage in meaningful cooperation. This especially impacts the participation of EU competition authorities to the network. While these author-
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...ities are relatively well represented and well-staffed compared to many of the other ICN participants, they also participate in other multilateral forums, most notably the ECN and the OECD. The latter two cater more specifically to their needs, as they address the needs of sophisticated competition enforcers. The ICN is therefore a less interesting forum for EU authorities, in particular for DG Competition. As is the case with the OECD, participation of (EU) competition authorities in this setting is seems therefore mainly related to what they can take home from these networks in terms of expertise, rather than to a direct motivation of exporting regulation.

7.1 Establishment of the ICN and promising beginnings

The ICN is a network for competition authorities worldwide. The network has been frequently highlighted as a case study in the literature on global governance networks, which emphasizes policymaking in transnational networks with voluntary dynamics, as opposed to than power politics between nation states.

7.1.1 History and membership

While the EU actively supported the adoption of a set of binding global competition rules in the context of the WTO in 1996-2004, the position of the Unites States was more ambivalent. Their initial submissions to the WTO competition working group for example were careful to emphasize that the 'proposed work programme is intended to foster (...) a common understanding of the relationship of competition matters to the WTO framework and to be neutral regarding any conclusions that may be reached' (emphasis added).260 As Gerber (2010: 105-106) explains, the concern with sovereignty was one of the main reasons for this skepticism towards binding WTO competition regulation.

While discussion on competition regulation in the WTO working group was still ongoing, the American International Competition Policy Advisory Committee issued a report on the implications of globalization on antitrust enforcement (ICPAC, 2000). As was also highlighted in this report, the main concern for the United States in a global context were merger reviews. Due to the global proliferation of national competition laws, mergers of companies doing business beyond national borders would now increasingly have to notified in different countries. This could not only result in diverging outcomes, such as the strict scrutiny of DG Competition of the Boeing McDonnell Douglas merger had shown (which concerned two American companies in the 1990s), but according to the report more

260 WT/WGTCP/W/6 (19 June 1997). Some forty years earlier, the US failed to ratify the Havana charter, which was equally meant to contain binding competition rules combined with global trade rules.
importantly increase the legal costs and uncertainty for companies operating globally.

Rather than binding global rules in the WTO context, which the majority of the ICPAC found an inappropriate way forward, the report proposed an alternative that ‘would foster dialogue directed towards greater convergence of competition law and analysis, common understandings, and common culture. Such a gathering could also serve as an information center, offer technical expertise to transition economies, and perhaps offer mediation and other dispute resolution capabilities.’

This ICPAC recommendation resulted in the launch of the ICN in October 2001 during the Fordham conference, which a key annual event for competition policy practitioners. Just a month after, in November 2001, negotiations in the WTO Doha round were formally opened with competition policy featuring on the agenda. The ICN, therefore explicitly established as a global alternative for competition policy in the WTO context, was pragmatic both with respect to the ‘light-weight’ administrative structure (without secretariat) and the suggested direct cooperation between competition authorities. Since the output of the network was to be non-binding, generated norms would not compromise national sovereignty.

While European legal scholars such as Amato (2001) and Budzinski (2004) have continued to express a principled preference for binding global rules in competition law, the initiative was received more positively on the American side (Damtoft and Flanagan, 2009). The ICN’s initial aims were threefold: sharing of best practices and experience, promoting competition advocacy and the facilitation of international cooperation. Unsurprisingly considering the aims of its establishment, mergers were among the key initial topics of the network. Considering its relatively modest ambitions combined with the fast-expanding membership of the network in practice, it is difficult not to consider the ICN as a success-story. And undoubtedly, the ICN turned out to be a more successful venue for competition cooperation than the WTO; not only was competition policy was removed from the agenda for negotiations in 2004, but the entire Doha round effectively ended with a breakdown of negotiations in 2008.

The ICN was conceptualized as an open and lightweight alternative for cooperation. Importantly, it is network between practitioners, rather than a high-level initiative between government representatives. In addition to competition authority staff also non-governmental participants, such as academics, consultants, law firms and consumer and industry representatives, are able to participate in the network. Participation of these ‘Non-Gov-

261 See also Bailleux and Vauchez (2014).
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ernmental Advisors’ (NGAs) however goes via national competition authorities, who as such are the main drivers of the network. In terms of coverage, ICN membership is now quasi-universal. The network started with 16 authorities from 14 jurisdictions in 2001 and included 138 authorities from 125 jurisdictions in 2018. Membership therefore includes a highly diverse spectrum of authorities from EU, (Latin-) American, Asian and African competition authorities. Illustrating the diversity of the network, India hosted the ICN’s annual conference in 2018; competition authorities from Botswana and Norway actively drive the ICN’s agency effectiveness working group.

Despite this high level of inclusiveness, there is one main jurisdiction missing in the ICN, and that is China. There are several reasons that may account for China’s absence in the ICN. Maher (2013) explains that politically speaking, the participation of Taiwanese competition officials to the ICN is problematic. But importantly, the horizontal and bottom-up approach of the ICN is also likely to be a “mismatch” with the setup of the Chinese administration, both on the agency level (in the absence of specific agencies dealing with enforcement) (Jenny, 2011) and at the level of the individual civil servants. The non-participation of China however does not preclude that some of the ICNs working products find their way to China, for example as part of technical assistance programmes in mergers provided by the United States (Coppola & Lagdameo, 2011: 309; Stern, 2011: 326).

The ICN currently has five working groups: the advocacy working group, which will be discussed in section 7.3; the cartel working group; the unilateral conduct working group; the merger working group; and the agency effectiveness working group. The groups on mergers and advocacy were the first to be established; the other three groups followed later (cartels in 2004; unilateral conduct in 2006; and agency effectiveness – based on the capacity building working group in 2008). Currently the ICN therefore works on all the main three topics of substantive competition policy (mergers, cartels and abuse of dominance), which in the EU are covered by Article 101 and 102 TFEU and Regulation 139/2004 (see section 3.1).

Resuming, the ICN was established as a light-weight, non-binding and direct global cooperation structure between competition authorities. The United States initiated this network

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262 See in particular the ICN guidelines on NGAs, available at: http://www.internationalcompetitionnetwork.org/uploads/non-governmental%20advisors%20to%20the%2ointernational%20competition%2zonetwork.pdf
263 Anecdotal evidence suggests that the EU insisting on this: see Lewis (2013).
264 https://www.internationalcompetitionnetwork.org/members/
265 I am very grateful to Tao Tang from Utrecht University for his insights on this matter.
266 Taiwan also participates in the OECD global forum, but as ‘Chinese Taipei’.
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as an alternative to binding competition rules in the context of the WTO as proposed by the EU. While the latter initiative failed, the ICN has been much more successful. Competition authorities from all countries except for China currently participate in the network. As such, the ICN has also been widely discussed in the academic literature, as the next section will explain.

7.1.2 Expectations from the literature

The ICN notably featured as a case study in academic work on transgovernmental networks in global governance. While Raustalia (2002), Maher (2002) and also Verdier (2009) consider the emergence of transgovernmental (competition) networks as supplementing rather than replacing state-centered cooperation, Slaughter (1997; 2000; 2004a; 2004b) sees more extensive possibilities for transnational regulatory networks. She explains how networks directly between government officials, such as the ICN, work with mechanisms like socialization and peer oversight instead of relying on traditional notions of economic or political power. She is most interested in the peer pressure that these networks generate, which can provide an alternative model of accountability.

Peer pressure is also a key factor in the concept of an epistemic community, i.e. ‘a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area’ (Haas, 1992: 3). However, while in the work of Slaughter, peer pressure is key for generating accountability, peer pressure in an epistemic community is foremost expected to generate convergence. Djelic and Kleiner (2006) in their discussion of transnational governance in competition policy characterize the ICN as a community which creates common beliefs in the superiority of the market and competition, rather than standards or rules. They emphasize therefore important function of the ICN in terms of socialization of competition authorities.

It has also been proposed that the governance in the ICN may be ‘experimentalist’. As discussed in chapter 2, in an experimentalist governance dynamic, common framework goals set jointly at the central level are implemented and systematically adjusted through peer review (Sabel and Zeitlin, 2010). Problem identification and peer review processes could be expected to function better in the ICN than for example in the OECD, since cooperation in the ICN takes place directly between government officials. In addition, the network is also open to stakeholders, such as representatives from private practice, academia and civil society, which may feed in their experiences to the governance cycle.

In practice, it is however very much the question to what extent the structure of the ICN offers sufficient institutionalized possibilities for learning from difference. Svetiev (2015) suggests that a cognitive shift from convergence to informed divergence is taking place in
the network, because the possible topics for soft convergence (the 'low hanging fruit') have been exhausted, and because of the need to be more responsive to the needs of agencies from developing countries. But as he acknowledges, such a shift does not automatically result in an experimentalist architecture, which requires higher levels of institutionalization of learning mechanisms.

Despite high expectations from the global governance literature on the ICN regarding the potential for transnational learning and cooperation, several authors have expressed doubts about the functioning of the ICN in practice. Svetiev (2012) suggests that the EU and the US are dominating the agenda in the network by virtue of their extensive experience in competition enforcement. Learning in the network would be mainly 'one way' and top-down - with the smaller agencies and agencies from developing countries playing only a marginal role in the deliberations. These imbalances do not only undermine claims with regards to the horizontality of participation in the ICN, but may also undermine assumptions about its impact on domestic systems. The findings of Svetiev are generally in line with expectations by authors like Drezner (2007) who attribute a de facto leading role to large powers in setting global standards.

Turning more specifically to the influence of the EU, Botta (2014) suggests that the EU has not been able to exert significant influence in global competition governance, including in the ICN. He argues that despite active participation of DG Competition and EU member states in global competition forums, the EU is placed in a rather defensive position. While the EU prevented that the outputs of the OECD, the ICN and UNCTAD contradict EU competition policy, Botta suggests that the United State dominates the global agenda, demonstrated not only by the global success of the ICN as their forum of choice, but also by consistently being able to retain mergers on the ICN’s agenda.

Damro and Guay (2016) on the other hand predict an important role for DG Competition in the ICN. Working with the underlying assumption that competition authorities will generally be motivated mainly to participate in order to reduce levels of political intervention with their enforcement (see also Damro, 2006a; 2006c), the authors predict that the ICN is most likely DG Competition’s priority forum to exert global influence in competition policy rather than UNCTAD, the OECD or the WTO. In the analysis, they consider four different aspects of the forums under discussion: the level of global coverage of the membership, the bindingness of the output, the target audience, the mandate and EU representation. The ICN has a very wide coverage and target audience but a limited (competition-only) mandate; especially the latter factor seems crucial to the expectation that the network will be DG Competition’s venue of preference. While Damro and Guay do not assess whether this prediction also holds in practice, they greatly contribute to the literature in addressing and categorizing underlying network characteristics and linking these to the possible export motivations of DG Competition.
The inclusive and bottom-up nature of the ICN makes it potentially a suitable forum for the EU to spread their competition policy models to a more global audience, but also to import best practices from other parts of the world. Not only does its broad membership increase the available experience around the table, but the network potentially also has a very direct impact on the work of competition authorities, both because of the attendance of competition authority staff and of the practical and non-binding nature of the outputs. The main expectation on the ICN is that this will be the main point of reference for competition authorities worldwide, and that the EU will likely use this forum to download promising practices on competition policy from elsewhere, including the United States.

7.2 The role of the EU in the ICN

This section shows that the governance characteristics that make the ICN successful in theory, are also the ones that seriously limit the relevance of the ICN. Contrary to the expectations formulated in the literature, while EU competition authorities actively participate in the network, DG Competition and EU NCAs do not prioritize the ICN on their international agenda.

7.2.1 An inclusive, ‘competition only’ and virtual network

Main characteristics of the ICN are its inclusive membership, its exclusive focus on competition policy and its lightweight institutional structure in the absence of a secretariat. While these features are generally expected to be highly conductive to the work of the ICN, as the work is carried out directly by and for competition authority staff, I will show that these features also bring several important limitations.

Inclusiveness

The highly inclusive nature of the ICN’s membership, which includes competition authorities from all over the world and with different levels of experience, raises the question of how diversity is accommodated in the network. Yoshizawa (2012) proposes that the accommodation of diversity has materialized through the membership and ‘competition only’ focus of the network. While composed of members from anywhere in the world, these members all have in common that they are enforcers of competition rules and therefore generally share the same concerns. It is however clear that the ICN nevertheless struggles in practice to deliver to all the actors involved. This has shown most explicitly in concerns of participants and academics that ICN does not cater enough to the needs of the ‘younger’ competition agencies, and that the EU and the United States are dominating the network in practice (ICN Steering Group, 2011; Svetiev, 2012).

As the main expectation on the EU’s engagement with the ICN is that the EU will also
download practices from this network, I would like to point out that the opposite consideration is highly relevant to consider as well. The ICN may in fact not sufficiently cater to the needs of more established agencies: while initially the ICN indeed worked much on relatively sophisticated merger review procedures, relatively easy ‘low-hanging fruit’ that did not touch upon more sensitive issues of competition policy, the question is where the ICN should head next to stay relevant for more established competition authorities. It turns out to be difficult to identify topics that are relevant for both competition authorities that are just starting up and more established authorities. The ICN in this sense risks becoming more of a social network rather than a forum for high-quality implementation discussions.

‘Only competition, all the time’

The ‘competition only’ focus was presented as the main added value of the ICN, not only making this forum unique but also enabling the network to maintain focus within the inclusive membership. The idea was that the ICN would be demand-driven, practical, and as relevant as possible for participating staff of competition authorities. However, an important concern is that this ‘competition only’ focus of the network actually significantly limits the relevance of the agenda. For example, this focus meant in practice that the ICN does not tackle competition issues that authorities face in liberalized sectors. Since competition law has many interfaces with sectoral legislation, such as telecom, energy but also agriculture, one may wonder how useful this ‘competition only’ focus will be in the foreseeable future.268

A technical focus on competition enforcement issues also fails to address more fundamental issues regarding state involvement in markets more generally. Lewis (2013) has been very critical of the ‘competition only’ focus of the network. In his highly personal contribution on the ICN’s inception and functioning from a South-African perspective, he assesses the broadening of the ICN’s substantive agenda from merger issues to also include unilateral conduct (abuse of dominance) and therefore beyond the preferences of the United States as a positive development. However, Lewis also stresses the relevance of the link between competition policy and trade and the link between competition policy and industrial policy, which mainly fall outside of the ICN’s mandate. If such topics are not taken up, he warns, then the ICN will risk to ‘increasingly marginalize’ itself.

A further risk of a ‘competition only’ focus is it may actually not result in problem identification and/or problem solving that is very innovative. Working predominantly with competition authorities on enforcement issues may reinforce dominant views, rather than resulting in more critical discussions. Tarullo (2000) in discussing global cooperation on competition issues writes about this issue: ‘[t]he very sense of identification among anti-

268 Also in view of the merger of several regulatory and competition authorities in the UK, Spain and the Netherlands; see on this topic Ottow (2014).
trust enforcers, which fosters the trust of those who share a mission that others may under-value, [...] imposes limits on the extent of cooperative innovation. Competition authorities are often quite resistant to external suggestions, whether on enforcement policies or on international cooperative issues. Once they reach consensus on an issue, that consensus may be very hard to shake.’ Therefore, rather than being at the ‘cutting edge’ of enforcement, by only focusing on competition enforcement in the narrow sense the ICN risks recycling existing practices and paradigms.

The virtual nature of the network

Finally, the ICN is ‘virtual’ - meaning that it works without a secretariat, and that many proceedings take place through conference calls, teleseminars and e-mail. While the Canadian competition authority supplies a centralized secretarial support service, it is the members themselves who carry out the work in network. Such a lightweight structure in theory allows for a more inclusive participation, since there are no fees and the meetings are easily accessible from anywhere across the world. Outputs and materials are freely available on the ICN’s website for anyone to use.

However, an important risk of this virtual nature in practice is that it may reinforce existing inequalities in the network. In the absence of a supporting secretariat, active participation highly depends on resources of the authorities. And since the participants drive projects and draft outputs themselves, influence in the network is heavily linked to resources. In other words, while less resourced or small authorities will perhaps have proper possibilities to participate, it is not said that the virtual nature also enhances their possibilities to contribute or feed into, for example, the formulation of best practices. Resource imbalances also play out for non-agency participation. Law and consultancy firms will generally have more resources (although not necessarily more experience) to participate than for example (non-Western) NGOs. The open and virtual nature of the ICN, which is potentially one of its most important assets, is at the same time therefore one of its most important shortcomings because it reinforces existing inequalities.

The ‘competition only’ dynamic, inclusiveness and virtual methods therefore pose considerable challenges that undermine the relevance of the ICN’s work for competition authorities of developed and developing countries alike. An open question remains where network should head next, as the mandate of the network and the role of the United States seem to prevent it from tackling anything beyond competition enforcement. Papadopoulos and Maher (2012) propose that the ICN could become more of an overarching network of other competition networks, and would transform to a coordination network rather than a forum to provide best practices and other outputs. Another angle would be to focus more on the organizational needs of the competition authorities, for example to focus on HR policy, staff training and knowledge management. Several years ago, the ICN started an agency
effectiveness working group (AEWG) that works on precisely these topics.

### 7.2.2 EU participation in the network

Following the failure of bringing competition policy to the WTO level, the EU seems to have welcomed the idea of a ‘global competition initiative’ as a second-best solution to binding global competition regulation (Monti, 2001; Papadopoulos, 2010: 252). Especially in the first years of operation, the ICN was mainly driven by American leadership. This included the form (non-binding and therefore not interfering with national sovereignty) and the scope of the network (‘all competition, all the time’), and also the emphasis on the convergence of merger reviews, which directly followed from the ICPAC report. In intellectual terms, the ICN was strongly supported by the American competition community, in particular by leading authorities in the field like Eleanor Fox, a prominent competition law professor, and William Kovacic, who would later become commissioner of the Federal Trade Commission, one of the two US competition enforcement agencies.

This dominance of the United States in the ICN has somewhat declined in recent years, and the emphasis of the network shifted more towards inclusiveness. From recent interviews by Gaus (2015) emerged that the United States are strongly opposed to broadening the range of topics in the ICN from competition to regulatory sectors; working groups on regulated industries and telecom in the past were abandoned quickly. However, countries hosting the network’s annual meeting have recently shaped the agenda by introducing topics that were previously outside the ICN remit. The Turkey annual conference (2010) had a special project on the interface between competition law and public policy, while the Morocco annual conference (2014) included a special project on state-owned enterprises and competition policy. Therefore, it seems that new topics and avenues for the ICN are developing: when authorities are willing to spend the resources, they are able to steer the ICN agenda to a significant extent.

In such a context, the EU could be particularly well placed to influence the network for at least three reasons. First, EU competition authorities are relatively experienced. This is particularly the case for ‘elite’ agencies like the German, UK and French authorities, but also competition authorities in newer member states who quickly developed capacity and expertise under the guidance of DG Competition. The experience of the latter authorities may actually be more relevant in the ICN, since many authorities participating in the network face issues related to starting up a competition authority and the use of competition policy as a tool for economic growth. Second, EU competition authorities are relatively well-resourced, also because successful domestic implementation of competition policy is a requirement for EU accession. Since the ICN is only marginally supported by a secretariat, resources are a precondition for successful participation. Third, while the EU is not as dominant in the ICN as in the OECD in terms of membership, the numerical presence of
EEA NCAs in the ICN is still considerable, representing around a fourth of the network members.

However, is the EU actually influencing the ICN in practice? EU competition authorities are well represented in the network’s steering positions. DG Competition has been part of the steering group since the establishment of the network, and the German competition authority chairs this steering group since 2013. A significant number of working group chairs are EU NCAs. And where it comes to providing input for stocktaking exercises in the working groups, EU NCAs are also quite active: DG Competition and more well-established competition authorities from the EU (most notably from the UK and Germany) will generally provide input. However, it is notable that compared to the OECD Competition Committee, where the EU generally acts as a block, in the ICN the EU NCAs (especially the authorities from the UK, Germany and France) are operating in a less coordinated manner.

While there is no lack of engagement as such, the ICN does seem to be of less relevance for European competition authorities than the other international networks in which they participate. The network generally provides a less compelling discussion forum for EU authorities, either because they are more experienced than the rest or because their demand for implementing guidance is already satisfied by the ECN or by the OECD’s Competition Committee, in which they also participate. EU NCAs consider the ICN a less important international competition forum compared to the OECD and the ECN.\(^{269}\) Also DG Competition itself, while active in a number of ICN working groups, prioritizes mainly the OECD in its international cooperation.\(^{270}\) Similarly to what was suggested in the chapter on the OECD, also in the ICN context it seems that participants are mainly motivated to participate by what they expect to take home from the network in practical terms. Rather than considering the network as a forum to spread best practices, the commitment of the authorities is linked to how the network can provide them with solutions to problems they face in the domestic context.

Various participants in the network have stressed a lack of information about implementation of ICN products and called for more action in this area (Lugard, 2011). A recent study by Danielsen (2013) who worked with surveys targeted at Scandinavian competition authorities, similarly suggests that in Norway, Sweden and Denmark, the ICN has the least percentage of reported influence on domestic practices (50 percent, compared to 56 percent for the OECD and 79 percent for the ECN). In addition, the study finds that the percentage of affected officials in the ICN is significantly lower than in other international networks (31 percent, compared to 38 percent for the OECD and 66 percent for the ECN). While ICN is explicitly meant to be accessible to regular case handlers from a large number of

\(^{269}\) See for example interview NO.3. on Norway and Tavares (2011) on Portugal.  
\(^{270}\) Interview INT.1.
jurisdictions, in practice therefore the influence of the ICN on case handlers in smaller, but well-resourced competition authorities in Northern Europe seems quite limited.

The main area where the ICN had a tangible effect on domestic competition policy in the EU so far has been in the area of merger review. The ICN’s outputs in this area, such as the ICN’s recommended practices on merger notification (2002), reportedly had influence for example on Portugal (Tavares, 2011) and Sweden (Sjöblom and Widegren, 2011), but also on German rules and on EU legislation (Botta, 2014). Because many global mergers in the early 2000s had an EU-US dimension, the ICN could serve as a platform to discuss best practices, in addition to the bilateral EU-US cooperation in mergers that had been set up in the 1990s (see Damro and Guay, 2012).

The merger example dates from the early 2000s; and since then, the ICN also started working on several other issue areas. But it is very much the question if the output of the network has been influential beyond mergers; as I have shown above, it is quite unlikely that the ICN has been able to maintain relevance for both new and more established competition authorities alike. Rather than firmly establishing itself as an influential forum on the global stage, the ICN seems to have become a platform in search of meaning after its main mission (establishing global best practices on multijurisdictional mergers) was exhausted.

In the first years of operation the ICN was therefore mainly dominated by the United States. The network developed a number of widely used products on cooperation in merger review. Recently the focus of the ICN has become more differentiated, although it does not seem to have shifted towards EU priorities or needs. For many EU NCAs, the ICN is not a priority forum; the ECN (internally) and OECD (externally) already satisfy much of their demand for international cooperation. Contrary to the expectations from the literature, the ICN is also not the preferred international venue for DG Competition.

### 7.3 The ICN in practice: competition advocacy

This section looks specifically at the ICN’s work in competition advocacy in order to assess the functioning of the network and the role of EU competition authorities in the network. Advocacy is a suitable focus area because, in addition to mergers, it is one of the main areas of work in the ICN. The ICN’s work on advocacy also allows for a comparison with the OECD’s work on the evaluation of competition enforcement, since evaluation is often used as an advocacy tool as was explained in chapter 6.

The ICN’s conceptualization of advocacy, which was presented at the first annual ICN meeting and is the starting point of the Advocacy Working Group (ICN AWG), remains the most generally used and accepted definition to date. The ICN (2002) has defined advocacy as:
'activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.'

Competition advocacy therefore relates to the creation of a ‘competition culture’ by non-enforcement mechanisms towards other governmental entities and the general public. Such non-enforcement action may consist of the competition authority being involved in domestic regulatory processes, such as advising on new or existing legislation in certain areas that relate to market regulation, but it may also consist of market monitoring or dialogue with the business community (see section 3.3 for a short discussion of competition advocacy in the EU). Advocacy is therefore a broad topic: while it does not limit itself to particular substantive issues of competition policy but is about the regulatory competition framework in its entirety, it also covers the relation between competition policy and other policy areas in the domestic context.

In terms of process, the ICN AWG has held a number of workshops, both at each annual ICN meeting and separately from this meeting (separate meetings and workshops were for example held in 2012-Paris, 2013-Rome, 2014-Mauritius, 2016-Mexico City), and meets in a monthly conference call. The group produced a number of reports, best practices and toolkits, a number of teleseminars and more recently, an online database for competition agencies (the ‘benefits project online resource’).

A first question is how the ICN’s inclusive nature takes shape in the ICN AWG. From the launch of the group in 2002, advocacy was conceptualized as a key tool mainly for competition authorities in ‘developing countries and transition economies’.

According to the 2002 report, advocacy in is especially important in these contexts because: 1) the benefits of competition are less understood; 2) public authorities are less transparent and potentially more resisting competition advocacy; 3) there is much ongoing privatization, where competition advocacy could play a major role; 4) there is more resistance from internal groups against global competition; 5) resource limitations.

Within the ICN, initially it was indeed the case that mostly authorities from ‘developing and transition’ economies were interested in advocacy topics. The ICN’s work in mergers, the other major topic in the ICN’s initial years, on the other hand was interesting for jurisdictions both affected by mergers and with already functioning competition authorities. It


272 ICN (2002) under 2.6: ‘Developing and transition economies versus developed countries’.
is therefore not surprising that the merger working group was mainly led by American and EU competition authorities (from ‘developed economies’), while many of the non-Western authorities (largely ‘developing and transitional economies’) were more interested in the work of the ICN AWG.

More recently, competition authorities in Western countries have become interested in advocacy topics as well. In the wake of the economic crisis, competition authorities have been facing budget cuts and came under increasing public scrutiny. Trust in global markets declined, and there is a growing tendency towards protectionism rather than economic openness. But while the ICN AWG receives input from authorities from all over the world, and while there is a growing shared concern between competition authorities to explain the value of their work, the needs of authorities still diverge.

Many Western countries are interested in explaining the value of what they do by modelling the impact of their enforcement, and thus are more likely to find the OECD working products on the evaluation of competition interventions (as discussed in section 6.3) more relevant for their domestic advocacy purposes. By contrast, the ICN AWG has remained more of a non-Western working group; illustrative in this respect is the Competition culture project (2015), which detects areas for action specifically for authorities in developing and transition economies.

A second question is how the ‘competition only’ nature takes shape in the ICN AWG. Because advocacy concerns the role of competition policy in the economy, and can be particularly relevant in processes of privatization and liberalization, one may expect it to have a rather strong connection with other policy areas, or at least to include some broader reflections on the role of competition policy in an economy. However, as transpires from the ICN’s 2002 definition of advocacy, the ICN AWG has focused mainly on how to promote these benefits, rather than discussing what these benefits might be in the first place.

While in the first years of the group, there was some work focusing on specific issues in liberalized sectors, these topics soon became replaced with a more general agenda that is tuned towards effective marketing of competition authorities rather than discussion about the underlying principles. An example of this is the ‘benefits’ project, made available as an online toolbox (2014) with tips for explaining the benefits of competition policy including possible themes, strategies and a number of case studies. This also has implications for the relevance of the groups’ work for EU NCAs, who will most likely be interested in more specialized advocacy products. The ICN AWG in this sense seems mainly to cater to newly established competition authorities, who work in a context which still has to become familiar with the dynamics of competition enforcement.

A final issue for discussion is how the virtual nature of the ICN shapes the ICN AWG. As ex-
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explained above, while the virtual nature of the ICN in theory allows for broad participation, in practice it is the question to what extent this participation also extends to contribution. In the ICN AWG, many competition authorities participate in the sense that they attend meetings and give input to surveys. Already in 2002, the first ICN AWG report included responses from 53 competition authorities worldwide, which is very inclusive for the situation at that time in terms of competition enforcement.273

However, when considering who drives the work in the group, the picture changes somewhat. For the drafting of outputs the ICN AWG strongly relies on (Western) NGAs, such as academics and consultancies, rather than competition authorities. NGAs are stronger represented in the INC AWG than in other areas of ICN work, since NGAs do not have to be formally proposed by a competition authority to participate this group. The ICN AWG at present even contains much more NGAs than competition authorities (69 authorities and 110 NGA members).274 While the Chairs are all from competition authorities and retain the end-responsibility of the work, this does not preclude a strong influence from (mainly Western) NGAs on the ICN AWG’s outputs.

While this seems likely to result in a unilateral export of products and best practices from Western countries to newer authorities, this is only partially the case because of the form the outputs take. Over time, the working products of the ICN AWG have evolved from more ‘traditional’ surveys, where answers to closed questions were mapped and compared, to more open stocktaking exercises, where examples from a range of different countries are presented in a working document for inspiration and learning purposes (see Annex III). Therefore, the ‘steering’ by Western authorities and NGAs is less unilateral than might have otherwise been the case because the form and goal of the outputs has changed. An example of this is the advocacy toolkit (2011), which includes 12 case studies from around the world of how advocacy works in practice in different jurisdictions.

The EU is not only potentially influential in the ICN AWG because of its strong structural presence, but also because of its substantive experiences in the area of advocacy. Gerber (2010) suggests that ‘throughout its evolution European competition law has had to compete for legitimacy and support with entrenched attitudes favoring an active role of the state in the economy. […] This meant that competition law had to construct and maintain competition as well as develop the attitudes and values that support it.’ The EU, in other

273 Responses came from the Americas (e.g. US, Canada, Argentina, Peru, Jamaica); from Africa (Zambia, Kenya), from Asia (e.g. Japan, Korea, Indonesia but also Australia, New Zealand); and from the EU (DG Competition, EFTA, older member states such as Germany, France, UK but also many aspiring member states in an EU accession procedure, such as the Baltics, Hungary, Romania).

words, would have more experiences with competition advocacy than enforcing authorities in the United States because American approach to market working is traditionally less interventionist, and therefore encounters less resistance in the domestic context.

Turning to the EU’s participation in the ICN AWG, a first thing to note is that many national EU authorities are indeed quite interested in contributing to products that relate to the institutional aspects of competition advocacy. In the framework of competition assessment regimes (2015) for example Bulgaria, France, Greece, Italy, the Netherlands, Spain and Sweden contributed on issues related to institutional dynamics. This makes perfect sense, since these EU NCAs have relevant experience in terms of advocacy towards other governmental entities in a national context. That is especially the case where countries have introduced competition policy relatively recently (such as Bulgaria) or where there is a relatively high level of state intervention in the economy (such as in France). This is also one of the areas where EU is not harmonizing, the authorities are free to pursue their own advocacy strategies in the national territory so it is not a conflict with EU law or policy. The result is a large EU-based input to the ICN AWG, even in the absence of strong steering or strong interest from DG Competition. In both the 2002 advocacy report and the 2015 competition culture report, around half of the survey respondents were EU either from member states or from EU countries that aimed for EU accession and preparing the adoption of the EU’s competition acquis.

Unlike the EU authorities operating in a national context, DG Competition is not so active in the context of “institutional” advocacy, i.e. competition efforts directed at governmental entities. While in the EU’s institutional context, DG Competition does not normally have to defend its position vis-à-vis other Commission DGs, the Council or the European Parliament, advocacy towards the member states mainly takes place within the context of the ECN (see section 3.2).

In the ICN AWG, DG Competition seems rather interested in a different dimension of advocacy: that of market or sectoral studies, which can be characterized a form of pre-enforcement. Sectoral studies are carried out by competition authorities when they suspect that certain markets function suboptimal, but lack insight in the dynamics of the market as a whole. While the US and the UK are very active in the area of market studies, the EU also conducted a number of such studies in recent years (see section 3.3.). DG Competition regularly puts forward sector inquiries in ICN surveys, even when these do not relate to this type of advocacy. Illustrative are the Advocacy Toolkit (2011) and the Framework of competition assessment regimes (2015), where DG Competition was the only authority to exclusively contribute with a sector inquiry.

While EU NCAs and DG Competition have different experiences to contribute to the ICN AWG, for their own advocacy products both are more likely to turn to the OECD rather than
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the ICN. As discussed in section 6.3., the OECD secretariat developed a number of sophisticated products that help competition authorities to quantify their enforcement efforts, which in turn may help them to reinforce their position in the domestic context. The ICN AWG on the other hand functions as a platform for more recently established authorities. The OECD’s Competition Committee and the ICN therefore provide complementary products and cater to complementary audiences. Many ICN AWG products seem actually to follow from OECD work: for example, the ICN’s Recommended practices for competition assessment (2014) builds upon OECD competition assessment toolkit and the ICN’s Market studies project (2009) was started after the market studies roundtable at the OECD. In this sense it is interesting to notice that the OECD published a ‘Market Studies Guide for Competition Authorities’ in 2018, which suggests not only that topics go back and forth between the OECD and the ICN, but also that there still is a likely level of competition for global relevance between these networks.

This section shows that while the topic of competition advocacy has the potential to appeal to a broad audience, these audiences do not necessarily have converging needs. This is especially the case for DG Competition, since it operates in a supranational rather than a national context.

7.4 Conclusions

The ICN was established in 2001 as the American-led alternative to binding competition rules in the context of the WTO. The network was to be inclusive, focusing only on competition policy, and working without a secretariat; it would generate non-binding outcomes as not to jeopardize national sovereignty. The literature on transgovernmental regulatory networks has high expectations of such global expert networks, where technocrats can deliberate and meaningful output would be realized through peer pressure, and in particular of the ICN. The emphasis on direct contact between competition authorities and inclusiveness are expected to establish a functional dynamic beyond command and control, state-centered governance. At the same time, the literature also points out potential problems in accommodating the broad membership of the network and the imbalances in the network due to a strong presence of the US and the EU.

The main expectations on the ICN and the role of the EU in this network were the following. Based on the existing literature one would expect the ICN to be the most relevant and influential global forum to deal with competition issues and hence in theory the most suitable vehicle to externalize EU competition policy to a global context. Indeed, some authors specifically predict that the ICN will be the global forum of choice for DG Competition (Damro and Guay, 2016). However, because of the highly inclusive membership of the ICN and the important role of the United States in the network, we would not expect the EU to be very successful in externalizing its policies through the ICN. Rather, we would expect
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that the EU would be importing best practices from this context than the reverse. Botta (2014) suggests that the EU will indeed not be very successful in the ICN context, in particular when compared to the US.

The chapter however shows that these predictions do not hold when we look at how the ICN works in practice. To begin with, the very features that were considered to contribute to the success of the ICN, in fact turn out to be problematic in practice. First, the demands of participants in the ICN diverge to an important extent because the network is so inclusive: the needs of highly experienced competition authorities (such as Germany) significantly diverge from those of newer competition authorities (such as Botswana). Second, the ‘competition only’ focus of the network makes that many relevant topics remain outside the remit of the ICN’s activity and that there is little room for innovative problem-solving. Third, the virtual nature of the network enhances existing imbalances because active participation is directly linked to resources. When we look at the second decade of the ICN, it is very much the question if the network has been able to live up to expectations.

While the influence of the United States in the ICN has decreased in recent years, the EU has not become significantly more influential. Some EU NCAs are highly active in the network, but other EU competition authorities, including DG Competition, seem less interested in the ICN. As was the case with the OECD, the degree of interest to engage with the forum seems directly related to what these competition authorities expect to take home from the network. The needs of EU competition authorities are already catered for by other networks, mainly the ECN and OECD, and compared to these the ICN seems to have little added value for more experienced competition authorities. Contrary to the expectations from the literature, the ICN is therefore not the preferred global venue for DG Competition, but also not the main relevant global point of reference for more experienced competition authorities more in general.

Section 7.3. more specifically looked at the ICN’s advocacy working group (ICN AWG). The large number of products and outputs shows that the group works in a bottom-up and spontaneous manner; it can proceed quickly when members are willing to invest time and resources in given project. The ICN AWG mainly proceeds in the form of stocktaking exercises, which function as a source of inspiration rather than as prescriptive guidance documents. However, the ‘competition only’ nature of the ICN has shaped the group into a best practice group on agency marketing, rather than a deliberative discussion forum addressing the interfaces with other policy areas in substantive terms.

When turning to the role of the EU in the ICN AWG, EU NCAs are to a certain extent interested in the ICN’s work on institutional advocacy since as most of the other participants, they also work in a national context (rather than a supranational context, such as DG Competition). EU authorities share their experiences in the ICN AWG and are also quite
effective in influencing these outputs by contributing their experiences to the stocktaking exercises. However, the outputs realized by the group seem foremost intended for a non-EU audience. For DG Competition the group is not a very compelling venue for engagement; not only does the group fail to produce the kind of technical products the DG Competition is interested in, in addition their input is limited to market studies rather than domestic competition advocacy practices.

In the ICN AWG therefore we see that contrary to the initial expectations, there is not a high level of policy import (downloading) from the working group to the EU. And while EU competition authorities are relatively successful in uploading (exporting) their experiences to the outputs of this group, as these outputs are stocktaking exercises rather than best practices (experience sharing, not actual guidance), we may wonder to what extent this actually translates in influence on non-EU countries. Therefore, other than that the ICN AWG will likely not produce outputs that are relevant for more established competition authorities, the example also suggests that participation in the ICN will only have a limited influence on global practices.

The next chapter provides an overview of the findings from the empirical chapters and discusses the policy implications of these findings. In addition, the chapter also briefly reflects on what should be considered as ‘successful’ export of EU competition policy and proposes several directions for further research on regulatory influence beyond EU membership.
8. CONCLUSION

This thesis explores how externalization of EU competition policy takes place in two non-EU countries and two global forums. The research more specifically considers the practical implementation and coordination realities of EU-style competition policy in non-EU contexts, rather than only focusing on either rule adoption in non-EU countries or formal participation in global forums. The main added value of this research is that it provides an empirical assessment of bilateral and multilateral externalizations of EU competition policy that were to a large extent unknown; the thesis also shows that implementation and coordination realities in these externalizations are quite different from what we would have expected on the basis of the available literature.

The country case studies Norway and Turkey are relevant models for an EU that becomes increasingly layered in the way it operates. EU integration already progressed at different ‘speeds’ before, most notably through the Eurozone in which not all EU member states participate. However, EU integration is likely to become more fragmented because of both internal and external factors. Internally, the UK is due to leave the EU and may continue its future relation with the EU through a comprehensive FTA. The Commission’s tendency to steer towards a single-speed Europe with enhanced integration in both economic and social terms,275 if continued by the 2019-2024 Commission, may paradoxically also result in more member states leaving the EU in the medium term, and hence again in a more fragmented integration model for which the experiences with the EEA (Norway) and the EU customs union (Turkey) provide valuable lessons. Externally, the EU is rapidly concluding a series of regulatory bilateral FTAs, both with individual countries and with regional trade blocks.

In a global context, the OECD and ICN will likely remain the main relevant global cooperation alternatives for a global environment in which the functioning of the WTO, and global multilateralism in general, is increasingly problematic. Not only is a next successful WTO negotiation round implausible, also the hitherto operational part of the WTO - its dispute resolution mechanism – is increasingly being compromised.276 In the absence of global competition rules and a mechanism to enforce such rules, ‘soft’ convergence through expert forums, either global or regional, currently seem the only feasible way forward. The

276 This is due to the blocking of appointment of judges by the US: Politico - 19 December 2018: https://www.politico.eu/article/wto-gatt-trade-tariffs-dispute-back-to-gatt-law-of-the-jungle-returns-to-tradeland/
experiences in the OECD and the ICN are therefore the blueprint for what lies ahead in global competition cooperation.

With this rather bleak picture of an unravelling EU in an unravelling global order, both from a policy and from an academic perspective it becomes even more important to focus on implementation and coordination realities and on how coherence can be achieved between the EU and non-EU countries and in global networks. Theoretically however, existing frameworks on external EU governance to non-EU countries do not help us much in this regard as they mainly focus on rule export and accession conditionality rather than on implementation. In empirical terms, the literature on external EU governance has not extensively considered competition policy. Theoretical frameworks on the EU and global governance do not sufficiently consider the realities of EU engagement with global forums, and again the empirical work has important gaps where competition policy is concerned. In addition, often it is presumed that the EU is deliberately attempting to export its policies to global forums, which is not necessarily the case.

The research puzzle of the thesis relates to the question of how externalization of EU competition rules takes place in the absence of an accession logic. In such settings, the EU will increasingly have to lead by example rather than by force, as any external dynamics are deemed to be less powerful than full accessional conditionality. Below I will resume the main findings of each empirical chapter in the light of the research questions and the theoretical framework.

**Summary of findings**

This thesis shows that implementation and coordination realities matter in the externalization of EU competition policy beyond accession. The drivers that are relevant in this externalization, both in the EU and in non-EU contexts, are a range of factors related to the institutional setup of implementation in the EU and the non-EU country or global forum, and the motivations of actors involved in implementation, mainly competition authorities but also national administrations, on the other. More specifically, when considering implementation of EU competition policy in the EU, there is more internal variation than expected. Rather than compromising policy externalization, the thesis argues that such circumscribed diversity enhances the uptake of EU competition policy in non-EU contexts.

**Implementation of competition policy in the EU**

Since the theoretical literature highlights the importance of internal EU governance for external dimensions, chapter 3 assessed the implementation of EU competition policy within the EU. The chapter showed that the implementation of EU competition policy is more
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diversified than is commonly assumed. While this policy area is perceived as operating with little discretion at national level and strict oversight from DG Competition and the EU courts, the chapter shows that implementation in the EU actually includes a range of enforcement rationales, enforcement authorities and enforcement tools. In addition to the institutional component of implementation, which is often highlighted in the literature on external EU governance (i.e. the proliferation of National Competition Authorities – ‘EU NCAs’ - and how these cooperate with DG Competition) the chapter therefore also considers two additional factors: the policy goals of EU competition rules and the enforcement toolbox that authorities have at their disposal.

In terms of policy goals, while the ultimate underlying goal of EU competition policy has remained market integration, intermediate policy goals moved from an emphasis on reducing private barriers in the internal market towards including the reduction of governmental impediments to EU-wide competition. In terms of enforcing agencies, this shift was accompanied by a proliferation of EU NCAs, both in old and new member states, who cooperation in the European Competition Network (ECN). And while EU NCAs are bound to apply EU legislation in certain national cases, the range of enforcement tools at the disposition of EU competition authorities also has become increasingly diverse. While traditionally relying mostly on infringement decisions (‘cease and desist’ type of decisions with a fine), the toolbox of most NCAs now explicitly includes possibilities for alternative enforcement, such as behavioral remedies, market monitoring and advocacy.

Therefore, I have argued that EU competition policy has become diversified in terms of (intermediate) goals, actors and tools. This thesis suggests that such increased diversity can positively contribute to the externalization of EU competition policy to non-EU countries and global forums.

First, a diversification of the goals of EU competition policy beyond full market integration should allow for policy externalization in the absence of EU accession. If the rationale of EU competition policy is limited to market integration in the EU’s internal market, it would not make much sense for non-EU countries to use a similar system in the domestic context. However, if EU competition policy can be used to serve other (intermediate) goals as well, this will likely make the system more useful to non-EU countries.

Second, national experiences with implementation of EU competition policy could provide more comparable experiences for learning in non-EU contexts, and enhance the EU’s influence in global forums. EU NCAs not only have a range of different experiences to offer (smaller markets, divergent economic realities) compared to the enforcement experience of DG Competition, but also offer a national perspective to competition implementation that can be useful for non-EU countries in search of competition policy solutions to domestic problems. In a cumulative sense, EU NCAs will also have many resources to devote to inter-
national cooperation and will have a stronger voice in forums where a large number of EU member states are represented.

Third, international cooperation on alternative enforcement is less difficult in practice than case-related cooperation as it requires a lower level of similarly between systems. The increased variety in the enforcement toolbox of EU competition policy also makes it a more suitable model for competition authorities that are either starting up their activity or are involved in the regulation of complex and fast-moving markets which require more flexible enforcement solutions.

However, the diversity of implementation of competition policy in the EU is not without boundaries. Because of the supranational nature of EU competition law and control of the EU courts on its application, both DG Competition and EU NCAs operate within a bandwidth of variation. While there is thus a margin of discretion to apply EU rules, this discretion is ultimately regimented by the European courts. This raises the question of what shape implementation of EU-style competition rules will take in the absence of formal authority of the EU courts over the domestic legal system. The Turkish and Norwegian case studies consider this matter in more detail.

**Externalization to non-EU countries: Norway**

The discussion on the externalization of EU competition policy to Norway illustrates implementation realities when EU competition policy is applied within the internal market, but without full EU membership. Norway is closely associated with the EU through participation in the EEA, which extends the EU's internal market to Norway, Iceland and Liechtenstein but does not include a customs union. Competition provisions from the EU Treaties are mirrored in the EEA agreement and have been transposed to national law. In terms of enforcement, the EFTA Surveillance Authority is competent to rule directly on competition complaints in a similar manner to DG Competition in the EU. There is thus something of a *de facto* direct effect of EEA competition rules even in the absence of formal supranationality.

The extension of EU rules to non-EU countries through the EEA however raises issues related to the homogeneity of the different legal systems it is comprised of: EU competition rules, EEA competition rules, and Norwegian competition rules. While the Norwegian competition law has been amended in 2014 and 2016 to further approximate the EU rules in addition to a previous revision in 2004, potential divergence between Norwegian and EU competition rules arises when changes to the EU rules go beyond what was foreseen in the EEA agreement, for example where EU competition regulation touches upon issues related to procedural law. While the latter is contested also within the EU, such issues come out more clearly in the absence of full membership, since EEA EFTA countries deliberately
limited their association with the EU to internal market issues and not beyond.

Implementation of competition policy in the Norwegian food sector shows that networked cooperation between the Norwegian competition authority (*Konkurransetilsynet* - KT) and EU NCAs through the ECN has resulted in a more EU-style approach to domestic competition enforcement to areas outside the scope of the EEA agreement. While formally the KTs membership to the ECN is subject to limitations, in practice the authority seems to be participating on almost the same terms as EU NCAs to the network. Direct cooperation of the KT with EU NCAs and DG Competition in the ECN brought out a productive interaction between the EU and the domestic system.

On the other hand, direct enforcement of EU competition policy to the Norwegian gas market by DG Competition in the absence of domestic implementation shows the limits of a unilateral approach. While direct enforcement was possible because the EU is an important import market for Norwegian natural gas, this approach was ultimately unsuccessful in fragmenting the power of (partially state-owned) gas companies; it also did not result in further domestic implementation of the competition rules to this sector. In this case, top-down enforcement brought out the divergent material interests at stake, rather than aligning them.

Therefore, the Norway case study suggests that even in a close association such as the EEA where competition rules can be enforced in a *de facto* supranational manner, networked dynamics and domestic factors are more important than we would have expected. While the EU is able to both impose and enforce its rules in the Norwegian context, such hierarchical imposition may still fail to change market structures. The following factors are of relevance in the implementation of competition policy in the Norwegian context.

- **Wide range of EU actors in implementation.** The key factor of relevance from implementation of competition policy in the EU for the Norwegian context is the range of actors that apply EU competition policy (section 3.2), that is to say the increased number of EU NCAs applying EU rules and their cooperation in networks- mainly but not only the ECN. The possibility for the KT to participate in the EU’s competition networks ECN and ECA has been an important dynamic in the Norwegian implementation of competition rules. Since Norway also closely cooperates with EU NCAs in the region through the Nordic cooperation, their direct application of EU competition rules was conductive in the further calibration of implementation as well.

- **Other relevant EU factors.** To an extent, the diversified intermediate goals of EU competition policy (section 3.1) and the broadened toolbox that EU NCAs are using to regulate markets (section 3.3.) were factors of relevance as well in the Norwegian
context. That is because EU competition rules were sufficiently open-ended to allow their use for a domestic interest, namely to tackle the highly concentrated food sector, and because the cooperation with EU NCAs and DG Competition mainly took place in the shape of market monitoring and practice sharing, rather than common enforcement actions.

- **Domestic incentives.** Norway’s competition rules are almost completely aligned with EU competition rules through the EEA agreement. Nevertheless, there has been virtually no domestic implementation of domestic competition rules to the natural gas sector. In this example there are insufficient domestic incentives to apply EU rules. Diminished market concentration in the natural gas sector likely reduces state revenues, while at the same time the concentration on this market does not cause any problems on the domestic market (as there is essentially no domestic market for natural gas). But while the EU can unilaterally impose its rules to this sector by direct enforcement to Norwegian companies, this has not resulted in a significant market opening. Since there is a high mutual dependence between Norway and the EU in this market, the EU probably also has relatively little to gain from imposing its competition regime as long as prices remain at an acceptable level. Potentially there are therefore insufficient interests from the EU side to further insist on market opening.

- **Joint problem-solving.** Implementation of the competition rules to the food sector has been more successful. The EU-inspired competition rules provided a tool for the KT to tackle a problem that was identified in the domestic context; namely high prices and little choice when it comes to food and food retailers. Cooperation with EU NCAs and DG Competition through the ECN and the Nordic network provided a suitable forum for the KT to raise these issues, and it turned out that concerns regarding market dominance in the food sector were shared by NCAs across the EU. While the KT is ultimately not always successful in opening the Norwegian food market, this example shows a more productive dynamic of common problem solving and identification by the KT, EU NCAs and DG Competition.

**Externalization to non-EU countries: Turkey**

The Turkey case study raises further issues that may arise when externalizing EU competition policy in the absence of EU membership. While Turkey is formally an enlargement candidate, EU accession is at present an unrealistic scenario. The Turkish and EU market are integrated through the EU-Turkey customs union, which abolishes duties on goods and establishes a common external tariff for industrial products from countries outside the union. Agriculture, coal, steel and services are excluded from the agreement. The customs union agreement also foresees approximation of competition rules.
The Turkish competition act contains rules that are to a high extent similar to EU competition rules. There are however a number of areas in which Turkish competition policy is not fully compatible to EU policy; most of these issues relate to internal changes in the EU following Regulation 1/2003 which have not been formally translated to the Turkish system. A recent draft competition draft law, that would further align Turkish competition law with EU competition policy, has been abandoned. This suggests that EU accession conditionality is a necessary condition to overcome national obstacles to further reform. It is therefore questionable if approximation to EU rules in competition policy will continue in the future.

The Turkish case study also shows that the Turkish competition authority (*Rekabet Kurumu* - RK) is an operational and well-staffed agency which continues to be oriented to EU practices. While to some extent divergence of the rules may be supplemented by creative ways of interpretation by the RK, this can only work while the divergences are not too significant and where the RK is allowed to do so within the institutional context in which it operates. While the RK has been influential towards other ministries and agencies in the past, it is the question to what extent this can be upheld in the current political landscape.

Turkish competition policy shows a mixed picture in terms of implementation. As expected, the implementation of EU-style state aid rules has been unsuccessful in the absence of EU accession. While Turkey adopted a state aid law in 2010, implementation progress has been very slow. The rationale to apply these rules in the absence of EU membership is unclear, as the EU rules are mainly inspired by an idea of full market integration. But implementation in the domestic context also faces practical difficulties, as in the absence of supranational oversight the state aid rules will have to be applied by one part of the government towards other parts of the same administration. This is problematic when the enforcing agency is not sufficiently independent *de jure* and/or does not have sufficient *de facto* authority enough vis-à-vis the ministries it is supposed to control.

By contrast, implementation of competition regulation in the telecom sector has resulted in a relatively successful opening of the mobile telecom market to non-Turkish companies. While it is legally unclear whether competition law or sectoral law prevails in the area, the RK has been able to assert itself as an influential actor that has tackled dominance in this market through enforcement decisions. This happened in the absence of direct cooperation with EU NCAs. However, liberalization in this sector was initially driven by IMF rather than EU conditionality; in addition, the interests of the incumbent market player aligned with further opening of the mobile market segment, where this incumbent was a newcomer. Therefore, the preconditions for such successful implementation included a favorable domestic situation created by a combination of external conditionality and material interests of the domestic incumbent operator.

The Turkish case confirms that successful externalization of EU competition policy strongly...
relates to the domestic context. While the EU is not able to impose its rules in view of weak accession conditionality, and the dynamic of the relationship is therefore networked rather than hierarchical, domestic dynamics are key in both rule adoption and implementation. The following factors are of relevance in the implementation of competition policy in the Turkish context.

- **Flexible EU policy goals.** The key factor of relevance from the EU’s domestic implementation of competition policy for the Turkish context is the range of intermediate policy goals (section 3.1) that is to say the open-ended nature of the EU competition rules and the policy goals they may serve. In Turkey, EU-style competition rules were used to liberalize telecom markets in view of IMF conditionality and was therefore useful in the domestic context irrespective of EU membership.

- **Other relevant EU factors.** To a smaller extent the proliferation of EU NCAs (section 3.2) also played a role in the Turkish context: some capacity building missions in state aid took place with other EU authorities from member states with recent experiences in the implementation in view of state aid in view of accession (e.g. Romania and Hungary). However, this has not resulted in implementation of the state aid rules in the Turkish context.

- **Conditionality.** For the adoption of the competition rules, the Turkish case confirms that direct conditionality by the EU has been a key condition. In particular the timing of the adoption of the Turkish competition and state aid laws show that their introduction was directly linked to an accession perspective; in the absence of such a perspective, there seems to be little incentive to adopt EU rules. This confirms expectations based on the external EU governance literature that hierarchy will be most successful governance mode for external rule transfer. For the implementation of the competition rules, in particular in the liberalization of the telecom sector, conditionality by the IMF has also been a key factor.

- **Institutional capacity and context.** When considering the implementation of the competition rules in practice, the institutional capacity and the institutional domestic context in which the competition authority operates are key. The Turkish case study shows the importance to look beyond the formal rules and the formal independence of the competition authority. In practice it turns out that the RK is more independent than we would expect in a country with a highly centralized administration. In the example of telecom markets it has built a strong position vis-a-vis the ministry in charge of telecom and effectively changed market structures. It also turns out that the RK has been implementing the existing rules with a level of flexibility. Such partially informal dynamics may have a positive effect for EU influence, as they may allow for Turkish implementation in line with EU implementa-
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In the absence of full alignment between domestic and EU rules. But while such dynamics may make implementation more resilient, in the sense that implementation can be better adjusted to tackle domestic problems, at the same time they can also make implementation vulnerable, as it is dependent on the political leeway that the authority is allowed at a certain moment in time.

EU engagement in global competition forums

Turning to the EU’s participation in global forums that work on competition policy, the chapters on the OECD (chapter 6) and the ICN (chapter 7) discussed EU engagement in these settings. Based on the existing literature, the expectations as set out in section 2.4 were the following. In the OECD, I expected high levels of EU influence and an emphasis on export of EU competition policy, mainly in view of the largely EU-based membership. At the same time, again in view of the confined OECD membership, I expected the OECD to have limited influence in the global context. In the ICN, we expected lower levels of EU influence, but high overall influence of the network on its participants, both in view of the ICN’s inclusive membership - in particular the leading role of the US.

The OECD is an organization with currently 35 member countries, including Western Europe, the US, Canada and Japan. Its focus is on developing and promoting good governance to enhance economic growth. The OECD has a designated Competition Committee. While the EU is not a member to the OECD, it has a special status that allows the European Commission to participate in the work of the organization. Due to the limited available literature on the competition work of the OECD, we know little about the workings of the Competition Committee.

Chapter 6 showed that the OECD’s Competition Committee is an inclusive and expert-driven forum, which not only allows for non-OECD members to participate, but also works directly with competition authorities. The outputs of the Committee are less focused on policy change than expected, and instead concern tools that are directly relevant for (experienced) competition authorities. The OECD’s work in the area of competition policy is authoritative, mainly due to a combination of expertise of the OECD secretariat and the consensus process with participating peers. Many competition authorities use the work of the OECD to strengthen their position in the domestic context.

Contrary to the expectations from the literature, the OECD is first of all more globally relevant in the area of competition policy than we would have expected in advance. In addition, the EU does not seem so much interested in exporting competition policy to this forum; rather EU NCAs are importing best practices from the OECD. The OECD’s Competition Committee caters to a high extent to the needs of EU competition authorities, which make up for half of the membership of the Working Parties of the Competition Committee and
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thus can significantly influence the agenda.

The example of evaluation of competition enforcement in the OECD illustrates how the OECD shapes guidance in a new and technical issue area. Competition authorities were uncertain how to best approach this issue, and the OECD had the capacity to develop guidance in the form of economic modeling that authorities can use to measure the impact of their enforcement. Several EU NCAs are already using this guidance, also in the absence of guidelines on this topic from the EU side. This example therefore shows that EU NCAs can use the OECD to produce (non-binding) guidance that they cannot find in the ECN, in this case mainly with the aim of increasing the legitimacy of their enforcement in the domestic context. While the input for the guidance document was influenced by DG Competition and several EU NCAs, the example also shows the strong role of the OECD secretariat is the steering and preparation of the output.

The ICN is a bottom-up network of global competition authorities. It was set up in 2001 on US initiative as an alternative of binding competition rules in the context of the WTO. The ICN’s membership is highly inclusive with the exception of China, and was composed of 138 competition authorities in 2018. DG Competition and all EU NCAs are members of the ICN. In the literature, the network has often been portrayed as a successful example of a transgovernmental expert network of competition enforcers.

Chapter 7 showed that the inclusive, ‘competition only’ and virtual nature of the network limits the relevance of the ICN in practice. That is because the needs of the participating competition authorities widely diverge; but also because the ICN does not work on cross-cutting topics such as competition and trade policy or competition and industrial policy, or even competition policy in liberalized sectors; and because the virtual nature of the network reinforces existing resource imbalances.

Contrary to the expectations from the literature, the ICN is not as influential as we would have expected, at least not for more experienced competition authorities, and potentially also not for less experienced authorities. The ICN seems a network in search of a mission, now that the objective for which it was initially set up (multijurisdictional merger review) to an important extent has been achieved. Rather than importing best practices from the network, EU competition authorities seem rather to export their experiences to the network. Due to the shape of the outputs, which gather experiences rather than formulate best practices, a further question is if this export actually translates to global influence.

The ICN’s Advocacy Working Group (ICN AWG) focuses mainly on providing effective marketing strategies to promote the benefits of competition policy in the domestic context. Because of the highly diverse membership of the ICN AWG, which includes authorities from both highly experienced and less experienced competition authorities, the outputs are
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increasingly composed of mapping documents where different authorities - including DG Competition and EU NCAs – elaborate their experiences on a certain topic. While this may be considered an example of successful ‘informed diversity’ (Svetiev, 2015), these outputs seem limited in terms of their added value. For less experienced competition authorities, the outputs seem of limited value because they do not engage in an actual discussion of the proposed benefits of competition policy, or in a discussion on state involvement in markets. More experienced EU competition authorities on the other hand will benefit more from the more extensive guidance on the evaluation of the enforcement using economic modeling provided by the OECD, which similarly serves to enhance domestic legitimacy.

• **Wide range of EU actors.** A first relevant factor for EU engagement in global forums is the increased implementation of EU competition rules at the national level (section 3.2) - that is the increased diversification in implementation of EU rules by national authorities and the wide range of experiences and capacity this brings to these global forums. Also in purely quantitative terms, DG Competition and the 28 EU NCAs combined can have an effective impact on global networks if they wish to do so, in particular because all these authorities are relatively well-resourced. In practice, EU NCAs seem to reinforce rather than undermine the position of DG Competition. National experiences from EU NCAs with the implementation of the EU rules can sometimes also be more useful for the other (mainly national) participants to the forums than DG Competition's supranational experience.

• **Diversified EU toolbox.** A second key factor of relevance from the EU's internal implementation experience in the context of engagement in global networks is the diversified toolbox EU competition policy offers to implementing authorities (section 3.3) - that is to say the opportunities this toolbox offers for discussions with NCAs outside the EU beyond case-cooperation. The OECD and the ICN do not work directly on mutual case cooperation, but support more voluntary best practice sharing, including in the area of alternative enforcement. This allows competition authorities to discuss not only more freely, in the absence of confidentiality concerns, but especially in the context of the ICN it also frees the way for a productive discussion to which authorities with different levels of experience can contribute.

• **Expert-driven forums.** Both the OECD Competition Committee and the ICN are expert-driven global forums. Influence or power in these forums mainly derives from experience, but also from resources to contribute to the network. The latter is in particular the case for the ICN, which depends fully on members to develop outputs and does not have a designated secretariat as the OECD. The case studies suggest that the interest in effectively influencing the ongoing work in these forums is mostly inspired by the need to obtain outputs in return that are useful for competition authorities in the domestic setting, rather than by a clear interest in regulato-
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ry export - either for the sake of market opening or for reasons that are not directly economic in nature, such as development assistance. EU competition authorities are well placed to influence these forums, because they have both the experience and resources to contribute in a meaningful way, but are not necessarily interested in spreading EU competition policy through these forums.

- **Demand-based dynamics.** Similar to the case studies that relate to the influence of EU competition policy on non-EU countries, in the global forums the main scope condition for successful engagement is demand-based, as its logics are determined by a demand of competition authorities to either improve the quality of the authority’s work, or directly or indirectly increase the legitimacy the authority in the domestic context. In view of this demand-based dynamic, participation in these forums is a two-way street. Rather than either mainly importing from or exporting competition policy to these forums, it is more sensible to characterize involvement as either high or low levels of engagement.

**Reflections on ‘successful’ policy externalization**

In the introduction of the thesis I referred to the ‘dependent variable problem’ of studies in European integration, where it is difficult to conceptualize the outcome of domestic change in advance. While it is possible to measure approximation of the rules in formal terms, by comparing legal texts, it is quite unclear how policy externalization which includes domestic implementation and influence on global forums should be measured. In view of this thesis’ focus on implementation and coordination realities I would like to make a few observations on what should be considered as a ‘successful’ externalization of EU competition policy. A main question is of course to what extent successful externalization is actually a full approximation to EU policy, in particular as chapter 3 has shown that there is a circumscribed level of variation in the implementation of competition policy in the EU context, and the thesis proposed that this level of variation may positive contribute to policy externalization.

Regarding the country case studies, readers are likely inclined to consider the externalization of EU competition policy to the Norwegian context as more successful than externalization to the Turkish context. That is because the Norwegian system more closely resembles EU implementation, both in terms of the approximation of rules and in terms of participation in the EU’s internal competition network. Implementation of competition policy in the Turkish context in the absence of an accession perspective has resulted in a more selective adaptation of national rules, and the possibilities for direct cooperation with EU competition authorities are rather limited. The Turkish case faces more concrete problems at first sight, most notably when it comes to overcoming national interests and the setup of the legal system in the absence of supranational logics.
Conclusion

At the same time implementation of competition policy in the Turkish setting may also prove be more resilient than the Norwegian adaptation precisely because of this selective rule adoption and adjustment to the institutional realities of the domestic context. The position of the competition authority in a centralized institutional context has urged the RK to develop new solutions for the problems encountered in the national context, which over time could prove to be more resilient than simply ‘copying’ existing implementation practices. In addition, the Turkish case could in the long run be a more genuine source of inspiration and learning (both for EU and non-EU competition authorities) than the Norwegian example. Still, this flexibility makes the system at the same time more vulnerable, as implementation in such a situation depends on the political leeway that the competition authority is allowed.

When turning to the global forums, the question of what amounts to successful externalization is even less straightforward, since these global forums are only ‘intermediaries’ which may (or may not) ultimately influence non-EU domestic systems. While a first step is thus the EU influence on the outputs of the forum, either in the form of formal recommendations or informal best practices, these outputs are in turn expected to influence domestic competition rules and implementation. Successful externalization in global forums thus depends not only on the extent to which the EU is able to influence the forum itself, but ultimately on the extent to which the forum influences domestic rules and implementation.

The ICN at first sight seems a more appealing context to directly spread EU competition policy to the global context in view of its highly inclusive membership and exclusive focus on competition matters. However, eventually externalization to the more selective OECD context is likely to be more fruitful if the goal is to spread EU competition rules and implementation experiences, not only because the forum is more authoritative and thereby more influential in domestic contexts, but also because the influence of the OECD’s outputs actually reaches far beyond its formal membership. What is more, often unlike the ICN, the OECD context provides outputs that are directly relevant for EU competition authorities and therefore offers a direct incentive for engagement.

Policy implications

In view of the thesis’ focus on empirical realities, a note on the policy implications of the research is in place. Especially important is the ‘diagnostic’ value of this contribution, which enables policy-makers to interpret a concrete situation and allow for a better assessment of the possible available policy solutions and actions (George and Bennett, 2005). The thesis considers the externalization of EU competition policy as an extension of the dynamics and qualities of implementation of this policy in the EU itself - not in the sense of the extra-territorial effects of internal decisions, but rather as a regulatory model that is exported to non-EU countries and to global forums that work on competition policy.
As the externalization of EU competition policy happens in a less explicit and deliberate manner than one would have thought, the EU could be a more a deliberate leader in competition policy, rather than an ‘unintended’ leader as seems to be the case at present. Doing so has clear economic advantages from the EU side, as it can further open non-EU markets for European companies and create stable regulatory environments for EU companies abroad. From the receiving end, the EU’s model of competition policy offers an extensively tested regulatory blueprint for non-EU countries, and is sufficiently flexible as to allow for domestic policy goals to be included.

• **Implication 1:** Rather than focusing on full EU harmonization in the implementation of the EU competition rules, acknowledging the circumscribed diversity in EU implementation can bring internal and external benefits. While the benefits highlighted in this thesis mainly relate to the externalization of EU competition policy, further diversification in the EU is probably inevitable and in fact seems to be increasingly acknowledged by the European competition community, although not necessarily in a positive light (e.g. Budzinski and Stöhr, 2018; Brooke, 2019). When limited by the case-law of the European courts such a margin of discretion can bring internal benefits, as this thesis also shows that national enforcement systems are likely to be more resilient when they can tackle domestic issues, thereby increasing domestic legitimacy.

• **Implication 2:** Such a margin of diversity could be supported by the ECN if it were to become more of a ‘lesson-drawing’ and less of a ‘case cooperation’ network. Rather than going in the direction of the recently adopted ‘ECN Plus’ Directive, which focuses on further procedural harmonization and case cooperation within the EU, the ECN would likely be more effective as a kind of ‘lesson-drawing’ network and less of a case cooperation network. In such a setting, the ECN would not be used to exchange confidential information, but it would rather be a discussion platform for tackling new issues in competition policy, such as those arising with market challenges in digital. Such lesson-drawing would also allow the EU to become even more influential as a global regulatory model, for example by tackling dominance in digital markets in an innovative manner by more explicit learning from national experiences.

• **Implication 3:** As a direct result, the ECN could become more inclusive for countries that have close relationships with the EU in order to align their implementation with EU best practices – even when membership perspectives are delayed over longer periods of time. This might be the case for current accession candidates, but also for the ENP where progress on competition matters has been slow. If the ECN was more open, it could for example have been a forum to exchange best practices with the Turkish NCA on competition policy dynamics in
online platforms (the French, Italian, Swedish and Turkish NCAs all tackled booking.com in recent years – but only the Turkish case resulted in a ban on the Dutch platform, while EU NCAs accepted remedies offered by the company). A more accessible EU network could also facilitate cooperation with the UK NCA in a future relationship. This is not to say that the ECN should be open to any competition authority; but for countries with a strong institutional association to the EU, such a selective opening in order to support implementation would be justified.

- **Implication 4:** A focus on the externalization of EU-style competition rules either in a bilateral or multilateral context will not necessarily bring the desired result. Overall, this thesis emphasizes that the key condition for successful export is successful implementation, which requires commitment over time from all sides. In view of the importance of implementation, we should consider to move away from focusing on the necessity of full coherence of competition rules between different jurisdictions towards equal levels of protection. Direct enforcement of EU competition rules towards companies in non-EU countries will likely accentuate divergent interests, rather than bringing about a dynamic of convergence.

**Suggestions for further research**

While this thesis has explored implementation and coordination realities of EU regulatory externalization in the area of competition policy in a number of specific case studies, there are several areas that would highly benefit from further exploration in the future.

Regarding the theoretical framing of EU regulatory externalization, in particular the literature that considers EU integration (or ‘Europeanization’) to non-EU countries beyond membership, we still lack a comprehensive framework that allows us to understand how these processes of policy externalization take place in practice. Existing frameworks are either broad (‘Europeanization beyond Europe’), highly specific (‘experimentalist governance’), or do not include domestic implementation (‘functionalist extensions of regulation’) thereby not really allowing for an integrated conceptual understanding of policy export to non-EU countries beyond membership. Such conceptualization is highly relevant not only as an academic exercise, but has important real-world added value in a context that is increasingly characterized by different levels of EU association. Also the scope conditions that drive or limit externalization, in particular those related to the domestic context in the non-EU country and the institutional context of the network, could be explored in further detail in different EU policy areas. At the same time such efforts should not excessively focus on theoretically appealing models of causation that may lose sight of the practical realities on the ground.

In empirical terms, this thesis considers a set of specific case studies, namely two countries
that are closely associated with the EU and two global forums that deal with competition policy. However, new bilateral dimensions for research are rapidly increasing with the conclusion of a number of regulatory FTAs between the EU and countries in Asia and the Americas on the one hand, and on the other had upcoming negotiations about the future relations between the EU and the UK, but also for example the continuing dialogue on relations between the EU and Switzerland. It would be highly relevant to consider the implementation realities of regulatory FTAs in competition policy, such as most notably the FTA between the EU and South Korea, which in force since 2016 and will by now allow for some first assessments on its working in practice. In the near future, implementation realities of the FTAs concluded between the EU and Canada (provisionally entered into force in September 2017) and Japan (entered into force in February 2019) will be among the main cases to consider.

When turning to multilateral settings in competition policy, it would be highly relevant to further consider not only the influence on the EU on global and regional competition networks, but also the impact that these networks have on rule-adoption and implementation of competition policy in the domestic context. That is the case for the OECD and the ICN, where there is little academic work on how these global forums inform domestic rule-making and implementation, but also for different regional trade blocks which include networks on competition policy, most notably as ASEAN (Southeast Asia).

In the case of ASEAN, the adoption and implementation of competition rules in the domestic context of members is explicitly supported by the organization, which aims also to ensure harmonized rules and implementation. At the same time, the EU has concluded FTAs with several ASEAN members which include competition provisions and is negotiating such FTAs with others (EU-Singapore FTA, negotiations concluded in April 2018; EU-Vietnam FTA; negotiations concluded in August 2018; negotiations with Indonesia and the Philippines are ongoing). While Mercosur (South America) has not been very active in the area of competition policy, there are at least two specific competition networks operational in the Mercosur region: the Lusophone and Ibero-American competition networks (both including also EU NCAs). It would therefore be highly relevant to study the influence of the EU on these networks, and in turn the impact of these networks on the domestic context.

One could also draw further comparisons between the dynamics of voluntary regional competition networks, which work in the absence of supranational regional competition enforcement, and the ECN. The ECN is unique when compared to most of these networks. That is not only because of the prominent role of DG Competition, but also because the implementation of EU competition rules became more decentralized over time. In most regional networks, this development can be expected to take place in the reverse direction: from a situation of divergence towards convergence in a regional context. More research
Conclusion

on these regional networks and their relation to the OECD Competition Committee and the ICN is needed to understand the role they play in the fragmented global competition landscape of today.
### ANNEX 1

**List of interviews**

**Interviews Chapter 3 – Competition policy in the EU**

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<th>Location</th>
<th>Interview Details</th>
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<td>Brussels</td>
<td>European Commission, DG Competition, ECN unit</td>
<td>EU.2</td>
</tr>
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<td>Phone</td>
<td>Case handler Finnish competition authority, international unit</td>
<td>EU.3</td>
</tr>
<tr>
<td>Brussels</td>
<td>Case handler French competition authority</td>
<td>EU.4</td>
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<tr>
<td>Brussels</td>
<td>Case handler Romanian competition authority</td>
<td>EU.5</td>
</tr>
<tr>
<td>Brussels</td>
<td>Case handler Swedish competition authority</td>
<td>EU.6</td>
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<tr>
<td>Phone</td>
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<tr>
<td>Brussels</td>
<td>National expert European Commission, DG Competition</td>
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<tr>
<td>Phone</td>
<td>Case handler Hungarian competition authority</td>
<td>EU.9</td>
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<td>Brussels</td>
<td>European Commission, DG Competition, strategy unit</td>
<td>EU.10</td>
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<tr>
<td>Brussels</td>
<td>Czech competition authority – State aid department</td>
<td>EU.11</td>
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<td>The Hague</td>
<td>Case handler Dutch competition authority</td>
<td>EU.12</td>
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## Interviews Chapter 4 – Competition policy in Norway

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<td>Academic, University of Bergen (informal)</td>
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Interviews Chapter 5 – Competition policy in Turkey

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# ANNEX 2

## Reports and working groups on competition policy in the food sector in Norway, at EU level and at the OECD (2005–2016)

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<td>2005</td>
<td>Norway</td>
<td>KT report: ‘Payment for shelf space’ (in Norwegian)</td>
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<td>05.2008</td>
<td>EU</td>
<td>European Commission Communication: ‘Tackling the Challenge of Rising Food Prices’</td>
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<td>EU</td>
<td>European Commission: High-level Group on the competitiveness of the agro-food industry</td>
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<td>European commission: High level Forum for a better functioning food supply chain</td>
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<td>04.2011</td>
<td>Norway</td>
<td>Norway report: ‘The powerful and the Powerless in the Food Supply Chain’ (in Norwegian)</td>
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<td>EU/DG COMP</td>
<td>Establishment ‘task force food’ at DG Competition</td>
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<td>Norway</td>
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### Annex 2

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<td>2015-2019</td>
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# ANNEX 3

Main outputs of the ICN’s advocacy working group (2002-2017)

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<th>Year</th>
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<th>Description</th>
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<td>2002</td>
<td>Advocacy and competition policy</td>
<td>Report based on survey</td>
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<td>2003</td>
<td>Report on advocacy in the selected sectors</td>
<td>Report based on submissions, with case studies from different jurisdictions</td>
</tr>
<tr>
<td>2003</td>
<td>Advocacy provisions</td>
<td>Report mapping advocacy provisions in different jurisdictions vis-a-vis other governmental bodies</td>
</tr>
<tr>
<td>2009</td>
<td>Market studies project report</td>
<td>Report based on survey</td>
</tr>
<tr>
<td>2009</td>
<td>Report on ICN members’ requirements and recommendations for further ICN work on competition advocacy</td>
<td>Report based on survey</td>
</tr>
<tr>
<td>2010</td>
<td>Market studies information store</td>
<td>Online database with examples of sectoral studies (updated in 2015)</td>
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<tr>
<td>2011</td>
<td>Advocacy toolkit – part I</td>
<td>Case studies of how advocacy works in practice in different jurisdictions</td>
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<tr>
<td>2012</td>
<td>Advocacy toolkit – part II</td>
<td>Case studies of on effective communication in different jurisdictions</td>
</tr>
<tr>
<td>2012</td>
<td>Explaining the benefits of competition – interim report</td>
<td>Based on survey, plus four teleseminars with stakeholders (government, business, media, general public)</td>
</tr>
<tr>
<td>Year</td>
<td>Topic</td>
<td>Description</td>
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<tr>
<td>------</td>
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<tr>
<td>2012</td>
<td>Market studies good practice handbook</td>
<td>Partly based on 2009 market studies report survey, written and peer reviewed by different authorities and stakeholders</td>
</tr>
<tr>
<td>2014</td>
<td>Explaining the benefit of competition to government and legislators</td>
<td>Made available as online toolbox including tips for explaining benefits, themes, strategies and case studies</td>
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<tr>
<td>2014</td>
<td>Recommended practices on competition assessment</td>
<td>General recommendations on competition enforcement</td>
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<td>2015</td>
<td>Competition culture project report</td>
<td>Report based on survey</td>
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<tr>
<td>2015</td>
<td>Framework of competition assessment regimes</td>
<td>Report based on survey, plus case studies, about which institution carries out competition assessments in different jurisdictions</td>
</tr>
<tr>
<td>2016</td>
<td>Revision of market studies good practice handbook (2012) + booklet with guiding principles for market studies</td>
<td>Enriched version of the 2012 handbook; the booklet is a more user-friendly and simple overview of the materials from the handbook</td>
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<tr>
<td>2017</td>
<td>Explaining the benefit of competition to businesses / Explaining the benefit of competition to the general public</td>
<td>Made available as online toolbox including tips for explaining benefits, themes, strategies and case studies</td>
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REFERENCES


Bagis-Akkaya, M. (2013). ‘Tailored Fit or One-size-fits-all: Lessons from the Turkish Com-
References


References

institutional change in the light of digitization’ *European Competition Journal.*


References


Challenges with Special Focus on the Leniency Field’ World Competition 30/1, 3-24.


EEA Joint Parliamentary Committee (2013). Report on the Future of the EEA and the EU’s Relations with Small-sized Countries and Switzerland. 30.05.2013

References


Franklin, C., Fredriksen, H. and Barlund, I. (2016). ‘Private enforcement and Collective Re-


References


References


References


Nilsen, Ø., Sørgard, L. and Ulsaker, S. (2013). ‘Upstream Merger in a Successive Oligopoly:
Who Pays the Price?' Working paper.


References


OECD (2016a). Reference guide on ex-post evaluation of competition agencies’ enforcement decisions. Written by Cristiana Vitale and Silvia Carrieri with support from Pedro Gonzaga from the OECD Competition Division.


Parret, L. (2010). ‘Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy’ European Competition Journal 6/2: 339-376.


References


References


World Bank (2014). Evaluation of the EU-Turkey Customs Union, 28.03.2014.
References


SUMMARY

This thesis considers how EU competition policy is externalized beyond EU borders, and therefore looks at the EU as a global ‘regulatory’ power. Specifically, the thesis analyzes the country case studies of Norway and Turkey, which are closely associated with the EU through the European Economic Area and the EU-Turkey customs union. The thesis also analyzes two global forums that address competition policy: the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN).

Research on external dimensions of EU governance is highly relevant for several reasons. First, because it sheds light on what kind of influence the EU can have in a global context thereby uphold the interests of its citizens. Second, because the study of regulatory externalization provides useful insights for scenarios of enhanced internal EU fragmentation, for example in the context of Brexit. Considering how EU governance is externalized beyond the EU provides us lessons for dealing with the EU’s new immediate neighborhood.

In considering externalizations of EU competition policy, the thesis looks beyond extraterritorial enforcement of European rules, or even the adoption of rules in non-EU countries and formal membership of global forums. Instead, the research specifically looks at the implementation of competition rules in the domestic (non-EU) context and at coordination realities of engagement in global forums. Such implementation and coordination realities are equally if not more important than formal arrangements, since it is these realities that show us whether and how policy is used in practice, and how influence materializes in a network context.

The theoretical and empirical perspectives that inform the thesis are the literature on external EU governance literature; the literature on the EU and global governance; and the legal literature on external dimensions of EU competition law (including but not limited to extraterritorial enforcement). Broadly speaking, the first two consider external EU influence from an ‘inside-out’ perspective that views internal and external governance as intrinsically connected, rather than as different realities. In addition, these literatures place much emphasis on EU institutional governance and on how this ‘fits’ with domestic institutional structures in non-EU countries and of global networks. Finally, the legal literature closely follows developments in policy and case law and provides an empirical perspective on external dimensions of EU competition law.
Summary

In view of these perspectives - and specifically the emphasis on the connection between internal and external governance - the thesis starts with an assessment of how EU competition policy is implemented inside the EU. Competition policy is an area in which the EU has exclusive competences and where the European Commission directly enforces EU rules. It is also a relatively uncontested policy area that has successfully supported EU market integration over time. Nevertheless, the implementation of competition policy in the EU is less homogeneous than is commonly assumed. The main argument of the thesis is that such a degree of internal variation can have a positive rather than a negative effect on externalization.

This variation in internal implementation plays out on various levels. Following initial emphasis on private barriers to market integration, the focus has recently expanded to include public barriers to competition. And from centralized enforcement by the European Commission, the governance structure now includes National Competition Authorities that are directly applying EU competition law. These authorities cooperate with the Commission and with each other in the European Competition Network (ECN). Finally, the toolbox that EU competition authorities have at their disposal has become more diverse, and now explicitly includes many tools for alternative enforcement.

The country studies of Norway and Turkey show that these internal developments in EU competition policy are reflected in externalizations. Most notably, the Norwegian competition authority can successfully participate in the ECN and through this network agendize issues that are of interest to them. In that sense, it is unfortunate that the Turkish competition authority cannot participate in the network, as this would have probably allowed for more alignment on implementation in a scenario where EU accession has become highly unlikely. Especially in the Turkish case, the internal rationale to apply competition policy is important (focus on private and/or public barriers), since this rationale influences the motivations for both externalization by the EU and for import on the Turkish side in the absence of a realistic accession perspective. A further key factor for implementation in both country case studies are factors relating to the domestic context, and in particular to the institutional administrative context and capacity on the one hand, and material incentives of domestic actors on the other.

In the global forums case studies on the OECD and the ICN, internal EU governance is of importance because of the increase in (national) EU competition authorities applying the same regulatory framework. This has resulted in more overall EU engagement with these networks. In addition, the increasingly diversified EU toolbox is relevant in these forums, which are essentially based on mapping and sharing of best practices rather than on case cooperation. However, the case studies also show that the EU's engagement in these global forums mainly depends on what EU competition authorities expect to gain from them in terms of practical output – i.e. more so than a desire to spread EU competition
policy globally or to provide development support. The OECD is more directly relevant for EU competition authorities than the ICN because its outputs cater directly to experienced competition authorities.

The overall conclusion of the research is that in the implementation of EU competition policy, there is more internal variation than is commonly assumed. The thesis argues that this is not necessarily a negative feature from the perspective of assessing the EU as a regulatory global power. On the contrary, a margin of variation is likely to enhance the uptake of EU policies in non-EU contexts, as the case studies show. By explicitly acknowledging this, the EU could more deliberately influence competition policy beyond its borders than is currently the case, and thereby further shape global policy in this area.
SAMENVATTING

Dit proefschrift onderzoekt hoe Europees mededingingsbeleid wordt ingezet buiten de grenzen van de Europese Unie (EU) en kijkt daarmee naar de EU als een ‘regulatory power’ in de wereld. Als casus analyseert het proefschrift de implementatie van mededingingsregels in Noorwegen en Turkije, die geassocieerd zijn met de EU via de Europese Economische Ruimte (EER) en de douane-union tussen de EU en Turkije. Het proefschrift kijkt ook naar twee mondiale beleidsnetwerken die actief zijn op het terrein van mededinging: de Organisatie voor Economische Samenwerking en Ontwikkeling (OESO) en het ‘International Competition Network’ (ICN).

Er zijn ten minste twee belangrijke redenen waarom onderzoek naar deze externe dimensies van Europees beleid van belang is. Ten eerste is het interessant om beter te begrijpen welke rol de EU kan spelen in een mondiale context, om vervolgens deze rol te kunnen versterken in het belang van haar burgers. Ten tweede is zulk onderzoek ook belangrijk voor scenario’s van toenemende interne fragmentatie van de EU, bijvoorbeeld in de context van Brexit. Als we weten hoe op de EU geënte regels worden toegepast buiten de EU zelf, kan dit ons helpen in de relatie met onze (nieuwe) buurlanden.

Het onderzoek kijkt verder dan alleen de extraterritoriale toepassing van Europese mededingingsregels, of zelfs dan de wet- en regelgeving in landen die geen EU-lid zijn en het formele lidmaatschap van mondiale beleidsnetwerken. Sterker nog, de nadruk ligt specifiek ook op de implementatie van de mededingingsregels in de nationale context en op de daadwerkelijke afstemming die plaatsvindt in beleidsnetwerken. Deze realiteiten zijn wellicht nog belangrijker dan de regels zelf en de lidmaatschapsstatus, omdat we hiermee kunnen zien of en hoe beleid in praktijk wordt toegepast, en tot op welke hoogte de veronderstelde invloed zich ook echt manifesteert in een mondiaal beleidsnetwerk.

De theoretische en empirische perspectieven waarop dit proefschrift voortbouwt zijn de literatuur over ‘external EU governance’; de literatuur over de EU en global governance, en de juridische literatuur over externe dimensies van Europees beleid (inclusief maar niet beperkt tot extraterritoriale toepassing van het Europees mededingingsrecht). In het algemeen kunnen we zeggen dat de eerste twee perspectieven de nadruk vooral leggen op de link tussen interne en externe dimensies, in plaats van dat zij deze als losstaande elementen beschouwen. In het bijzonder wordt vaak gekeken naar de institutionele context, en hoe de institutionele context in de EU ‘matcht’ met die van andere landen en van mondiale beleidsnetwerken. De juridische literatuur volgt de ontwikkelingen in beleid en jurisprudentie
op de voet en verschaft zo een empirisch perspectief op externe dimensies van Europees mededingingsrecht.

Gezien de veronderstelde nadruk op de link tussen de interne en externe dimensies van Europees beleid, begint het proefschrift met een analyse van de implementatie van het Europees mededingingsbeleid in de EU zelf. Mededinging is een beleidsterrein waar de EU exclusieve bevoegdheden heeft en waar de Europese Commissie zelf direct Europese regels toepast. Het is bovendien een in de regel weinig omstreden beleidsterrein dat integratie van de interne markt sinds lange tijd succesvol heeft ondersteund. Het blijkt echter dat de implementatie van mededingingsbeleid in de EU minder eenvormig is dan men over het algemeen veronderstelt. De belangrijkste bijdrage van het proefschrift is de stelling dat een bepaalde graad van interne diversiteit geen negatief, maar juist een positief effect heeft op externalisering van Europees beleid.

Deze interne diversiteit manifesteert zich op verschillende manieren. Van een initiële focus op barrières in de interne markt die worden opgeworpen door bedrijven, is er in de loop van de tijd ook meer aandacht gekomen voor barrières die worden opgeworpen door de overheid. En van een gecentraliseerd model van toezicht door de Europese Commissie, worden de Europese mededingingsregels nu ook direct toegepast door nationale mededingingsautoriteiten, die met elkaar en met de Commissie samenwerken in het ‘European Competition Network’ (ECN). Tot slot zijn de instrumenten die handhavers tot hun beschikking hebben gevarieerd geworden, en zijn er nu bijvoorbeeld meestal expliciet mogelijkheden tot zogenaamde alternatieve vormen van handhaving.

De landencasus Noorwegen en Turkije laten zien dat interne ontwikkelingen in de EU hun weerslag hebben op externe dimensies. De Noorse mededingingsautoriteit kan bijvoorbeeld succesvol deelnemen aan de discussies in het ECN en daar zaken agenderen die in de Noorse handhavingscontext van belang zijn. Het is dan ook jammer dat de Turkse mededingingsautoriteit niet kan participeren in het netwerk, gezien dit waarschijnlijk zou hebben geleid tot betere coherente met Europese regels in een periode waarin toetreding tot de EU zeer onwaarschijnlijk is geworden. Vooral in het geval van Turkije is de achterliggende motivering voor toepassing van de mededingingsregels een belangrijke factor, omdat deze de drijfveren voor zowel de export van de EU-zijde als voor de import aan Turkse zijde beïnvloedt bij gebrek aan een realistisch toetredingsperspectief. Een andere voorwaarde voor succesvolle externalisering in beide landen is de binnenlandse context, en dan met name de administratieve capaciteit van de instellingen en de materiële drijfveren van lokale spelers.

In de hoofdstukken die gaan over de OESO en het ICN zien we dat de interne dimensie van het mededingingsbeleid vooral belangrijk is doordat de toename aan Europese nationale autoriteiten die de Europese regels toepassen heeft geleid tot een grotere invloed van
deze regels op de mondiale beleidsnetwerken. Ook het gevarieerde instrumentarium voor toezicht en handhaving is relevant, gezien deze netwerken zich beiden in essentie toelogen op het identificeren en delen van ‘best practices’ en niet op samenwerking in concrete zaken. Desalniettemin laten deze casus zien dat het engagement van Europese mededingingsautoriteiten hier vooral afhangt van wat zij daar uiteindelijk voor terugkrijgen in termen van output. Deelname wordt dus niet zozeer gemotiveerd door een (materiële of ideële) behoefte om Europese mededingingsregels te verspreiden of om bij te dragen aan economische ontwikkeling elders. De OESO is relevanter voor Europese autoriteiten dan het ICN, met name omdat de OESO zich specifiek toelegt op ondersteuning voor contexten waarin al veel bestaande ervaring is met handhaving en toezicht op het gebied van mededinging.

De conclusie van dit proefschrift is dat implementatie van Europees mededingingsbeleid in de EU meer gevarieerd is dan verwacht. Het proefschrift beargumenteert dat dit geen negatief effect heeft op het gebruik van dit beleid buiten de EU zelf; zoals de casus laten zien is een marge van variatie juist een positieve invloed op de externalisering naar nabijgelegen landen en internationale beleidsnetwerken. Door dat meer expliciet te erkennen kan de EU bewuster dan momenteel het geval is mededingingsbeleid buiten haar grenzen beïnvloeden en daarmee mondiaal beleid op dit gebied verder vormgeven.
ik knip iets
heel erg moeilijk uit
het wordt misschien
een olifant
nee toch niet
de slurf valt eraf
het wordt een krokodil
of is het een giraf

Hans & Monique Hagen, Olifant
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This dissertation is about competition policy as an example of external EU governance. Competition policy has traditionally played a key role in European integration and is arguably one of the EU’s strongest assets. More recently, EU competition policy has also become a main point of reference for regulatory competition regimes worldwide. What are the characteristics that make it so successful? This research looks at the governance of competition policy within the EU and then assesses the EU’s influence on competition policy in Norway and Turkey and on the OECD and the International Competition Network. It argues that a certain degree of internal diversity, rather than full harmonization at EU level, has a positive effect on the externalization of competition policy to non-EU countries and global forums.