

Chicago-Kent College of Law

From the Selected Works of David J. Gerber

January, 2005

The Evolution of a European Competition Law Network

David J. Gerber, *Chicago-Kent College of Law*

The Evolution of a European Competition Law Network

Networks necessarily have a time dimension. They consist of relationships that take shape and function over time. The European Commission's proposals to 'modernise' the EU's competition law system call for the establishment of a 'European competition law network' that will perform key functions within the system.¹ In assessing these proposals, the time dimension thus takes centre stage. This paper examines that dimension by locating the Commission's network proposals within the development of European competition law.

A European competition law network should not be understood as something new. Although the term 'network' has only recently come into common use, relationships among competition law officials have shaped competition law decisions since the inception of the system, and this is the core idea of 'network'. Europe has thus had experience with competition law networks, and this will condition the operations of the proposed network ('PNW') in important ways. It also provides a basis for thinking about how to structure and operate the PNW most effectively. The proposals carry much potential, but they also entail risks that deserve careful analysis.

This paper has three main objectives. One is to identify the changes that will be brought about by the proposals. Effective assessment requires analysis of the ways in which the PNW differs from past and current competition law experience. A second goal is to explore some possible implications of these changes for the proposals. How, if at all, they should be modified? What strategies should aid in achieving their goals? And what we can expect from them? Finally, I consider how we talk about networks. The network concept has become fashionable in discussions about Europe's future, and much potential value is ascribed to it. However, the idea is often so vague that it carries little useful content. If networks are to function as many hope they will, we need to develop a language for talking about what they are, what they do, and how they do it.

I look first at the concept of 'network' used in the proposals and explore ways of analysing it. I then use these analytical tools in looking at three models of network: the foundational model, the current model and the model proposed by the Commission. Finally, I suggest some implications of this analysis for shaping and implementing the PNW.

* Professor, Chicago-Kent College of Law, USA.

¹ European Commission, *Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, COM (2000) 582 (Sept. 27, 2000).

I. The Network Concept: Framing the Subject

1. The Concept in the Modernisation Proposals

My assignment here is to explore the 'network' concept as it is used in the proposals.² That concept has three main features. First, it is defined formally by reference to employment status. A competition law official in the Commission or in a Member State competition authority (national competition authority: 'NCA') is automatically a member; others are excluded. Second, it refers to relationships among these officials. Third, it is unitary: all EU and Member State competition law officials are conceived of as being part of the same set of relationships.³

The proposals ascribe several functions to the proposed network. One is to reduce the Commission's burdens by eliminating or transferring from it tasks that it currently performs. The most prominent of these burdens is the review of applications for exemption under Article 81(3) EC. This is an efficiency claim about how the EU should use its resources, but it is based on claims about the capacity of the PNW to achieve particular results.

Three such claims are central. The first is that the PNW will improve the enforcement of competition law. Local competition officials are said to be closer to markets than the Commission can be, and thus the enforcement of the law should improve if they assume greater enforcement roles.⁴ A second claim is that the PNW can achieve better voluntary compliance with the competition laws, primarily by developing and promoting what the proposal calls a 'competition culture'.⁵ Third, the PNW is expected to improve the quality of individual competition law decisions. The rationale is that there will be more of them; they will be made in more varied contexts; and they will thus create a richer and more valuable body of case-law.⁶

2. Analysing Networks

The analytical value of this network concept is limited by its static and formal definition. It does not relate directly to the operations of the network, and it does

² Another use of the network concept is more inclusive, but also more focused. It includes in a NW all who regularly interact in interpreting and applying a particular set of laws. This would permit, for example, the inclusion of judges and academics.

³ For detailed discussion of the proposals, see Ehlermann C.-D. and Atanasiu I., eds. (2001): *European Competition Law Annual 2000: The Modernization of EC Antitrust Policy*, Hart Publishing, Oxford and Portland, Oregon.

⁴ European Commission, Explanatory Memorandum accompanying the *Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, p.6 (hereinafter 'Explanatory Memorandum').

⁵ Id. at 9.

⁶ See Wils W. P.J. (2001): 'The modernisation of the enforcement of Articles 81 and 82 EC: a legal and economic analysis of the Commission's proposal for a new Council Regulation replacing

not, therefore, provide a basis for analysing the decisions that comprise those operations. In turn, this obscures the causal relationship between the network and the benefits that it is intended to provide.

I here employ the network concept in a more precise way that refers directly to its operations. It contains three basic elements. First, for our purposes the network consists of relationships; the term refers to how individuals and institutions relate to each other. Secondly, the analysis looks specifically at only one aspect of those relationships: how they influence decisions of those within the network.⁷ Relationships have many aspects, but we are concerned with them only insofar as they relate to decisional outcomes. And thirdly, we are concerned only with particular categories of decisions: those that make, interpret and enforce competition laws. Therefore, our analysis focuses on how network relationships influence the decisions of network members. This focus on decisional influences allows us to ask more precise questions about the network and its operations.

We ask two sets of questions. One relates to the structure of the network. We need to know how it is organised: who influences which decisions? This leads to a basic distinction. Members of the network make and influence decisions with regard to two separate sets of competition laws: those of the EU and those of its Member States. These represent what we can call 'spheres of operation'.⁸ The 'EU sphere' refers to network relationships as they relate to EU law, while the Member State sphere includes those relationships insofar as they deal with Member State law. The distinction is essential to an effective analysis of the network.

Each sphere has its own internal structure. We need to know what kinds of relationships exist among participants within it. We will ask questions such as: 'What kinds of subgroups are there?' and 'What are the lines of authority and the positions of status within it?' Some structuring factors are formal and institutional; others are personal and social.

The other set of questions relates to network operations. Two functions are of primary concern: the flow of information through the network, and the normative authority that network relationships exert on decisions within it. Often these two factors are not clearly distinguished from each other, but the distinction is important for analysing the proposals.

Claims about the transmission of information are central to the proposals, and we ask several questions about that process. First, what does the network

Regulation No. 17', in Hawk B, ed., *2000 Fordham Corporate Law Institute*, Huntington, New York.

⁷This form of decisional analysis is discussed further in Gerber D. J. (1998): 'System dynamics: toward a language of comparative law?', 46 *American Journal of Comparative Law* 719.

⁸The term is important, because it emphasises the decisional focus of the analysis. The issue here is not who is part of the series of relationships that constitute the network, but to what extent members of the network influence decisions relating to a particular set of laws — either national or EU. An official may participate in both spheres of operation or merely in one. The term 'sub-network' could also be used, but it would focus attention on formal membership, and it would fail to capture the decisional element of the analysis.

transmit? What are the characteristics of the information? It might include specific information (such as full reports of cases, legislative rules, industry data and policy guidelines), but it might also include general principles, values, expectations and interpretations of experience. Second, how much does it transmit: what quantity of information? Third, in which directions does the information flow: who sends and who receives? Fourth, how is information transmitted: what are the methods of transmission? Finally, what factors affect the reception and use of the information by the intended recipients?

Equally important is the flow of normative authority through the network. By 'normative authority', I simply mean the capacity of the network to shape competition law decisions and influence decisional outcomes. The transmission of information is intended to affect decisions, and it is thus necessary to understand the mechanisms by which the network expects to achieve that result.

3. Modelling the Network

The concept of 'model' is a valuable tool for capturing the key elements of the story. Its use necessarily oversimplifies complex situations, but it has the benefit of clarifying lines of development and changes over time. I do not use 'model' as a theoretical construct. I have not begun with an abstract explanatory model and applied it to the evidence. I instead use it as an empirical construct to capture patterns, and pattern changes over time.

The network has operated according to three basic models. A foundational model evolved in the early years of European integration. It was characterised by virtually autonomous spheres of operation. There were minimal institutional links, and the exchange of information and ideas on the basis of personal contacts and informal authority was its most salient feature. As European integration proceeded, it precipitated a gradual change in the operation of the network. This produced what can be called a 'solar model', in which the spheres are partially integrated but remain largely distinct and separate. The modernisation proposals call for changes that will produce yet a third model of network operation, which is characterised by a high degree of integration between the spheres.

II. The Foundational Model: Separate Spheres

The foundational model was conditioned by the political and institutional circumstances of the first decades of EU integration. It remained more or less in place until about the mid-1980s. As a result, it set the basic patterns of operation for the network, and it is the form of network that has operated the

longest and with which many competition law decision-makers have the most experience.⁹

In this model, the officials of each competition law system operated almost exclusively in their own spheres (EU or Member State). Virtually all decision-makers were concerned almost exclusively with the development and application of their own legal regimes. They sometimes transmitted information to officials in other systems, but such contacts were limited and sporadic, and they were often based on personal relationships. They were rarely formalised or institutionalised.

This network structure was consistent with the political and economic circumstances in which the network operated. In the early stages of integration, European economies were largely national in structure, and national governments operated largely autonomously. A network such as the one currently proposed would have been almost unthinkable.

1. The EU Sphere

The EU sphere initially operated in a highly uncertain context. The process of integration was halting and uncertain, and many doubted its future. At times it moved forward, while at other times it stagnated. As late as the early 1980s, the references to 'Euroclerosis' — the unpromising condition of a bureaucratically hampered community with limited forward momentum and little internal dynamism — were common.

This conditioned the development of competition law in many ways. Perhaps most important was the urgency it imparted to the enterprise of competition law, which often served as a principle tool for moving the process of integration forward.¹⁰ The European Court of Justice repeatedly established broad principles of competition law that reduced the capacity of Member States or private firms to segment markets along national lines, thereby also maintaining the forward momentum of the integration process.

The EU sphere consisted primarily of employees of DG IV (as DG Competition was then called). In general, only they made or influenced EU decisions; Member State officials had very limited influence on those decisions. However, there were two exceptions.

⁹For perspectives on this period, see, e.g., Gerber D. J. (1998): *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Clarendon Press, Oxford, at pp. 346–358; Hawk B. E. (1972): 'Antitrust in the EEC — The first decade', 41 *Fordham Law Review*, pp. 229–292; Goyder D. G. (1998): *EC Competition Law*, 3rd edition, Clarendon Press, Oxford, at pp. 34–74 and 561–586; and Holley D. L. (1993): 'E.E.C. competition practice: A thirty-year retrospective', in Hawk, B. E., ed., 1992 *Fordham Corporate Law Institute*, Huntington, New York, pp. 669.

¹⁰For discussion, see Gerber D. J. (1998/2001), *supra* note no. 9, at pp. 351–64; and Gerber D. J. (1994): 'The transformation of European Community competition law', 35 *Harvard International Law Journal* 1, pp. 97–148.

One was the Advisory Committee on Restrictive Practices and Dominant Positions, which meets to review important decisions of the Commission before they are finalised. Although this group has undoubtedly given valuable comments to the Commission in some situations, its influence has generally been marginal.

A more important source of influence was informal. The Commission was developing EU competition law, and it sometimes turned to Member State officials for advice or information. As a result, some officials acquired significant influence on decision-making and became significant parts of the EU sphere, but their membership was primarily personal rather than institutional. German officials were the most prominent, particularly in the early years. Germany had introduced a competition law in 1957 after almost a decade of intense debate and analysis, and the German Federal Cartel Office was assiduously developing competition law in Germany during the same period that the Commission was developing EU competition law.¹¹ Moreover, no other Member State had comparable experience with competition law during this period. Naturally, therefore, German officials were accorded roles relating to EU law that were seldom available to officials from other states.

The EU sphere was primarily structured by the official status and authority relationships within DG IV. To the extent that it included members from outside the Commission, their status was based largely on reputation for knowledge or expertise.

The amount of information transmitted among the members of this group was limited, primarily because there was relatively little information to transmit, particularly in the early years. In the competition law area, the *acquis communautaire* developed slowly during its first decade. There was little case-law, and there were relatively few well-developed rules and policies. For example, the block exemptions are an important feature of EU competition law today, but they became a significant factor only late in the period.

When information was transmitted beyond the boundaries of DG IV, it generally flowed through informal channels, and it was usually directed to specific needs of the Commission. The Commission generally did not provide regular information regarding its activities to the Member States other than in the limited, formal context of the Advisory Committee. When EU decision-makers sought information and advice, it was typically with a specific purpose. This meant that the information and its normative influence were often inseparable. Member State officials were included in the network precisely because of the expected value of their knowledge or skills. As a result, they were expected to influence outcomes, and the information they transmitted automatically had status and often a degree of urgency. The NCAs transmitted little information to the Commission or to other NCAs.

¹¹ For discussion, see Gerber D. J. (1994): 'Constitutionalizing the economy: German neo-liberalism, competition Law and the "New Europe"', 42 *American Journal of Comparative Law*, pp. 25 *et seq.*

2. Member State Spheres

Each national sphere had its own statutes, procedures and institutions. Although there were broad similarities among them, they often differed in important ways from each other and from EU law and procedure.¹² Each identified its own policy objectives in the light of national political traditions and economic circumstances, and each operated within a unique juridical space. In the early years of competition law development, some Member States either had no competition authority or one that lacked any significant role in legal and economic life. Except in Germany, these authorities were initially small, under financed and with little political or popular support. However, this was changing rapidly by the 1970s. Member State competition law systems were becoming increasingly important, increasingly juridical and increasingly independent of domestic political control.

3. Relationships between the Spheres

EU and Member State spheres were officially related in three basic ways. One was on the above-mentioned Advisory Committee, where the representatives of the NCAs had to become familiar with EU law and with the objectives and decisions of the Commission, and where they were expected to take positions regarding them. They were also related jurisdictionally. When the Commission took action to enforce EU law, NCAs were required not to interfere with those actions.¹³ This meant that NCAs had to take into account Commission policies and decisions in making their own policy and enforcement decisions. Finally, they were related by the didactic, educational role of the Commission. Particularly during the 1960s, the Commission considered the education of Member State governments regarding competition law matters to be an important part of its responsibilities.¹⁴

III. The Current Network: A Solar Model?

The current competition law model took its basic shape during the 1980s. In it, the EU and Member State spheres have moved closer together. They still

¹² See Gerber D. J. (1998), *supra* note no. 9, at ch. 6.

¹³ The relationship between the Commission and Member State laws was given lasting structure in Case 14/68 *Walt Wilhelm v. Bundeskartellamt* [1969] ECR I.

¹⁴ See, e.g., Graupner F. (1973): 'Commission decision-making on competition questions', 10 *Common Market. Law Review* 291.

generally operate separately, but they have become more closely related. Their relationships can be represented by a solar model. The Commission is the centre of the system. It makes decisions that affect all NCAs, but it gets little information from them and generally pays little attention to them. It sets the constraints within which they must operate, but it does not interfere directly with their operations. The NCAs operate independently, and they have relatively fixed relations with each other and with the Commission. They are firmly tied to the central source of power and influence, but their role is largely passive with respect to it. They are expected to heed information from the Commission, and to receive and act on its directions. What the Commission does is often important to NCAs, particularly if their national legislation tracks EU competition law.¹⁵

1. The Context

This model began to evolve in the mid-1980s as the pace of European integration increased. During this period the process of European integration was re-energised under the Commission presidency of Jacques Delors. The Single European Act in 1986 signalled new levels of both political and economic integration, and this changed expectations regarding the role of the EU and its future. In its wake, the idea that competition law decision-makers would operate in isolated spheres seemed increasingly untenable.

National competition laws have gradually converged in response to this political and economic integration. The new states that entered the Union in the 1990s generally copied the competition law legislation of the EU, and existing Member State legislation has also been frequently revised to reflect EU law. In 1990, for example, Italy introduced its first competition legislation, which it modelled to a large extent on Community legislation.¹⁶

The introduction of an EU merger control regime in 1989 was a further step toward convergence and centralisation.¹⁷ It seemed to many to herald a future in which competition law would be centralised in Brussels, as much of merger control now was. Some even anticipated that Member State competition laws and Member State competition authorities would disappear.

But the direction of development began to change in the early 1990s. Two factors were primarily responsible. One was the growing recognition that the

¹⁵ In Sweden, for example, current legislation is almost identical to EU law, and it specifically requires that the text be interpreted on the basis of the same sources used in applying EU law. See Bernitz U. (1993): *Den Nya Konkurrenslagen*, 2nd edition, Stockholm.

¹⁶ For discussion, see Donativi V. (1990): *Introduzione della Disciplina Antitrust nel Sistema Legislativo Italiano*, Giuffrè, Milano.

¹⁷ Commission Regulation 4064/89, OJ L 257/14 [1990] (corrected version of OJ L 395 [1989]). For discussion, see Mestmäcker E.-J. (1989): 'Merger control in the Common Market: Between competition policy and industrial policy', in Hawk B., ed., *1989 Fordham Corporate Law Institute*, Huntington, New York, ch 20.

demise of the Soviet Union was likely to lead to inclusion of former Warsaw pact members as members of the Union. The other was growing popular dissatisfaction with bureaucratic centralisation and resentment toward too much interference from Brussels. This led to the introduction of subsidiarity as a fundamental structural principle of European integration.

In recognition of these two factors, the Commission began to reverse the centralisation process in the competition law area by increasing the role of NCAs in the application of EU law. In 1994, DG IV issued a call for increased participation by Member States,¹⁸ and in 1997 it issued more comprehensive guidelines defining the respective spheres of competence of the NCAs and the Commission.¹⁹ The primary focus was on inducing more of those aggrieved by arguably anticompetitive conduct to go to the national courts for relief rather than to Brussels. These calls did not yield a significant increase in the use of national courts, but they did begin a process of increased interaction between the Commission and NCAs.

2. The EU Sphere: Integration and Authority

The structure and operations of the network reflect these changes in the legal and political context of competition law. We look first at that portion of network operations that relates to EU law. It now includes more participants, and it carries more information of more kinds that is used for more purposes. It is also performing functions that had not been conceived before the 1990s.

2.1. Participants and Structure

The size of the network has grown significantly. Expansion of the EU to 15 members during this period has significantly increased the number of officials that are part of the network. In addition, existing authorities have generally grown substantially during the period.²⁰

The formal structure of the EU sphere now includes additional authority for NCAs to apply EU law, even though this authority is seldom used and some states have not yet authorised their authorities to apply EU law.²¹ However, the authority structure is little changed in other respects, with the Advisory Committee continuing to provide the most direct NCA input into EU decision-making.

¹⁸For discussion of these efforts, see Ehlermann C.-D. (1986): 'Implementation of EC competition law by national antitrust authorities', 17 *European Competition Law Review* 88.

¹⁹*Commission Notice on Cooperation Between National Competition Authorities and the Commission in Handling Cases Falling Within the Scope of Articles [81] or [82] of the EC Treaty*, OJ C 313/3 [1997].

²⁰For discussion of this process, see Gerber D. J. (1998), *supra* note no. 9, at ch 10.

²¹At this writing those countries are: Austria, Finland, Ireland, Luxembourg and the UK.

The informal structures based on experience, expertise and personal relationships that were often important during the foundational period have become generally less so, basically because the Commission has less need for specific individual expertise from NCA administrators. The introduction of merger controls temporarily increased the need for specific expertise in that area of competition law for the first few years after its introduction, when the merger task force included many officials on loan from members states (again, the knowledge and experience of German officials made German influence predominant).²² However, that need has also diminished.

2.2. *Process*

There is also significantly more information transmitted through this expanded set of relationships. The Commission more frequently informs NCAs of its activities and policy views, primarily in the context of specific factual situations but sometimes also on a more general level. The most dramatic increase in information flow has occurred in the process of evaluating and discussing the modernisation proposals, which is a process that has now lasted for several years.²³

The normative force of network relationships remains little changed. The Commission basically directs developments involving EU law. It expects the Member State participants to listen and adhere to its instructions and guidelines, but they are not expected to wield influence. Again, the modernisation negotiations represent a special situation in which the Commission needs political support from Member States in campaigning for the changes it wants, and it must therefore consult extensively with Member State representatives about the specifics of the proposals.

2.3. *Member State Spheres*

As noted above, NCAs have generally become significantly larger and more influential than they were during the foundational period. The last of the original Member States to create a competition authority was Italy, but within a short period of time the Italian competition authority became a formidable and highly respected institution.²⁴ Moreover, more officials from each authority are now involved with EU law in one-way or another.

²²For discussion, see Krause H. (1995): 'EC merger control: An outside view from inside the Merger Task Force', 39 *Journal of Business Law* 627.

²³For extensive discussion of the modernisation programme, see Ehlermann C.-D. and Atanasu I., eds. (2001): *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Hart Publishing, Oxford and Portland, Oregon, and Ehlermann C.-D. (2000) 'The modernization of EC antitrust policy: A legal and cultural revolution', 37 *Common Market Law Review* 3, 537 *et seq.*

²⁴For discussion, see Amato G. (1998): *Il Gusto della Libertà: Italia e l'Antitrust*, Laterza, Roma-Bari.

The NCAs continue to operate primarily as separate spheres of decision-making. Neither the Commission nor other Member States have any significant role in or influence over the internal decisions of a NCA, except insofar as the latter is aware that the Commission has the ultimate authority to remove a case from its jurisdiction by commencing proceedings of its own. NCAs do not transmit significant amounts of information to either the Commission or other NCAs.

2.4. *Toward an Integrated Model*

Tentative first steps have been taken toward integrating the EU and Member State spheres of operation. The members of the network have generally grown increasingly interdependent. Moreover, the trend during the 1990s for Member States to adopt EU substantive law has created a situation in which most or all decision makers share basic principles and ways of thinking about competition law issues, and they often share the same texts.

However, European political and economic integration has yet to be given full expression in the relationships among those who make and enforce competition laws within it. There is currently a very limited flow of information between them, and there is limited coordination of activities. This sets the stage for the modernisation proposals.

IV. Modernisation: A Centralised Interactive Model

The network envisioned by the Commission is similar to these earlier models in important ways. It evolves from them and would be inconceivable without them. Yet it also represents fundamental change. This section looks at the relationship between the PNW and its predecessors.

The PNW represents what can be called a centralised interactive model.²⁵ It is centralised in the sense that it is, for most purposes, a unitary system that is directed by the Commission. Except in the limited situations in which NCAs apply their own laws, all members of the network are primarily concerned with the interpretation and application of EU law. This means that the Commission directs decision-making throughout virtually the entire network rather than merely within a limited EU sphere. The PNW is interactive in the sense that all

²⁵ I am tempted to call this a 'ship model'. A ship is a single unit in which there are many separate operating departments, but each one is ultimately subject to the direction of the ship's commander, and they must function together with respect to a common plan and set of procedures. This is what the Commission envisions for the network. For insightful and here remarkably relevant analysis of the ways in which the members of a ship's crew relate to their common objectives and rules and to the directions of the ship's officers, see Hutchins E. (1995): *Cognition in the Wild*, MIT Press, Cambridge, Massachusetts.

members are to react and respond to each other. Information and influence are intended to flow multidirectionally through the network.

1. The Modernisation Process

The PNW will operate in a context that differs — in some ways dramatically — from earlier contexts. Political and economic integration has significantly increased in the late 1990s, with the successful introduction of the Euro and the recently convened ‘constitutional’ convention as symbols of this integration. The Member States have come to accept and operate within a system of highly interdependent relationships, and this interdependence is becoming more widely recognised and fully accepted.

However, the most dramatic change of circumstances will come from the Union’s planned expansion. Membership could increase by as many as 10 or more over the next few years, and much of the impetus in the modernisation proposals comes from the claim that the current system cannot function in such a large Union. This expansion also differs from previous expansions in two important ways. First, the expansion members generally differ markedly from current members with regard to economic structure, political and legal traditions, and experience with competition law. In contrast, previous entrants tended to be largely similar in these ways to existing members. In particular, they already had competition law systems, some of which were — as in Sweden — well developed. The second major difference between this expansion and previous ones is that a large number of members are likely to enter the Union in a very short space of time.

2. Network Membership and Structure

In the PNW the distinction between EU and Member State spheres will continue to exist, but it will lose much of its importance because most network members will deal primarily or exclusively with EU law. In this sense, the competition authorities of the Member States and the Commission will become far more highly integrated. There will be some residual role for Member State competition laws, but under the current proposals it will be quite small.

The network will become integrated at a time at which membership is likely also to increase significantly. Each new Member State will bring with it a new competition authority whose members will become part of the network. Moreover, the increased obligations of Member States under the proposals are likely to lead to an increase in the number of officials they employ. This rapid increase in the number of members will put additional strains on network relationships.

The structure of the PNW will also be significantly more complex. For example, the new members will initially form an identifiably separate group. Formally they will have the same status as existing members, but they will have less informal or operational status because they will have less experience and knowledge that is relevant to competition law and the operation of the network. They will also be distinguished by differences in their economies and their general political and legal experience. The economies in which they operate will generally be less developed than those of existing members, and the political traditions and experience of most will continue for some time to be influenced by their recent history under Soviet dominance. In addition, their experience of market economy, Western European legal systems, international competition, and particularly EU institutions and operations, will differ markedly from the experience of current members.²⁶ The separateness of the group will be reinforced by the fact that its members are likely to enter as a block rather than one or two at a time as has been the pattern in previous accessions.

Integration of the EU and Member State spheres also means that each NCA will become a structural element within the EU sphere. Each has its own interests and its own economic and political realities, and these will become part of the decision-making process of EU law for the first time. Issues such as funds for performing network obligations now become directly relevant to the process of applying and developing EU law, as does the relative political and economic power of the Member States themselves. These factors have little relevance for EU law while the NCAs operate in their own separate spheres, but they will take on new significance when the network is integrated.

Expansion of the network is likely also to generate informal sub-networks in which information will flow more freely, communication will be more frequent, and mutual attention will be higher than with respect to the rest of the network. Language will play a role in fashioning these sub-networks, as will regional and local traditions and interests.²⁷

Formal authority will still be an important structuring factor. It will continue to be concentrated in the hands of the Commission, and it will now reach into far more activities and decisions by far more network participants. NCAs will have authority to interpret and apply EU law within their areas of competence, but the Commission will have the authority to override their decisions.

3. Transmitting Information

The most prominent change in the operation of the PNW will be a vast increase in the amount of information flowing through it. The proposals make information

²⁶For discussion, see Fingleton J., Fox E., Neven D. and Seabright P. (1996): *Competition Policy and the Transformation of Central Europe*, CEPR, London.

²⁷This can already be seen, for example, in intensified cooperation among the Nordic Member States in competition law matters.

flows a key part of the network's operations, and they create numerous new obligations to transmit it. These obligations fall primarily on the NCAs, who will be required to inform the Commission of many of their activities, especially if they intend to make particular types of decisions. NCAs will also be required to transmit extensive information about their activities to each other.

Information will also flow in many directions, thereby increasing the complexity of the transmission process. In the current model, information flows primarily from the Commission to the NCAs, but the latter have few general obligations to send information to the Commission and they have no obligations to send information to each other. The proposals envision a network in which extensive information will also flow from NCAs to the Commission and horizontally among NCAs.

Information will flow through the network under different conditions. Information has hitherto generally been transmitted in response to particular needs, and often on an *ad hoc* and informal basis. Under the proposals, information will be transmitted primarily pursuant to formal obligations and in response to the exercise of formal rights to information. It may also be transmitted in specific procedural contexts that will require close cooperation between the NCAs and the Commission (for example, when the Commission wishes to present its case in a Member State court).²⁸

The information that is transmitted will also often have different characteristics: frequently more procedural, more technical, and more specific. A large portion of it will be highly specific information about particular cases. The proposals require the NCAs to submit to the Commission, for example, detailed information about each case in which they plan to prohibit conduct, vary the applicability of a block exemption, or accept commitments.²⁹ NCAs may also be expected or required to transfer third party information, that is, information that it acquires from private firms pursuant to its own procedures. In addition, the Commission has promised a new set of detailed regulations and guidelines designed to guide Member State decision-makers.³⁰

Finally, the information will be received in a different context. Information is now generally transmitted only if its potential relevance for a particular purpose is established and there is thus a recipient interested in receiving and using it. Under the proposals, in contrast, much of the information that the PNW carries will not be targeted in that sense. It will be transmitted because it falls within a particular category described by general rules, and it will be received only to be sorted and processed. Officials may review it in order to determine its relationship to policy positions or pending decisions, but it may just be put in a database. This changes the role of the information and its transmission in ways that have yet to be analysed carefully.

²⁸ European Commission, *supra* note no. 1, Article 15.

²⁹ *Id.*, Article 11(4).

³⁰ Explanatory Memorandum, p.8.

4. Normative Influence

The capacity of the network to exert normative force is in many ways the key to the proposals. As the Commission is aware, it is relatively easy to require the transmission of information and to monitor the extent to which participants have fulfilled their obligations in transmitting it. It is more difficult to ensure that the information has the desired effect on decisional outcomes. Yet information must affect decisions if the network is to achieve the desired results. The proposals envision the network having normative force, both formally and informally and in both vertical and horizontal relationships.³¹

The vertical component consists primarily of the Commission's direction and control of the decision-making of NCAs. The Commission intends to exercise this formal authority in specific cases, as well as by issuing extensive and detailed regulations whose purpose is to tell the NCAs what they must do. It also intends to exercise informal authority in the context of increased personal interaction with Member State officials, but the proposals are vague as to how this is to occur.

NCAs will have no formal authority *vis-à-vis* the Commission, but the Commission suggests that it will take into account the views of Member State officials in making its decisions. The proposals are vague about how this will be done, and there is concern among Member State officials that their influence on Commission decisions will be marginal.

The Commission acknowledges that vertical influence will be inadequate to achieve the desired results. It intends that horizontal relationships among NCAs will add the necessary constraints and influence.³² The proposals do not include formal mechanisms for this horizontal influence. Instead, the Commission seems to view it as an informal process that will result from participation in the network itself. It anticipates that the increased interactions of Member State officials among themselves and with Commission members will shape decisional outcomes. It is in this context that it refers to the idea of a competition culture that will naturally tend to produce convergence in decision-making, but it provides little indication of how it expects this to work.

5. Member State Authorities — Residual Roles

Even under the proposals there will be residual individual spheres of operation for the application of Member State competition laws. Those residual spheres

³¹ See gen. Monti M. (2001): 'The modernisation of EC antitrust policy', in Ehlermann C.-D. and Atanasiu I, eds., *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Hart Publishing, Oxford and Portland, Oregon, pp. 3–13.

³² Schaub A. (2000): 'Modernization of EC competition law: reform of Regulation 17', 23 *Fordham International Law Journal* 752, at p. 764.

will be particularly limited if Article 3 of the draft Regulation, which calls for exclusive application of EU law when conduct affects trade between the Member States, is enacted.³³

6. Continuity and Change

This brief review reveals the extent of both continuity and change in the network proposals. The PNW shares important features with previous and current versions of the network. It will continue to operate as part of a largely administrative system in which private law mechanisms play a limited role. Although the proposals encourage private suits in national courts, it remains to be seen whether such suits will increase, much less become common.

The Commission will continue to be the dominant institution within the network. It will have the authority to control the flow of information and to determine who handles cases and what the substantive outcomes should be. The proposals increase the Commission's dominance in the sense that it will control a largely integrated network that includes all European competition law officialdom rather than merely one of many decision-making spheres within that network.

The network will still consist of administrative agencies that are not organisationally integrated. The Commission and the NCAs will remain institutionally separate. The proposals call for changes in function and relationships, not changes in formal organisational structure. The PNW will continue to transmit information and exercise influence across the boundaries of these institutions.

However, the changes are also extensive. Perhaps the most fundamental is that the network will become a formal legal concept. It is part of the modernisation plan and, as such, it will have official functions and be understood and evaluated in terms of its performance of those functions. In short, it will be institutionalised, and will therefore be encumbered with rights, duties, expectations and power positions.

In part as a result of this institutionalisation, pressure on the network's structures and operations will increase significantly. It will be asked to perform far more than it has performed in the past. Vastly more information will pass through it, and it will move in more varied and complex directions. In addition, it is expected to exert normative influence in new and more extensive ways, many of which are untried and unclear. This means, in turn, that businesses and political entities will attach more value to network relationships and to the many decisions that will constitute its operations, and they can be expected to expend correspondingly more resources to influence them.

³³ At the time of writing there were reports of some doubts as to whether that Article would be enacted.

V. Some Implications of the Proposed Changes

The modernisation proposals represent a bold step in the development of competition law in Europe, and their success will depend to a significant extent on how the proposed network of competition law authorities functions. As we have seen, a network has operated throughout the development of European competition law, and experience with it provides a basis for assessing the proposals. That experience will condition the network's operations, particularly in its early years, and it yields insights into what can be expected from the network.

1. Conditioning Factors

One conditioning factor is the trajectory of competition law development. Competition law in Europe has become steadily more important in business and legal life throughout the Union, and this has increased the status and influence of competition law authorities and the officials in them. Moreover, the relationships among these officials have become closer, more extensive, more effective and more important.

This experience colours both the proposals and the reasoning behind them, imbuing them with an unmistakable sense of optimism. The tone is: if the network can develop this far this fast, we can expect to develop it further along the same lines. The justifications for the network proposals reflect confidence that it can bear much increased demands and perform new functions, and that the Commission will be able to direct the flow of information and influence within the network.

Yet the impending changes impose significant costs on decision-makers and their institutions. All will have to operate as part of a dense web of relationships that places extensive new demands on their financial and human resources. Institutions that have operated more or less independently will be required to change their operations to respond to these new demands, and the costs of these changes will be a critical factor in the success of the PNW.

Perceptions shaped by previous experience will influence how network members assess and respond to these added costs and burdens, particularly during the early stages of the PNW's development. For example, Member State officials often believe that the Commission attaches little value to their views (except perhaps in the context of the modernisation negotiations) and that Commission officials view Member State officials not as equals but merely as enforcers of Commission decisions. The network proposals are built on the assumption that this perception can be changed, but changing it is likely to require sustained effort on the part of the Commission. One way of moving in this direction may be, for example, to increase the participatory rights of Member State officials in their dealings with the Commission, thereby anchoring their influence.

Past experience also creates expectations that entrain their own incentives and disincentives, depending on the extent to which such expectations are met and how disappointments are perceived and handled. For example, German competition law officials have long played a particularly influential role in the network. This role and the status that accompanies it are of much value, but that value is likely to decline under the new system, particularly when coupled with expansion of the Union. Similarly, current members of the network might expect their opinions to be valued more highly than those of expansion members, but officials in the latter group might not always share this expectation. The resulting disappointments could generate conflicts and thereby burden network operations.

2. Lessons?

European competition law experiences, in general, and the evolution of the network, in particular, provide some insights into the factors that are likely to influence the PNW. Drawing 'lessons' from any historical development is a matter of conjecture and interpretation, but it might nonetheless be of value.

2.1. *Responding to External Pressures*

One such lesson is that the effectiveness of the network is likely to depend to a significant extent on its capacity to withstand economic pressures. Officials who apply and enforce competition law are everywhere targets of pressure from business firms because of the often considerable economic consequences of their decisions. The battle to resist such pressures has been a constant theme of European competition law development at both Member State and EU levels. The Commission and some Member State authorities have proven to be generally effective in dealing with such pressures, but this has not always been the case with some authorities.

The increased size and enhanced importance of the PNW will create new targets for such pressure. Each of the many decisions that will have to be made about the transmission of information (what to send, how to send it, how to receive and store the information, and so on) and about the exercise of influence represents a point of vulnerability. Moreover, the decisions that shape substantive outcomes will become more numerous, more complex and often less transparent. This calls for designing network operations to protect those decisions from outside influence. The goal of creating a 'competition culture' should include creating a culture of resistance to such influence, and European experience has much to offer in that context.

Political influence over network decision-making creates similar issues. The network will function effectively only to the extent that (1) officials are permitted to pursue the shared public interest goal of developing and enforcing competition

law, and (2) they are widely believed to have that independence. The more independent they are and are perceived to be, the more likely it is that they will identify with common goals set for the network, and will seek to conform not only to their letter but also to their spirit.

Transmitting information and exercising influence within the network involves making decisions that will often be voluntary and non-transparent, making outside influence difficult to detect. Therefore, independence from political influence cannot be limited to formal independence but should also include operational independence. This may include, for example, protection for officials who reveal attempts to exert influence and obligations of mutual assistance from other network members.

2.2. Commitment

A key factor in the development of competition law in Europe has been the high level of personal commitment and engagement of administrative officials. The crucial early successes of the German Federal Cartel Office and other Member State authorities were due in large measure to the intense personal engagement of officials who believed — often passionately — in the importance of their project.³⁴ At the EU level, competition law development has often been driven forward by officials committed to a particular vision of the role of the market in Europe and willing to invest energy and enthusiasm to realise that vision.

This type of commitment is likely to be necessary to create and operate the kind of network envisioned in the proposals. Otherwise the pressures will be too strong and the costs of operation will be too high for it to succeed. An uninspired, routinised conception of competition law is not likely to generate high levels of commitment. The proposals will create extensive routine obligations to transmit, store and review information, and there is a risk that the weight of bureaucratic routine will overshadow and even blunt the necessary commitment. This suggests that network obligations should be calibrated to avoid excessive routinisation and to maximise opportunities and incentives for active commitment by all network members.

2.3. Aligning Interests

Resisting external economic and political influences and developing high levels of commitment will depend, in turn, on aligning the perceived interests of network participants. To the extent that network participants perceive the same set of interests as guides to their decisions, they are likely to use the decisions of others as guides to their own decision-making and to reach generally similar

³⁴ See, e.g., Gerber D. J. (1998), *supra* note no. 9, at pp. 280–87.

conclusions, and this coherence is critical to the success of the network. The greater the alignment of perceived interests, the greater also is the likelihood that network members will reinforce each other's decisions and interpret intra-network messages in a manner consistent with the intent of the sender. This kind of alignment has been critical to the development of the network in the past, as leading decision makers have generally identified with a particular conception of competition law and its role in European integration.

Increased pressures on the network could undermine this commonality of interests. There will be many more decisions to be made and many more possibilities for conflicts of interest, and such conflicts can reduce network effectiveness. One way of counteracting this tendency is to increase the participatory role of the NCAs. The more such officials are actively engaged in policy formulation and implementation, the more likely they will be to identify their own interests with the interests of other network members.

2.4. *The Structure of Information*

European competition law experience also suggests that the structure of information that moves through the network will play a role in network operations. Where it is organised in ways that make it easily accessible and understandable, it will be more readily assimilated by those who receive it and more likely to influence their decisions. As the network transmits increased amounts of more detailed information, this structuring will become correspondingly important. Structuring the information — for example, by clearly identifying the categories into which it falls and the goals and principles to which it relates — may be more important than the quantity of the information transmitted in the operation of the network.

2.5. *External Support*

Finally, external support for competition law has been critical in the development of competition law in Europe, and it is likely to be important in the success of the PNW. Political support is key because network relationships are influenced by the relationships around them. Officials within the network will be employees of separate institutions, whose policies and interests can influence their actions. Information will flow effectively through the network only if politicians provide the necessary resources and intra-institutional incentives for transmitting, receiving and using it. These institutions can also control the extent to which network members can put the goals and methods of the network above those of institutional and national interests. In general, network relationships will exert the expected normative influence only insofar as they operate within an atmosphere of cooperation and support from surrounding institutions.

Similarly, relationships with intellectual communities have often been important in the development of the network. As competition law has developed in each Member State and within the EU, and as information and influence have passed through the network, experience and ideas developed within academic and practitioner circles have played key roles. Influence within the envisioned network will continue to depend to a significant degree on the perceived strength of arguments and the capacity of network members to provide convincing analyses, and external intellectual input will continue to be an important factor in fashioning both.

3. Agenda

This review of the development of the European competition law network reveals areas that deserve further study. Most basic is the need for a more developed language for talking about networks and their operations. The network concept is often used in vague, imprecise ways that obscure more than they reveal. If the network is to play the central roles envisioned for it, those involved in it will need more sophisticated and widely accepted ways of talking about it. Social scientists have begun developing a language for analysing networks, and this work deserves further attention and application to the competition law context.³⁵

The modernisation proposals are based on several sets of assumptions about networks that call for further analysis. One relates to the flow of information. The proposals assume that this process will yield a common competition law 'voice'. They assume that the more information flows through the network, the clearer and more consistent the law will be, and the more effective enforcement will be.³⁶ However, this assumption is far from well grounded. It requires additional assumptions about how information will be sent, received and used that have been little studied. Our developmental analysis provides some points for evaluating the assumption, but more is needed.

The methods by which information is transmitted also call for more study. The proposals seem to assume that vast amounts of information can be transmitted through the network at minimal costs and in ways that tie the information directly to the decision-makers that are supposed to use it. That assumption is based, in turn, on assumptions about the capacity of information technology to create that result. Experience with information technology in comparable situations leaves room for doubt about such assumptions. At a minimum, they deserve more careful analysis.

³⁵For valuable examples of political science analysis in the competition law area, see, e.g., Doern B. G. and Wilks S. (1996): 'Conclusions: international convergence and national contrasts', in Doern B. G. and Wilks S., eds., *Comparative Competition Policy: National Institutions in a Global Market*, Clarendon Press, Oxford, at p. 327, and Sturm R. (1996): 'The German cartel office in a hostile environment', in the same volume, at p. 185.

³⁶'More decision-makers also mean more case-law and administrative decisions, which will further clarify the scope of the competition rules'. Explanatory Memorandum, p. 9.

A second set of assumptions refers to the normative force of the network. The proposals recognise that the Commission cannot effectively control or police all decision-makers within the network and that network relationships must therefore exert the requisite influences on network decision-making themselves. Information transfer is not enough to ensure that laws will be interpreted, applied or enforced in the ways that the Commission envisions. Decision-makers will often have interests and perceptual biases that could lead them in divergent directions, and the network is expected to have the normative force to counteract these obstacles to convergence and cooperation. This normative task might be more difficult than the Commission sometimes seems to expect, and, in any event, the normative capacity of network relationships deserves more study.

4. The Network and European Integration

Competition law has always had a special status and played special roles in the process of European integration. It has often been used as a motor of integration, pushing the process forward when its impetus has stalled. A central question in evaluating the current modernisation proposals is whether they will enable competition law to continue to play this role. If successful in the context of competition law, the network concept is likely to be more widely applied in other areas of European integration. However, to the extent that it is seen as a failure, this experiment will cast doubt on many current plans and could have serious repercussions for the future of integration.