

Chicago-Kent College of Law

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Europe and the Globalization of Antitrust Law

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EUROPE AND THE GLOBALIZATION OF ANTITRUST LAW

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I. INTRODUCTION

It is a delight for me to be here and an honor to be asked to present this Elihu Burritt Lecture. Many years ago in this room I heard a lecture that at the time I thought was the most brilliant I had ever heard. It was given by the sociologist Philip Rieff and analyzed the intellectual and sociological influences on Sigmund Freud's thought. So to give this lecture in the same room is for me very moving. Rieff was trying to influence the way his listeners thought about Freud, turn-of-the century Europe and the course of social thought in general. My goal is more modest. I want to influence one aspect of the way you think about the past and future of antitrust law in the world. Specifically, I want to talk with you today about European antitrust law experience and its potential significance for some central issues of law and economic policy today.

This speech will look at the European experience against the backdrop of the globalization of antitrust law.¹ At its most basic level, globalization refers to the expanding role and importance of antitrust law throughout the world and to the growing importance of transnational efforts to combat competitive restraints on competition. Antitrust is no longer the province of the United States alone or of a small group of industrialized states. It is increasingly an international phenomenon that operates in some fashion in many states. It impacts economic activity to an increasing extent and in an increasing number of ways, and it has become a major policy concern of

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1. I will use "competition law" and "antitrust law" interchangeably to refer to legal regimes whose objective function is to protect the process of competition against restraints on its operation. "Antitrust law" is the more common term in the United States, and it is often specifically associated with the United States, while "competition law" is a more generic term that is more frequently used outside the United States.

governments and of business decision-makers almost everywhere. European experience with competition law plays a central, and increasingly important, role in this development, and thus it is important to understand that experience.

More specifically, this experience plays a key role in the current conflict over whether an international framework of antitrust law should be created under the auspices of the World Trade Organization. It is a conflict in which the United States and Europe stand on opposite sides, and it is likely to be a major factor in the development of international antitrust law and, therefore, the development of the international economy.

My central thesis is that images of European competition law are often seriously distorted, and I suggest that these distortions can both hamper effective lawyering in transnational contexts and impede the process of developing an international legal framework for the protection of competition. My objective is to identify some of these distortions and indicate their significance for international lawyering and for the evolution of competition law and policy. Note that I will refer to images of European competition law experience that are widely held in the United States, but these images are also often highly influential elsewhere, including in Europe itself.

II. THE CENTRALITY OF U.S. ANTITRUST EXPERIENCE

The tendency of those who think about competition law to focus predominantly on the U.S. experience frames our enterprise. The U.S. experience tends to dominate thought about competition law throughout the world. It is the reference point for thinking about the entire phenomenon. Most scholars and leading officials in competition law know something about that experience and can, therefore, relate their own competition law decisions to it. European experience, on the other hand, tends to be marginalized. Few, particularly in the United States, know much about it. As a result, there is little recognition of its influence and its role. I suggest that this one-dimensional, U.S.-centered pattern of perception impairs our understanding of international competition law today and obscures important factors that are shaping its future development.

III. IMAGES OF EUROPEAN COMPETITION LAW EXPERIENCE

What then are the images of European competition law that I consider distorted? One is the assumption that European national systems and national competition law experiences are unrelated, except insofar as they have become interrelated in the last few years by the European Union. One frequently hears the following: European national competition laws are all

so different and their experiences so varied that it is not worth our effort to try to learn about them. The assumption is that there are no patterns in the European experience and, therefore, that there are no cognitive “hooks” for dealing with that experience. This contributes to the centrality of the U.S. experience, which at least has the virtue of being a single narrative that is also easily accessible from a linguistic standpoint because of the widespread knowledge of English among those involved in competition law issues.

The assumed lack of patterns in European national experience also deters exploitation of the intellectual and perceptual ties between national competition law and European Union competition law. It is quite typical to treat E.U. competition law as if it were unrelated in these senses to the European national competition law experience - as if one day it had simply fallen from the sky and continues to operate in its own hermetically sealed sphere. A corollary of this view is the tendency to treat its decision-makers as if they had neither nationality, nor experience other than as E.U. officials, nor relationships with decision-makers in national systems. This helps to account for a certain shallowness in many discussions of the dynamics of European Union law.

This is further associated with some misleading assumptions about the origins and identity of competition law in Europe. The most important, and perhaps the most persistent and pernicious, is the widely held belief that antitrust law in Europe was merely an import from the United States. The United States occupied Germany after the Second World War, and many are aware that competition law became prominent in Germany during that period. This makes it convenient to assume that the Germans copied U.S. antitrust law and transmitted it to Europe. As we shall soon see, this is simply wrong.

A related assumption is that European competition law is simply the product of administrative and regulatory impulses. The administrative state has been prominent in postwar Europe, and, lacking an explanation of what actually happened, many assume that competition law is merely the result of administrators expanding their controls over industry.

Another image is that European competition law experience does not reflect any particular values or messages - that European competition laws have nothing very important to say. United States competition law experience is easily related to the values of economic freedom and competition that are so prominent a part of U.S. social and political experience, but in a Europe in which these values are seen by many as submerged by social concerns and the weight of administrative hierarchies, it is not always easy to discern the impetus for competition law - its message - and thus its sources of appeal and support. From this perspective, the

image is a bland one in which laws seem to be without significant political or intellectual foundations.

Finally, it is commonly assumed that national competition laws and national competition authorities are fading in importance and are likely to continue to do so and that the only important decisions are those made in Brussels. The competition law of the E.U. is easily accessible, and it is part of the process of European integration. Major cases that are on the front pages of international newspapers usually come from there, and it is easy to assume this trajectory. It is also wrong.

The overall image is, therefore, not a very inspiring one. It assumes that European national competition laws are fundamentally weak, that they are without political or intellectual roots and carry no particularly noteworthy messages. In short, they are often assumed to be of relatively little importance. "The Europeans copied American ideas, but never got it quite right yet" is an underlying tone in many discussions of the subject. It is not difficult to see why relatively little attention tends to be paid to the European experience other than that part of it that takes place in Brussels.

IV. THE EUROPEAN COMPETITION LAW STORY

In examining these systems over the last decade or so, I discovered that these images are often riddled with highly distorted myths. This narrative is developed at greater length in my book on the subject, which was published a few months ago by Oxford University Press.² It is a story that I think has potentially enormous consequences for Europe specifically, and for competition law and the evolution of the world economy generally. Almost on a weekly basis I receive comments from Europeans to this effect. "We had no idea that this is actually what happened - that these forces had shaped our current institutions and modes of operation."

Let us look first at the myths about the origins of competition law in Europe. Origins are important; they tell us about identities and objectives and about the factors that influence decisions. The image that competition law was basically imported from the United States after the Second World War turns out to be fundamentally wrong. The European competition law story did not begin during the U.S. occupation of Germany! Many of its basic ideas were first articulated in the 1890s in Vienna, a place and time that witnessed a rather remarkable outpouring of creative energy in many areas of science, philosophy and art. A politically and socially powerful group of intellectuals began to explore the idea of using law to protect the process of competition. Imbued with the values of classical liberalism and

2. DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (1998).

aware of the new theoretical developments in understanding the economic process that were emanating from the Viennese school of marginal utility economics, they began to investigate whether the two strands of classical liberalism (economic freedom as a value and law as a protector of rights) could be used together, specifically, whether law could be used to protect the process of economic competition.

The vehicle this group chose to protect competition was administrative. Its makers did not have the English Common Law's restraint of trade tradition to draw on, as the United States did, and administrative solutions were in vogue in Austria at the time, so basically they said "we can give this assignment to a group of talented and enlightened administrators who will interpret the provisions and develop an administrative practice to implement them." This also had the advantage of being relatively easy to do. The result of their efforts was a government proposal for a competition law, which was accompanied by an Official Explanation that has a decidedly modern ring. It centered on a well-developed conception of the competitive process and the recognition that consumer welfare was the primary goal of protecting competition. This proposal was widely discussed in political, intellectual and economic circles in Austria as well as in Germany. Although it had widespread support in Austria and was almost passed into law, the political cataclysms of the late 1890s prevented its enactment. Had it been enacted, the lines of development in Europe might have been far clearer.

These ideas were further developed, however, in Germany. They were given additional intellectual substance and political prominence that virtually assured that the ideas would eventually find their way into legislation in some form. Consumer and labor interests were, for example, sensitized to the issues and tended to support proposals for this type of legislation. Germany was, however, still ruled by a Kaiser who had the power to veto most legislation, and Kaiser Wilhelm II was not about to allow legislation to be passed that might restrain, or even harm, the industries on which he was relying to build his naval and military strength. So again competition law ideas remained on paper, and in many people's minds, but they were not yet "law."

The first great horror of the twentieth century - the First World War - deflected attention from issues such as competition law, but in its wake some of the competition law ideas that had been discussed before the war were introduced into law in Germany. The context was the famous inflationary crisis of the early 1920s. Many of those responsible for this step, including the Chancellor, Gustav Stresemann, had been in the middle of the pre-war battle over competition law and now were in a position to put the ideas they fought for into legislation.

Consistent with earlier European discussions, their proposal relied primarily on administrative decision-making. "We are going to protect competition" was the message, "but we are going to let administrators do the primary work. We are not going to have private suits. That fits neither our legal system nor the political situation." This reliance on administrative decision-making has remained a central feature of competition law in Europe. Note, however, that the status of administrators in Europe is typically far higher than it is in the United States, and their roles tend to be more "juridically" conceived. They often act more like judges than policy implementers. There is, in other words, a very different kind of administrative law tradition in Europe than we have in the United States, and this needs to be kept in mind in looking at the European experience.

The German competition law was the first of its kind. It "got the ball rolling" for competition law in Europe. The statute was, however, hastily drafted and poorly conceived. Moreover, it did not achieve significant political backing in the turbulence and uncertainty of Weimar Germany. As a result, Germany's first experience with competition law was not particularly effective in deterring restraints on competition.

German and Austrian experience did, however, fuel interest in Europe in an international competition law during the late 1920s. An international cartel movement was gaining strength throughout the world, particularly in Europe, and there was widespread discussion of an international framework of competition law as a response to it. After the Second World War, virtually no one mentioned this movement, because it was not particularly successful, and also because in this area few wished to look back at the political and economic policies that led to the disasters of the 1930s and 1940s. But international antitrust was a major theme of economic policy, and by the late 1920s a kind of basic consensus about the preferred shape of competition law had formed. Not surprisingly, it was based on the administrative control conceptions that we have just noted.

The Great Depression and the Second World War again turned attention away from issues like competition law, and it is not until after the war's end that we pick up the story again. Here, the path of European competition law also divides temporarily, with Germany following one branch and much of the rest of Europe following another. Throughout Europe, however, there is an effort to find new economic and political forms that will avoid the catastrophes of the first half of the century, and competition law ideas often figure prominently in those plans.

I will look first at the German path, but before doing so I want to back up for a moment and refer to an "underground" intellectual development in Germany that most people know nothing about and that has played an extraordinary role in the development of competition law thought in Europe.

The reference is to ordoliberalism (often called the “Freiburg school” of law and economics).³ During the 1930s a group of lawyers and economists began to explore more systematically the possibility of using law to protect the process of competition and thus prevent both the debacle of the Weimar period—too little control of economic power—and the calamity of nazism—too much control of social life by the state. They sought a means of protecting economic liberty and competition from both the state and private accumulations of power. They developed a highly refined conception of how law could be used to accomplish those objectives, and competition law was at its center.

This is not the occasion to delve deeply into these ideas that were to be so influential in Germany and, less directly, in Europe. I do that elsewhere. In brief, however, the central idea was that a polity should choose an economic order based on competition and economic freedom. This choice should be seen as the adoption of an “economic constitution,” and legal processes should be used to protect this constitution in essentially the same ways that they protect the political constitution. Competition law was seen as the central tool for protecting this economic constitution.

The ordoliberals operated “underground” during the Nazi period. With the beginning of the postwar occupation, however, they moved to center stage. American occupation authorities found their ideas congenial, and untainted by nazism. As a result, many were awarded high positions in the German economic administration. They become the core of a group of mainly younger lawyers, economists and administrators who sought to develop a “new Germany,” and their doctrines became a kind of orthodoxy for this group. A key adherent of this way of thinking was Ludwig Erhard, who was the most influential figure in shaping German economic policy for over two decades, as head of the economic policy administration during the occupation then as economics minister and, finally, as chancellor.

Given the importance this group attached to protecting competition, it is not surprising that passing a competition law became one of its priorities. For almost ten years this project was discussed and debated, often on the front page of national newspapers. In 1957 the German Law against Restraints of Competition (GWB), the first “modern” competition law in Europe, was enacted. Although modified several times since then, its basic principles remain in effect. While relying primarily on administration mechanisms to enforce competition law principles, the German system was different in many ways from the competition legislation that preceded it. Above all, it is conceived as an essentially “juridical” system. Decisions are

3. See David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe*, 42 AM. J. COMP. L. 25 (1994).

generally to be made according to well-developed judicial methods and procedures. It contains procedures to assure that the administrators of the Federal Cartel Office (FCO) conceive their task as primarily one of applying a statute according to juridical principles rather than pursuing short-term policy objectives. It provides for review by the regular courts of FCO decisions, and it even allows private suits in certain kinds of cases.

But what about the rest of Europe? During the first four decades after the end of the Second World War, most European countries enacted competition statutes of the "administrative control" type. Most of them initially gave power to administrators to enforce relatively vague statutes. The decisions of these administrators were typically subject to legal control only for violation of administrative law principles. These systems have gradually grown in importance, as administrators slowly gained support for the idea of using law to protect the process of competition.

As these systems have developed in importance, however, they have also changed some of their basic operating principles. I call the process "juridification," and I use it to refer to the development of increasingly juridical modes of operation. European national competition law systems increasingly have restructured competition law decision-making from one based primarily on administrative discretion and policy judgment to one that is today far more based on the methodologically grounded application of legal principles. Accordingly, for example, administrative decision-making has been subjected to review by courts to an ever increasing extent. At the same time, administrators have been given increasingly powerful tools for combating competitive restraints.

A key factor in this process has been the process of European unification and the emergence of a highly sophisticated competition law at the level of the European Union. The timing of the evolution of that system is important. The Rome Treaty creating the European Economic Community dates from 1957, virtually the same time that the German competition law system was created. At that time, six states agreed to eliminate barriers to trade among themselves. In effect, they saw or came to see the Rome Treaty as a kind of "economic constitution."⁴

They thus included competition law provisions in the treaty as a means of implementing that constitution. From the early years of the evolution of the European Community, competition law has been a central component of the legal system, a "pillar" of the community. It has been used to break down barriers to trade and establish the conditions for positive economic development. It has also been used by the European Commission and the

4. For a discussion of the concept of economic constitution in the European Community context, see Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

European Court of Justice to move the process of integration forward, especially during periods when the political impetus has weakened. Although the Community competition law system contains strong administrative elements, it is also imbedded in a juridical framework in which the two European Community courts play a central role.

The evolution of Community competition law has been influenced strongly by the experience of the Member States, particularly German experience. At the time the Community was founded, Germany was the only country in Europe that had significant experience with competition law, not only from the prewar period but, to a limited extent, with Allied Decartelization laws. More importantly, competition law issues had been the source of intense public debate for almost a decade. Especially during the early period of Community competition law development, Germans tended to be its most important leaders. Except for a period of two years, for example, the head of the Competition Directorate in Brussels has been a German. As the system has evolved, the experience of other states - most notably France and England - has grown, and it is likely that the role of Member State experience will continue to grow.

Recent competition law experience in Europe has featured the related processes of convergence and decentralization. During the 1990s, Member States have increasingly structured their competition law systems to conform more closely to both the substantive and procedural components of European competition law. At the same time, the Competition Directorate of the European Union has emphasized the need to move more of the responsibility for enforcing competition law in Europe back to the Member States. Right now the fight is about just how to move more responsibility for protecting the process of competition from Brussels to the national competition law systems. Especially during the last decade, these national systems have become more powerful, more effective and more like the Community competition law system, making such a devolution not only more likely but also more likely to be effective.

V. EXPLODING THE MYTHS

We can now recognize the degree to which images of European competition law experience and of European competition law have been distorted. The assumption that there is no pattern, or narrative, of competition law in Europe - that European competition law systems are all disparate and unrecognizably dissimilar - is nonsense. There are clear patterns of development within European competition law. National competition law developments have tended to follow similar patterns of development. Moreover, the competition law of the E.U. has been much

influenced by national developments, just as it has influenced those developments.

The idea that competition law in Europe is an import from the United States is similarly wrong and potentially harmful. While U.S. experience has influenced this development in some important ways, competition law in Europe has developed primarily on the basis of European ideas and responses to European conditions and in recognition of the values and choices of European political groups and institutions.

The notion that competition law in Europe is just the result of expanding administrative prerogatives and carries neither values nor political messages also turns out to be false. Competition law in Europe has long sent politically powerful messages and represented deeply held ideals. It has expressed the commitment of European governments to the value of economic freedom and competition as a tool for the creation of a freer and more prosperous society. Particularly today, the people that make decisions in these systems are often very committed to protecting competition from restraints, particularly restraints tied to high concentrations of economic power. There is often a powerful conception of the role of competition, and it is one that often reflects the political values of democracy and social solidarity that have been such a key part of European political life during the second half of the twentieth century.

Finally, our story should put to rest the assumption that in competition law matters the only important location is Brussels. What happens in Brussels is certainly important, but the high point of Brussels' influence has probably already been reached. The pendulum is moving the other way. Officials in Brussels as well as in the Member States increasingly see decentralization as the most important challenge to the success of competition law in Europe.

VI. SOME IMPLICATIONS OF THE STORY

By looking at the story of competition law in Europe we can begin to realize the kinds of differences that exist between European and U.S. competition law today. We can better appreciate, for example, the differences in the substantive law concepts that are used. The concept of abuse of a dominant position is central to the operation of European competition law systems, while it is unknown in the United States, where concepts of monopolization are prominent. When we see abuse concepts as a product of the narrative of competition law in Europe—the respective roles, for example, of administrative decision-making and of neo-liberal and ordoliberal thought, we have a powerful tool for grasping the ways in which these concepts are used and interpreted.

The narrative is even more important for revealing differences in the way competition law systems operate. A basic difference between U.S. and European competition law lies, for example, in the role and dynamics of administrative decision-making in European systems. While U.S. antitrust law operates primarily according to a judicial model, European systems place primary responsibility for enforcing competition law in the hands of administrators. But these administrators often operate within legal frameworks and according to legal constraints that are very different from those in the United States. Understanding the factors that influence the decisions of these administrators is thus critical to effective lawyering involving European competition law issues.

How do norms get implemented? Who has power over what kinds of decisions? What kinds of arguments influence decision-makers? To what extent is administrative decision-making subject to judicial constraints? These kinds of issues are what divide the world in this context, and a clearer and more accurate picture of European competition law experience is a key to understanding these differences.

The distortions in images of European competition law that we have identified here not only interfere with the capacity of practitioners to give adequate advice, but they also impair the capacity of decision-makers to develop adequate responses to the problems entailed by a global economy. In order to combat restraints of competition effectively in an economy with increasingly global characteristics, coordination and cooperation are necessary. We are currently witnessing a major controversy between Europeans and Americans over the possibility of creating a legal "framework" for competition law under the auspices of the WTO, and I submit that distorted and superficial images of European competition law experience both exacerbate the conflict and impede its resolution.

I hope I have persuaded you that European experience in using law to protect the process of competition is an important part of the story of competition law and that images of it are often misleading and thus potentially harmful. United States experience has long been at the center of the competition law story, but we need to pay far more attention to the European experience, not only in order to understand how European systems operate - their dynamics - but also in order to understand the forces likely to influence the evolution of competition law in the future.

