

Chicago-Kent College of Law

Scholarly Commons @ IIT Chicago-Kent College of Law

All Faculty Scholarship

Faculty Scholarship

January 2001

Modernizing European Competition Law: A Developmental Perspective

David J. Gerber

IIT Chicago-Kent College of Law, dgerber@kentlaw.iit.edu

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/fac_schol



Part of the [Antitrust and Trade Regulation Commons](#), [Comparative and Foreign Law Commons](#), and the [European Law Commons](#)

Recommended Citation

David J. Gerber, *Modernizing European Competition Law: A Developmental Perspective*, 22 Eur. Competition L. Rev. 122 (2001).

Available at: https://scholarship.kentlaw.iit.edu/fac_schol/241

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

Modernising European Competition Law: A Developmental Perspective

David J. Gerber

The European Commission's proposals to "modernise" the European competition law system are of central importance for the future of European integration, not only because competition law plays a role in the legal framework of integration, but also because the proposals are often viewed as a test case for future reform efforts in Europe. The final form of the proposals will be debated for at least another year or two and perhaps much longer. When changes are enacted, as all agree they will be, an expanded number of officials, judges, lawyers and business decision-makers will either be involved in the implementation of the modified system or need to understand the factors that are influencing its operation.

European competition law experience is critically important for both evaluating and implementing the proposals. A developmental perspective uses that experience to reveal structures and forces operating on and within the system and to provide guidelines for implementing changes in it. It is particularly valuable, because the central challenges of competition law in Europe today are in many ways similar to those it has faced throughout its development. Competition law in Europe has, for example, always had to serve the overriding goal of European integration, and the planned expansion of the European Union will assure that this integration goal remains paramount.

My main objective in this essay is to view the proposals from such a perspective—to refract the current situation through the accumulated European experience of using law to protect competition. I refer frequently to my *Law and Competition in Twentieth Century Europe* (1998) [hereinafter, *Law and Com-*

petition] and the story of European competition law development that I offer there.¹ Note that I use the term "European competition law system" here to refer to both E.U. and Member State laws, because they are closely interrelated. Changes in one part of the system tend to have impacts on other components and on the relationships among them.

The modernisation proposals

In *Law and Competition*, I noted that the deepening and broadening of European integration seemed to call into question the continuing effectiveness of the competition law system. Modest efforts to decentralise competition law decision-making were undertaken in the mid-1990s, but major structural changes were not proposed until 1999, when the Commission presented its white paper on the modernisation of the system.² This served to ignite debate on the issue, and in September 2000 the Commission formally proposed major changes to the procedural and jurisdictional mechanism of competition law in Europe.³

On one level, the timing of the modernisation proposals is curious. Even as many competition law "experts" have criticised the system's operations in recent years, E.U. competition law has been achieving impressive results. The Commission's confident and firm stand in merger cases has been widely acclaimed as a sign of its independence and strength. In addition, revision of the substantive law on vertical restraints in 1998–99 has similarly attested to its flexibility and willingness to change.⁴ The Commission's decision to pursue major changes is not driven, therefore, by widespread public dissatisfaction with its accomplishments, but by concerns about its future.

The proposals centre on two basic changes in the way competition law is enforced. One is elimination of the notification system that has formed the institutional framework of European competition law almost since its inception. This system requires that when firms enter into an agreement that may be prohibited under Article 81(1) of the E.C. Treaty

1 David J. Gerber, *Law and Competition in Twentieth Century Europe* (Oxford University Press, 1998; pbk, 2001).

2 European Commission, White Paper on modernisation of the implementing Articles 85 and 86 of the EC Treaty [1999] O.J. C132/1 (hereinafter, White Paper).

3 Proposal for a Council Regulation implementing Articles 81 and 82 of the Treaty, COM (2000)582 final, available at <http://europa.eu.int/comm/competition/antitrust> (hereinafter, Modernisation Proposal).

4 Reg. 1216/1999 [1999] O.J. L148/5.

because it restricts competition, they must notify the agreement to the Commission if they wish to obtain an exemption from that prohibition. An agreement that has not been notified is effectively precluded from receiving an exemption. The other core change is elimination of the Commission's monopoly on granting such exemptions (Article 81(3)). According to current law, only the Commission can issue such exemptions. Since the European courts have interpreted Article 81(1) very broadly, the issue of who is authorised to grant exemption takes on great importance.

These two changes would significantly alter the way competition law operates in Europe.⁵ They would fundamentally change the basic posture of the system from *ex ante* to *ex post* enforcement—i.e., the law would now be enforced primarily in relation to past conduct rather than in the context of screening future conduct. It is important to note here that in practice the change may not always be as sharply etched as it appears, because *ex post* enforcement is already a prominent part of the Commission's enforcement efforts.

More fundamentally, the changes would greatly expand the roles that national authorities and national courts play in the operation of the system. National authorities would become the primary enforcement officials, subject only to guidance from and, in some cases, ultimate control by the Commission. National courts would become heavily involved in competition law litigation, because they would have the capacity to exempt firms from the prohibition of Article 81(1), and this would undoubtedly increase the number of private suits in those courts.

The Commission supports its proposals with three interrelated claims. The first relates to efficiency. According to the Commission, the notification procedure wastes scarce resources because officials have to review notifications, and (in addition to being rather drab) this process seldom produces valuable information. The second factor is the anticipated expansion of the European Union during the next few years. Even if the situation may be manageable today, the Commission argues, the current structure could not operate effectively if six or 12 additional states were to become members of the Union, as is currently planned. Thirdly, the principle of subsidiarity requires efforts to decentralise decision-making,

wherever possible moving decisions from Brussels to the Member States.

The Commission's basic position is that regulation 17 and the mechanisms it provides were appropriate for the circumstances in which they were introduced, but that they are no longer appropriate.⁶ Changed circumstances, it claims, justify its proposals for change.

Note that the proposal leaves large parts of the current system unchanged or little changed. The changes do not, for example, affect substantive law; they are entirely institutional and procedural. In addition, they have little direct impact in several important areas of conduct such as merger controls.

Evaluating and designing change: structures and forces

In order to analyse and evaluate the proposals, it is necessary to identify the structures and forces that will condition the operation of a modified system. This can only be done by examining the competition law experience that has generated them.

Structures of thought

Patterns and structures of thought are particularly important for these purposes, because they will continue to shape the decisions of actors within the system. These include, *inter alia*, concepts, values, preferences and the patterns of relationship among them. Often they operate as tacit assumptions that are revealed only in the context of their use.

Economic constitutionalist thought (especially the German ordoliberal school) has, for example, been an important influence on the development of competition law in both Germany and the European Union.⁷ It is a well-organised, highly developed idea-system with its own vocabulary, values and conceptual structures. Once one knows what that body of thought contains and sees how it has exercised influence, much that is otherwise opaque becomes perceptible. As one reviewer of *Law and Competition* has suggested, for example, it explains a great deal about the resistance of important individuals and

⁵ In its proposal to the Council, the Commission included for the first time a jurisdictional rule that calls for the exclusive application of Community law wherever a restraint of trade affects trade between the Member States. This would enhance the impact of the proposed systemic changes.

⁶ White Paper, p. 7.

⁷ See, e.g., David J. Gerber, "Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the 'New' Europe" (1994) 42 *Am.J.Comp.L.* 25.

groups within Germany to the modernisation proposals.⁸

Similarly, basic conceptions of competition law are fundamental to understanding how those within the system make decisions. Two such conceptions have been in tension throughout the development of the system, and they are likely to remain so. In one, competition law tends to be viewed as a device for framing and protecting private rights and relationships. In the other, it is understood primarily as a tool of economic regulation. These conceptions clash in fundamental ways, and they influence decisions about what to do in specific situations.

A third example involves conceptions of the role of competition law. These have shaped the proposals for reform, and they will influence support for them as well as the manner and success of their implementation. They create expectations that are central to all decision-making within the system, and they are often difficult, if not impossible, to perceive other than in the context in which they have developed.

The basic role of competition law is, of course, to protect competition from restraints. Even in unitary systems such as United States antitrust law there is often uncertainty about what that means. The uncertainty increases, however, in the multi-layered system of European competition law, where there are at least four basic conceptions of what it means to protect competition.⁹

One centres on economic efficiency—the idea that competition law should be governed primarily by principles of optimum resource allocation and wealth-maximisation. Such goals have always been part of the system, but social and political factors have often caused them to be expressed indirectly—in language that obscures their content. Understanding the forces at work in the system requires knowing how these efficiency goals are understood and expressed as well as the factors that shape the language used. A second conception of competition protection centres on economic freedom. Here the issue is the extent to which restraints on competition restrict the decisional opportunities of economic actors. This concept is part of the heritage of classical liberalism, and it continues to exercise a strong, if sometimes concealed, influence on competition law decisions in many parts of the system, including E.U.

competition law. A third view centres on economic power, using competition law to prevent firms from using their economic power to undermine competitive (and sometimes political or social) structures. This goal is often associated with German neo-liberalism and economic constitutionalist thought, but its influence is much broader, and it has become part of the perceptual and evaluative tools of the system. Finally, protecting competition is often understood as a means of destroying and weakening obstacles to economic change and development. In many countries (e.g. Sweden) this goal has often been prominent,¹⁰ and the current and future emphasis in Europe on reducing barriers to economic development is likely to reinforce its prominence.

But in Europe competition law must also serve the goal of integration, a goal whose importance is likely to increase in coming years. This goal is related to the protection of competition, but not coterminous with it, and it often leads to different outcomes. For example, it has led to a relatively restrictive approach to vertical restraints, because such restraints are often used to partition markets along national boundaries. Recent relaxations of those restrictions assume that these boundaries have become less economically significant,¹¹ but the expansion of the European Union may call that assumption into question.

Competition law systems in Europe sometimes also pursue a third type of goal, one which is “regulatory” in the sense that it seeks to shape the characteristics of economic activity or to acquire information for policy purposes. Notification requirements are often, for example, designed to provide both general and specific information about economic developments, and many systems specifically allow decision-makers to take economic policy goals other than the protection of competition into account in applying competition laws. The role of these regulatory goals has been diminishing in recent years, but it cannot be ignored, and the expansion of the European Union may combine with changing economic circumstances to re-emphasise it.

How decision-makers conceive the role of competition law will largely determine the direction of competition law development, and thus it is essential to identify these goals and their relationships. The amalgam of objectives that has contributed to both economic and political integration and extraordinary economic development during the last four decades is embedded in the process of European integration and

8 Claus-Dieter Ehlermann, Review of David J. Gerber, *Law and Competition in Twentieth Century Europe* (2000) 35 *Euro-pace* 297.

9 For discussion, see, e.g., Claus-Dieter Ehlermann and Laraine Laudati (eds), *Proceedings of the 1997 European Competition Law Annual Conference* (1998).

10 See, e.g., *Law and Competition*, pp. 194–207.

11 See n. 4 above.

needs to be understood in relation to it. In expanding the role of national officials and judges in the system, the modernisation proposals will increase uncertainty regarding these goals and their interrelationships, and this in turn is likely to destabilise the decisions that the system produces. The proposals appear to assume that the system's goals are well-defined and thus that those who will make decisions in the modified system can easily identify and follow them. The history of competition law in Europe suggests otherwise.

Participants and their agendas

The agendas of those who influence decisions within the system are as important as the goals associated with the system as a whole, and thus identifying and analysing them is a key to evaluating the proposals and anticipating their respective impacts. Often such agendas are not announced, but become perceptible only by looking at the decisions that are actually taken.

These agendas are often complex, relating to varying time-frames and specific situations. They also vary in the degree to which they are shared with other participants in the system. For example, decision-makers will often be guided by what they consider "best" for the future of the European Union because they identify their own interests and/or the interests of the institutions in which they function with the "success" of European integration. In other cases, their interests are not shared with other participants and may conflict with them, as where a state seeks to protect important economic interests from the application of Community law. A few examples illustrate the potential value of a developmental perspective in identifying these agendas and their interrelationships.

The agenda of the Competition Directorate ("DG-Comp") is central to this analysis,¹² because it has developed the current modernisation proposals and is leading the drive to enact them. Its decisions in this regard are a response to particular circumstances, and thus those circumstances provide a basis for analysing the proposals. The modernisation proposals and their timing undoubtedly reflect its leaders' assessments of what is the "best" policy. Yet other factors also play roles in its decisions. DG-Comp has, for example, long enjoyed a high level of prestige and a concomitant leadership role within the Commission. This may have encouraged it to act

boldly when the embarrassments of the Santer Commission led to widespread loss of morale in Brussels. It may also have influenced the timing of the proposals. It was probably not an accident that the white paper was issued in the waning days of the Santer Commission.¹³ These factors may also have encouraged it to attend more closely to its own role in the modified system than to the role of other (e.g. judicial) components of the system. This type of information identifies areas that may deserve particular attention in evaluating the proposals.

The agendas of other actors within the system will largely determine the future of the modernisation proposals as well as the ways in which they are implemented and the impact they have. For example, the European Court of Justice (ECJ) will almost certainly have to determine whether the proposals are consistent with the E.U. treaties, and it will (in co-operation with the Court of First Instance) have to fashion legal doctrine relating to a host of new issues generated by the proposals. The court's frequent recourse in the past to competition law as a tool for promoting integration, particularly during periods of relative stagnation in the integration process, suggests that it is likely to be supportive of the proposals and to interpret them expansively rather than restrictively.

The European Parliament presents a different type of example. Because it is a relatively new major player on the competition law stage, one might expect there to be few bases for predicting its actions. Yet even here a developmental perspective is valuable, because it reveals the sometimes complex agendas of Europe's political parties in competition law matters. These agendas are now being pursued in the Parliament, and thus knowledge of them represents a valuable source of insight into the factors at work there.¹⁴

The Member States will also play more prominent roles in the modified system. Their own courts and administrative agencies will become principal players in the system, and this will increase both incentives to influence their decisions and opportunities to do so. In some states, competition law decisions have often been influenced by national interests, and thus it is

¹² The Commissioner for competition (currently Professor Mario Monti) is primarily responsible for competition policy and thus leads DG-Comp's activities.

¹³ For discussion of this period from the perspective of the then Commissioner for competition policy, see Karel Van Miert, *Markt Macht Wettbewerb* (Stefanie Schäfer tr., 2000), pp. 353–86.

¹⁴ The expanded role of the Parliament was evident in November 2000, when the Commission and the Parliament jointly hosted a major conference on the modernisation proposals in Freiburg, Germany.

important to know where this happens, to what extent and under what circumstances.

The agendas of those directly affected by competition law are another part of the story. For business enterprises, the primary goal is to reduce costs and uncertainty, but in the context of European integration this goal takes on often unexpected dimensions. In some cases, for example, firms have supported E.U.-level competition law as a way of "escaping" from existing or anticipated national regulatory regimes, whereas in others they have preferred national competition law systems over E.U. law, sometimes even where the national system is at least arguably more restrictive than E.U. law.

The proposals will also make the consumer agenda more important. Consumers have seldom organised effectively to exert direct influence on competition law in Europe. Brussels has generally been difficult to reach, and often domestic competition law systems have not been sufficiently important to warrant such efforts. Under the modified system, however, the costs for local and national consumer organisations of reaching and influencing decision-makers will diminish and the opportunities to do so will dramatically increase.

Finally, in a system of complex power relationships and diffused decisional structures, a small group of "experts" can influence decisions in ways that are important and often concealed, and this has been true in the development of European competition law. In the early years, German economists and lawyers associated with economic constitutionalist thought provided this type of leadership. Although the position of that group is not as strong as it was, it remains important in many contexts. In addition, other more international and less well-defined expert groups have formed, and they often have significant influence.¹⁵ Commission officials acknowledge that such groups have been an important impetus for the modernisation proposals.

Sources of power and influence

As important as the agendas are, the sources of power to achieve them are equally critical in assessing the operations of the system and plans to change it. The power relationships within the system are complex and often opaque, and knowledge of how they have

evolved is often necessary to recognise their contours and force.

The value of competition law as a source of power for E.U. institutions illustrates the point. For both the Commission and the ECJ, competition law has provided status and power. Its direct impact on economic activity gives the Commission visibility, attention and influence. In most other areas of its activity, the Commission must work through other E.U. institutions or Member State governments to influence conduct, but in the competition law area it directly shapes the norms applicable to businesses and takes direct enforcement action. Competition law has also been an important tool for advancing the agenda of the ECJ, which has often asserted its leadership role in the process of European integration through decisions in competition law cases.

For both, competition law has been a source of power because it has been instrumental in the integration process. The Commission has often enjoyed political support for its competition law initiatives because they have been perceived as necessary to dismantle barriers to trade among the Member States, an overriding goal of all institutions within the European Union. Similarly, the ECJ has often used competition law's role in economic integration in developing the court's role as a "motor of integration". The proposed changes will alter this interplay between the power of institutions and the roles of competition law, and a developmental perspective provides a basis for assessing their impact.

The modernisation proposals would also change the power position of Member States. Not only will they have a greater stake in the operations of E.U. competition law, but they will also have enhanced opportunities to exercise influence on its operations. As long as the Commission has a monopoly on Article 81(3) exemptions, Member States can influence outcomes at the European level only by influencing the Commission, and the institutional structure of the European Union significantly limits their capacity to do so. Under the modernisation proposals, however, the courts and administrative bodies of the states will become the principal mechanisms for applying and enforcing Community law, and thus the relative power of Member States and the relative importance of their internal political landscapes will increase dramatically.

Capabilities

The effects of changes in the system will also depend on the knowledge and capabilities of those who play

15. Currently the two most notable of these centre on the annual conferences at Fordham University (organised by Barry Hawk) and the European University Institute outside Florence (organised by Claus-Dieter Ehlermann).

roles in it. Throughout the development of the current system, the Commission has sought to locate knowledge relating to E.U. competition law in Brussels, creating few incentives for Member State decision-makers to acquire such knowledge. The modernisation proposals represent a radical change of direction which rests on the assumption that national officials and judges will be able to acquire the requisite knowledge and capabilities relatively quickly. Such deficits in knowledge have been a frequent theme in Europe's competition law experience, and this experience can be of great value in identifying ways of dealing with the problem in the current context.

Implementing change: some lessons?

Modernisation will give Member State judges and administrators far larger roles in the European competition law system, and how they perform their roles will be a key to the success of the reforms as well as a major factor in the integration process. Here European competition law experience has much to offer as a source of guidance in shaping an effective implementation process.

Speed of change

The pace of implementation will be important. European integration has proceeded incrementally (if often fitfully), gradually overcoming political, epistemological and other barriers. It could hardly be otherwise, because the process requires decision-makers to make compromises regarding their own status, power and resources. The same applies to competition law. Decision-makers have proceeded cautiously in strengthening and expanding competition law, primarily because they have had to create and maintain political support and because they have had to educate both decision-makers within the system and those affected by it. Competition law represents a unique combination of juridical, economic and political issues that require time to understand, assimilate and apply effectively. History suggests that changes in the system should not, therefore, require too much too fast of those who will acquire new or heightened decisional responsibilities.

Conceiving the process

How national decision-makers conceive the implementation process and their respective roles in it is

likely to condition the future they shape for it. Two views of this process have been in tension throughout the development of competition law in Europe. In one, the development of competition law is seen as an essentially juridical process in which decisions represent the elaboration, clarification and implementation of a stable, normative framework for the relationship between government and private economic actors (a kind of economic constitution). In this image, those applying competition law are engaged in the patient process of giving meaning to the texts created by political decisions, and thus the focus is on developing effective methods and practices for interpreting and applying the laws.

A second conception of the process views competition law as primarily a policy instrument. Its rules and procedures are seen as tools for achieving political objectives; they represent an exercise of political authority, but they have no claim to "constitutional" status or fundamental importance. In this view, there tends to be less concern with the durability, internal consistency and stability of the normative regime and with developing methods and practices for generating consistent decision-making.

These two conceptions often lead to fundamentally different ways of making competition law decisions, and experience suggests that the effectiveness of the modified system may depend on which of them has the most influence on Member State judges and administrators. In the evolution of competition law in Europe, increases in the effectiveness and importance of competition laws have generally been associated with the increased prominence of juridical characteristics.

In general, therefore, we can expect that the greater the influence of a juridical conception of the implementation process, the more likely it is that the proposals will achieve the aims set for them, suggesting that the modernisation proposals should be complemented with measures designed to advance and anchor such a conception. These may include, for example, providing an enhanced role for one or more E.U. courts in reviewing and guiding the decisions of Member State judges, administrators and officials. Enhancing the role of legal processes will counteract the fear that the proposals place too much discretionary control in the hands of bureaucrats, and it is thus likely both to generate support for the proposals and improve their effectiveness. Such measures are likely to be particularly valuable in states that have had little experience with competition law. Note that this does not refer to a U.S.-style conception of

antitrust, but to the specifically European conceptions of competition law whose development is a central theme of *Law and Competition*.

Training the decision-makers

A third issue is related: training the decision-makers. Knowledge will be a critical factor in the operations of the modified system. What Member State decision-makers know and how they assess and apply what they know will to a large extent determine what they decide.

The relative lack of competition law knowledge and experience among those who will have responsibility for making competition law decisions may be the most significant obstacle to the success of the modified system.¹⁶ Member State judges, in particular, will frequently have neither knowledge nor experience in the area, particularly during the formative early years of the modified system.

The need to inculcate competition law knowledge has been a frequent theme in the development of competition law in Europe. At the E.U. level, it was a central concern of the competition directorate for the first decade of its existence, and each expansion of the European Union's membership has given it prominence again. Moreover, it has often been an important theme in the development of national systems (such as, e.g., the German competition law system). That experience teaches, above all, that the process is likely to be more difficult than it might appear and to require not only very close attention, but also significant resources.

The question of "what" to learn should not be viewed too narrowly. Technical legal knowledge is obviously necessary and fundamental. Judges and administrators need to know the applicable texts and how they have been interpreted, but this is only part of what needs to be learned. Competition law presents special knowledge issues, because it involves a variety of interrelated goals, values and perspectives, and because the economic causation issues that are central to its application are often complex and uncertain. A consistent and coherent application of Community competition law will require careful analysis of current practices, assumptions and methods and the extent to which they are shared among the many institutions in which competition law decisions will be taken.

¹⁶ The importance of this issue will diminish over time, but probably only very gradually, and it is unlikely to disappear completely, because most national court judges will rarely, if ever, face competition law issues.

The Commission recognises that such learning is critical to the success of its modernisation proposals, and it has accordingly urged the need to develop a "network" among the system's decision-makers, a set of personal and institutional relationships that will facilitate the transfer of information and views.¹⁷ Such networks can be of great importance in the development of competition law (as, e.g., in Germany), but experience suggests that they must be carefully *constructed*. Mere transfer of information is not likely to be enough; nor is political and administrative direction and leadership. If European competition law experience is a guide, intellectual and moral leadership are likely to be at least as important.

Another lesson from European experience regarding knowledge issues is that they fall into two quite distinct categories. One relates to the effectiveness of the decision-making process, as just discussed. Do the decision-makers know enough to make decisions in ways that are both justifiable in terms of the system's goals and methods and generally consistent with the decisions being made in other parts of the system? But knowledge is also an element of power in the system. Throughout the development of competition law in Europe, the Commission's power has rested in part on its control of knowledge of Community competition law. Its proposals for change represent a radical and uncharted revision of this power relationship. The diffusion of knowledge among a vastly expanded group of decision-makers is likely to diffuse the power currently held by the Commission, and this will change its relationships to other E.U. institutions such as the Parliament and the courts as well as to Member State competition authorities.

Protecting the decision-makers

Regardless of their knowledge and training, national authorities and judges will be subject to external pressures both public and private. The economic interests at stake in this area are often substantial and sometimes enormous, and they thus create powerful incentives to influence those decisions. The problem is greatest with respect to administrators, who are typically less protected from such influences than are judges. This is particularly important in Europe, because administrators have played, and will continue to play, the central roles in the application of competition law in Europe. To the extent that such efforts to influence competition law decisions are

¹⁷ See Modernisation Proposal, p. 6.

successful, or perceived to be successful, they will reduce the effectiveness of competition law institutions and undermine their role in promoting integration, and thus protecting the decision-makers from such influences should be a major goal in restructuring the system.

This issue has been a frequent theme in the development of European competition law. It has also been particularly difficult and sensitive. Conflicts over it have sometimes been bitterly fought, but sometimes carefully concealed. This experience points to the need for measures such as job security for administrators, mutual support among competition law authorities for specific decisions, and legal standards that minimise the scope of discretion.

Shaping the process: incentives

Incentives will be important in shaping the ways that judges and administrators operate this system, and the history of competition law in Europe has repeatedly demonstrated the importance of shaping those incentives. Outside pressures can never be completely eliminated, nor can the lure of current or future economic benefits from those affected by competition law decisions. Experience tells us that competition law systems must, therefore, provide rewards designed to induce decision-makers to direct their decisions to the goals of the system. These may be financial, perhaps in the form of economic support from E.U. coffers for salaries of competition officials under certain circumstances. They may also be less direct. For example, bureaucratic, social and intellectual status have all been factors in the success of competition law in some countries, as has dependable political and institutional support, especially for specific and sensitive decisions. The Commission should seek to build these types of incentives into the system.

Political support

Finally, the development of competition law requires the cultivation of political support. In much of Europe, competition law is not deeply anchored in either institutional structures or legal culture or personal and group value systems, and thus political support is indispensable for it to withstand economic and political pressures. Support for competition law has been drawn from a frequently changing interplay of political impulses. For example, at different times different institutions—sometimes the ECJ, sometimes

the Commission, sometimes particular political parties or intellectual groups in a given Member State—have had the power and the willingness to use it to develop competition law. In the highly complex interrelationships of today's Europe, recognising these sources of power and the factors that condition them is often difficult, but European experience with competition law is now extensive enough to help to identify and assess them, and it will be important to use that knowledge to cultivate the political support necessary to make the system work effectively.

Conclusion

The impending changes in the landscape of competition law will not change the basic themes of European competition law development. The patterns of five or 30 years ago are to a large extent those of today, and they will remain tomorrow, because the fundamental problems will remain basically the same. What will change is the decision-making process. A large group of national officials and judges will be drawn into that process, and they will be asked to perform important and sometimes unfamiliar functions within the system. The story of competition law's development will become critically important for them as well as for those who seek to influence or predict their decisions.

In *Law and Competition*, I sought to demonstrate the importance of viewing European competition law experience on its own terms—as a set of practices, institutions, and patterns of thought developed by Europeans to meet European needs, and it is important that the changes be understood as modifications of an evolving European “model” of competition law. Competition law in Europe is not, contrary to popular myth, an import from the United States or the mere extension of administrative controls to a new area, and the current proposals do not represent the adoption of a U.S. model of competition law. To assume otherwise misreads (or disregards) the history of European competition law and risks not only misinterpreting European decisions, but distorting them as well.

Experience with competition law in Europe should be an important part of the debate over the modernisation of competition law and a valuable source of guidance for all those who will make decisions regarding it, operate within it or seek to understand it. The extraordinarily rich and complex tapestry that is European competition law today can only be understood by looking at how it has been woven, and

there has never been a greater need for such understanding. An evolving sense of community, shared values and knowledge, and common goals establish the prerequisites for an effective competition law system, but shared experience provides the cement that can hold those elements together, and it can perform that function only if those involved have a rich understanding of that experience.