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Anthropology, History and the "More Economic Approach" in European Competition Law - A Review Essay

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In several works over the last decade, Wolfgang Fikentscher has reminded us that there are ways of viewing competition law that need not begin and end with economics – its concepts, its language, and its science-based normative stance. Discussions of competition law in the United States and increasingly in Europe generally dismiss or marginalize views of competition law that are not circumscribed by economic science. In the works reviewed here,¹ Fikentscher takes issue with the so-called "more economic approach" to law, particularly, competition law. As he has said on other occasions, he favors "a less economic approach" to competition law. Many in Europe and elsewhere may find value in some of his perspectives and insights, regardless of whether they accept his conclusions. Moreover, although his views clash with current orthodoxy in the US and Europe, they represent concerns that are far more frequently found in other parts of the world, but that are there often less fully elaborated.

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¹ The works by WOLFGANG FIKENTSCHER referred to here are a major book entitled "Culture, Law and Economics" (Carolina Academic Press, 2004); an expanded version of his final lecture (*Abschiedsvorlesung*) at the University of Munich law faculty published as "Wirtschaftliche Gerechtigkeit und Kulturelle Gerechtigkeit" (C.F. Mueller, 1997); and an article entitled "Intellectual Property and Competition – Human Economic Universals or Cultural Specificities" (38 International Review of Intellectual Property and Competition Law 137–163 (2007)).

Wolfgang Fikentscher has been a leading scholar of German competition law for about half a century. He has witnessed and participated in the extraordinary development of competition law in Germany, and his work in this area has often related German competition law experience to developments in competition law on the European level. He has also long been an important scholar of comparative law issues, and especially over the last two decades he has focused on legal anthropology and the insights it can provide into the rules and content of competition law. His scholarship is rooted in a profound knowledge of European legal history, the intellectual currents in competition law in the twentieth and now the twenty-first century, and deep anthropological awareness of related issues in many parts of the world. This combination of factors has shaped the perspectives he brings to the debates about the "more economic approach" to competition law in Europe.

For Fikentscher, the "more economic approach" gives economics too-central a role in competition law. Moreover, the form of economics that is used in that policy package is, in his view, inappropriate to the tasks of competition law. He argues for using a different form of economics in competition law – one that is not as totalizing as the neo-classical economics that is the core of the more economic approach. His anthropological perspective is prominent in these arguments. He also argues that the norms of competition law should also reflect values other than those of economics. Here his views reflect European, especially German, experience during the twentieth century.² He urges that competition law not abandon its concerns for providing protection against abuses of power that may limit the capacity of less powerful enterprises – whether domestic or foreign – to compete. Issues of economic freedom and opportunity to participate in the economy undergird this set of arguments.

Though written before the economic crisis of the 2008, the works discussed here and the insights they contain have been given added poignancy by that economic upheaval and the questions it has raised. These events have increased awareness everywhere of the limits of economic knowledge and of the need for a more balanced relationship between law and economics. I would like to comment on a few of these works in light of the debates about the direction of competition law development, not only in Europe, but also on the global level, and I would like to take this opportunity to do so.

I. Anthropology, the Social Market Economy, and Perspectives on the More Economic Approach

The works to which I have referred in this brief essay as well as much of Fikentscher's recent scholarship are primarily concerned with the role of economics, specifically neoclassical economics, in law, especially competition law. While economic issues have always been an important part of

² For discussion of these developments, see DAVID J. GERBER, "Law and Competition in Twentieth Century Europe: Protecting Prometheus" (Oxford, 1998; pbk, 2001).

competition law discussions in Europe, the role of economics as a science in shaping and implementing the norms of competition law has been given new form and new urgency by the interaction of two factors. One is the emergence of the so-called "more economic approach" in EU competition law. The other is the requirement introduced in the modernization reforms of 2004 that EU Member States apply EU competition law to most conduct that might be considered anti-competitive. This allows EU institutions basically to dictate competition law rules throughout the EU, provided that they are accepted by the European courts. The convergence of these two factors means that the conception of competition law favored by the officials of the European Commission – i.e. here the "more economic approach" – is imposed throughout Europe.³ In this conception, neo-classical economics plays the central role in determining whether conduct violates the competition laws. Put another way, it uses economics as the normative reference point for competition law. At its most basic, this view claims that if conduct leads, (or can reasonably be expected to lead) to an increase in price above a competitive price, it violates the law; if it does not lead to such an increase, it does not violate the law. In this conception, the term "consumer welfare" is often used to refer to this price-based standard. For Fikentscher, this approach is misguided, and he is not alone in Europe in expressing these concerns. In the following paragraphs, I identify central threads in Fikentscher's arguments, and in the following section I comment briefly on some of them.

A. Neo-Classical Economics and Competition Law: The Wrong Tool for the Job?

In Fikentscher's view, neoclassical economics has significant deficiencies as a guide to decision-making in competition law. For example, he assails the basic conception of markets on which neo-classical economics is based, claiming that it represents an inappropriate foundation for competition law. For Fikentscher, the idea that an abstract conception of markets should be used as the basis of analysis is wrong. For him, there is no such thing as an abstract market, because all markets are "individual" (or "subjective"). He argues that competition law should take account of the individual characteristics of markets, and that if it does not, it cannot be grounded in reality and thus cannot serve as an appropriate reference point for competition law norms.

In particular, neo-classical economics does not, in his view, take adequate account of time and place. It is static and does not reflect the passage of time, he writes, and thus it is unable to take into account the dynamics of particular markets. It also cannot account for the vast diversity in the characteristics of markets, especially outside the US and Europe. As an anthropologist, he argues that each market has its own characteristics and dynamics, and thus

³ I analyze these forms of modernization more fully in DAVID J. GERBER, "Two Forms of Modernization in European Competition Law", 31 *Fordham International Law Journal* 1235–1265 (2008).

the rivalry on each market differs correspondingly, depending on the many influences of culture, social dynamics and politics. Given that competition is about "rivalry", and rivalry takes differing forms according to the market on which it takes place, the neo-classical concept of markets cannot take account of the fundamental characteristics of the process that it purports to protect. In Fikentscher's view, this makes neo-classical economics a distorted and inappropriate normative frame for competition law.

B. The Centrality of Justice

A second major theme confronts the central role given to economics in the more economic approach. For Fikentscher, law is, or should be, about justice, and this applies to competition law as well. As he sees it, this means that it should take account of issues such as economic freedom and the right to participate in economic life. Competition law, he says, is intended to protect all in the economy and society – not only consumers, but also, for example, small and medium-sized enterprise producers and all who are affected by environmental degradation. A competition law that is limited to the specific issue of consumer welfare (as defined by neoclassical economics) is too narrow. It misses the point of competition law. In particular, he argues that justice requires respect for diversity. It must protect the rights and capacities of others – whether domestic or foreign – to shape economic relations in their own ways, regardless of whether those ways conform to the practices of markets in the US and in Europe. In this context, he urges respect for other conceptions and types of markets than those that fit neatly into the models of neoclassical economics.

C. Antitrust and the Limits of Power

According to Fikentscher, this justice-orientation of competition law also calls for a focus on power relationships. He asserts that protecting the weak against abuses of power by the strong is or should be a central goal of competition law. Competition law should combat uses of power that interfere with the freedom of firms to compete and that give an unearned and undue advantage to larger and more powerful firms in the rivalry for economic resources. This theme has run through much of competition law thought and practice in Europe until very recently. Although it is largely inconsistent with the more economic approach in its current form, there are vestiges of it in European competition law, especially in the law relating to dominant enterprises, and it represents arguably the most fundamental difference between US and European law.

D. Philosophical Underpinnings: Universals and Specificity

Fikentscher provides a remarkably broad-ranging philosophical underpinning for these propositions. He uses the many-centuries-old European debates about the validity of universals and the role of universals in normative thinking as a way of framing current debates about the "universal" claims of economics. In this analogy, neo-classical economics represents a "universal"

perspective that may have valid roles in some contexts, but that is not appropriate for applying law to specific fact situations involving significant diversity. The references to philosophical issues are numerous and often highly thought-provoking and insightful.

E. Style as Substance

Although difficult to identify with precision, the relationship between style and substance in these works is too important not to mention. Fikentscher's "voice" reflects a passionate concern that competition law should be used to prevent concentrations of power from being used to undermine economic and political systems. He fears the totalizing impact of allowing a particular form of rationality to control a society or, in this case, the legal machinery of an entire continent. This passion played a prominent role in supporting the development of competition law in Germany – and, to a lesser extent, elsewhere in Europe – in the decades after the Second World War. Having witnessed at close hand not only the consequences of allowing firms to acquire and use excessive economic power, but also the effects of a totalizing form of rationality in support of power-based objectives, Fikentscher and others of his generation of competition law scholars speak with a passionate concern for these issues.

Many of the above themes, perhaps all of them, are also rooted in the process of development of competition law in Europe since the Second World War. In particular, the successes of "social market economy" ideas in promoting economic development, social improvement, and European integration inevitably shape Fikentscher's views. As an anthropologist, Fikentscher is also keenly sensitive to the fact that the more economic approach is largely based on US models. From this perspective, it is an import into Europe, and it does not reflect European experience and European conditions.

II. Perspectives on the Fikentscher Perspective

These perspectives relate to central issues in European competition law development and in some cases even to the broader process of European integration. In this section, I offer some thoughts on Fikentscher's perspectives, seeking to place them in a broader context. In my view, some of his criticisms of the more economic approach are based on conceptions of the role of economics in the more economic approach that are too narrow, and aspirations for the role of competition law in Europe that are perhaps too broad. As an anthropologist, Professor Fikentscher will, I hope, find this effort to contextualize his work appropriate – and perhaps even worthwhile.

A. The Content of Neo-Classical Economics: A Fuller Picture

Fikentscher's dissatisfaction with neo-classical economics as a guide for decision-making in competition law is central to his criticism of the "more economic approach". If his depiction of neo-classical economics is not fully accurate, then his criticism of its role may lose force correspondingly. In my

view, his description of neo-classical economics is not as generous as it might be. Certainly, many economists would consider at least some aspects of that description to be a caricature, at best, and simply wrong, at worst.

I mention only two components of that description that might lead them to that conclusion. First, Fikentscher claims that neo-classical economics relies on concepts of perfect competition – i.e., the idea that markets are composed of multiple sellers and multiple buyers, none of whom can influence price. This description may have been accurate at other times in the history of economics, but today it is not. While it is true that basic models of economics use such simplifying assumptions and that these assumptions may influence economic thinking in some ways, economists today seldom stop with such simplified assumptions. Other factors may be included in economic analysis, and other assumptions about the nature of markets are typically built into the models of analysis that are used. Second, the economics profession has increasingly recognized and addressed some of the shortcomings of this perfect competition-based neo-classical analysis, especially during the last two decades. For example, game theory has been increasingly used to build into economic analysis some of the rivalry factors that Fikentscher considers important and that were not part of traditional neo-classical analysis. These include, for example, analyzing the potential effects on competitors where a dominant firm uses current conduct to signal likely future competitive moves. Another relatively new development in economic analysis is often called “behavioral economics”. In it, the analyst can modify the rational choice assumptions that underlie neoclassical analysis by using identifiable and verifiable behavioral variations. It can provide additional insights into the factors that shape the decisions of economic actors. To be fair to Fikentscher, it is important to emphasize that these developments have been relatively recent, and some of the items in the Fikentscher oeuvre reviewed here were written before some of these newer developments had become as significant as they are today.

B. Recalibrating the Roles of Economics

Fikentscher also assumes a narrower role for economics than many economists and competition law officials would recognize as appropriate. Many economists and competition officials are likely to view as oversimplified and perhaps misleading the role that Fikentscher ascribes to economics. He assumes that the role of economics is to present economic reality directly, and he faults neo-classical analysis for the obvious discrepancies between observable reality and some of the rational-choice-based behavioral assumptions that underlie it. Yet many, perhaps all, economists would accept that the models they use for analysis are based on assumptions that are at least sometimes inconsistent with observable reality. They see economic modeling as an analytical tool that provides a means of evaluating conduct. Its role is not, therefore, to represent reality, but to provide a metric for analyzing and sometimes predicting the probable consequences of conduct on markets. It provides a standard that can be used in most or all contexts as a basis for

predictions and assessment, but not necessarily an accurate representation of reality. By delineating economically rational conduct, economists can provide a means also for identifying conduct that is inconsistent with the model and thereby focus attention on explaining those inconsistencies.⁴

This recalibration of the role of economics takes some, but not all, of the force out of Fikentscher's criticism of the "universal" or totalizing effect of economic analysis. A single way of thinking and modeling economic conduct is still inherent in the scientific stance of economics, and it may tend to reduce interpretive flexibility. If, however, the role of modeling within the economics profession is taken into account, this totalizing effect takes on less ominous dimensions. The issue is, however, a central one, and it focuses on the need to evaluate carefully the precise roles economics should play in competition law. Debates in Europe (and, to a lesser extent, in the US) about competition law's future are infested with misunderstandings about this issue, and those branches of anthropology that deal with cross-cultural communication (here, for example, between economists and lawyers) could provide valuable analysis of these misunderstandings and their roles.

C. Justice & Economic Power

Fikentscher's claims about the goals of competition law may also call for further support. He claims that justice should be a factor in competition law, but he is so convinced that this is a necessary goal that he does not address the issue with as much circumspection as might be necessary to convince many who do not share that view. Much of the impetus behind decisions in both the US and Europe to give economics a more central role in competition law has been the conviction that "justice" provides too vague a criterion for competition law decision making. Fikentscher does not, at least in these writings, address these concerns directly, and without such a direct confrontation those who believe that ideas about justice should not play a role in competition law are not likely to change their views. In particular, Fikentscher's claims about the need to respect the diversity of markets in the international arena may have much potential value, especially insofar as they urge that economic power has differing dimensions and roles in many countries. Yet anthropological claims about difference and the requirements of justice may not be sufficient to cause reconsideration of these issues by those who consider a US-style economics-based approach to be the only justifiable basis for competition law.

D. The Changing Contexts of Competition Law in Europe

A more general issue relates to the changing contexts of competition law in Europe. As he notes in other contexts, legal systems have their own dynamics, and competition law in Europe is subject to the changing environ-

⁴ For discussion, see, e.g., LAWRENCE A. BOLAND, "The Methodology of Economic Model Building" (London, 1989).

ments and exigencies of the European integration process and of economic globalization. I note two factors that are, in my view, particularly relevant to Fikentscher's claims and to the broad and important issues that he raises. One is economic globalization itself. The move toward the more economic approach was, in part, a response to the perception that economic globalization required or at least called for such a move. An important policy emphasis in the EU was on "catching up" with the US – putting European firms in a position to compete effectively on global markets with US (and Japanese) firms.⁵ The economics-based view of competition law in the US appeared to promise greater predictability than EU competition law, at least in some areas, and it promised to reduce "interferences" in the European economy that were not economically justified. The more economic approach in Europe was thus driven by its perceived benefits for the European economy. Fikentscher pays little attention to this set of issues, but they are central to the entire issue and cannot be ignored.

A second factor is Europeanization. European competition law now governs basic economic relations and structures in a very large "community" of states and people, and within that community are a plethora of identities, tensions and boundaries. A major impetus behind the more economic approach has been the belief that it is more appropriate for this expanded and more economically integrated stage of EU development. It has been argued that the divergences in economic, cultural and legal traditions and experiences within Europe are now too extensive to rely on culturally loaded concepts such as fairness and justice. Economics is thus given a more central role, because it bases competition law decisions on criteria that are not only "objective," but also "scientific" and often quantifiable. This avoids difficult justice issues that inevitably place additional pressures on competition law institutions and render competition law decision-makers susceptible to questions about their "subjective" evaluation of fairness issues.

E. Style

Finally, passion for justice is a noble and generally laudable passion, and, in my view at least, it should never be ignored. In the domain of economic policy, however, it can obscure the relationship between policy claims and the community to which the claims are addressed. If the values which engender a justice-based argument are not shared by those to whom they are addressed, the style can itself be a barrier to encouraging acceptance of the claims. At some points in these works, the certainty and conviction of the author's voice may, in fact, make it easier for some to avoid the arguments that he promotes, precisely because the values that he represents may no longer be widely shared in European competition law circles. The levels, and forms of emotional commitment to competition law that have animated and supported many German and European officials, especially in the three

⁵ For discussion of globalization issues in relation competition law development, see DAVID J. GERBER, "Global Competition: Law, Markets and Globalization" (Oxford, 2010).

decades after the Second World War appear to be rather *demodé* at present, and this inevitably influences receptiveness to policy argument.

III. *Concluding Comments: Don Quixote? The Lone Ranger? Both?*

For Fikentscher, the role of economics in competition law – domestic, regional and global – is a critically important issue for the future of Europe, and he believes that it needs to be carefully evaluated. Many others in Europe and elsewhere share both of these views. In these two concerns, he draws on his long experience – almost three-quarters of a century – with the rebuilding of Germany and the integration of Europe. In both these contexts, competition law has played a significant and prominent role, and Fikentscher urges that the characteristics of German and European competition law that contributed to these successes not be forgotten. He does not, however, merely call for simply going back to an earlier time and an earlier form of competition law. He provides recastings and rethinkings of some of these issues while emphasizing some of the values that he sees as part of the European competition law tradition. Many of his claims have solid foundations not only in the experience of competition law in Europe in the twentieth century and in European legal thought and philosophy, but also in anthropological and other social science thinking that is seldom related to competition law. For these reasons alone, his work is valuable.

Fikentscher sees the more economic approach to competition law as imposing a kind of "tyranny" of economics – a body of ideas that controls too much and is controlled too little. One need not share this view of economics or its impact in order to appreciate the value of Fikentscher's concerns. Those concerns reflect European history during much of the twentieth century. In that history, values such as justice were often forgotten or degraded, and totalizing ideas were allowed to dominate thought and governmental policy. Competition law has been an important, even central, response to these concerns. These issues have faded into the background, but the issues themselves may remain relevant to the continuing success of the European integration project. In some ways, the language Fikentscher uses and the passion that he expresses appear out of touch with dominant forms of competition law thinking in the US and Europe, but this should not obscure the value of considering the perspectives he brings to the issues.

It is also critically important to remember, however, that the factors that have impelled European leaders to move toward a "more economic approach" are also based on solid policy considerations and carefully developed interpretations of European needs at the current stage of the integration project. It may, therefore, be more useful to see the more economic approach as part of an evolutionary process rather than to fear the potential roles of economics. The European integration process has changed rapidly and often dramatically, and it will undoubtedly continue to evolve. Perspectives such as those Professor Fikentscher provides can be of value in shaping that future.