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## Two Forms of Modernization in European Competition Law (symposium)

David J. Gerber

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## TWO FORMS OF MODERNIZATION IN EUROPEAN COMPETITION LAW

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David J. Gerber\*

## INTRODUCTION

In European competition law, the term "modernization" has been a catchword and focus of attention since the late 1990s. Usually, the reference is to "procedural" or "institutional" modernization. The European Commission ("Commission") used the term "modernization" when referring to the important set of changes in the institutional structure and procedures of competition law that it introduced in 2004, and it called the new regulation and its accompanying materials its "modernization package."<sup>1</sup> This procedural modernization has fundamentally changed the procedures for developing and applying competition law in Europe.

During the same period in which this form of modernization was proceeding, another form of "modernization" also took shape. It represents a fundamental reorientation of much of the thinking about substantive competition law in Europe. Given that the term "modernization" was already occupied by the procedural program noted above, it is generally not used to refer to these substantive law changes. Nevertheless, these changes have also been fundamental and very much represent a program of "modernization." They are often referred to as a new and more "modern" form of competition law.<sup>2</sup>

Curiously, little attention has been paid to the relationship between these two processes. Yet they have taken place over

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1. See generally EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR COMPETITION, MODERNISATION OF EC ANTITRUST ENFORCEMENT RULES: COUNCIL REGULATION (EC) No 1/2003 AND THE MODERNISATION PACKAGE (2004), available at [http://ec.europa.eu/comm/competition/publications/publications/modernisation\\_en.pdf](http://ec.europa.eu/comm/competition/publications/publications/modernisation_en.pdf) [hereinafter MODERNISATION PACKAGE].

2. See, e.g., Commission Press Release, SPEECH/00/240 (June 26, 2000) ("The Commission is . . . in the process of modernising and rationalising much of the Community's substantive legislation in the competition field.")

roughly the same period, many of the same people have been involved in instigating the changes, and they have been driven by many of the same forces and pressures. Understanding the relationship between these two processes promises not only to provide a better understanding of each, but also important insights into the current roles of competition law in the further integration of Europe. Even more broadly, it helps to reveal the forces at work in this critical period of European legal and political development.

This Article makes two central claims. One is that the two processes are related in important ways and that neither can be fully understood without understanding the other. The other is that the relationships between the two reveal changes in the dynamics of European competition law that have so far been little noticed.

This Article first sets out briefly the basic outlines of the procedural modernization process, focusing on aspects of its dynamics that are particularly relevant to the ties between it and the process of substantive modernization. It next depicts the process that I call "substantive modernization," identifying the dimensions and dynamics of that process and revealing a story that is often not clearly perceived. I then point to some of the ways in which the two processes have been related to each other and analyze some of the implications of this relationship. Finally, I use this analysis to draw some conclusions about the current state of competition law in Europe.

## I. PROCEDURAL MODERNIZATION

### A. Initial Phases

Many aspects of procedural modernization have been well described, and thus we need not go into detail about the basic contents of the modernization package.<sup>3</sup> Nevertheless, it is necessary to review some basics of the process in order to recognize

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3. For further discussion of the basic contents of the Modernization Package, see David J. Gerber & Paolo Cassinis, *The Modernisation of European Community Competition Law: Achieving Consistency in Enforcement Part I*, 27 EUR. COMPETITION L. REV. 10 (2006); *The Modernisation of European Community Competition Law: Achieving Consistency in Enforcement Part II*, 27 EUR. COMPETITION L. REV. 51 (2006). For background, see David J. Gerber, *Modernising European Competition Law: A Developmental Perspective*, 22 EUR. COMPETITION L. REV. 122 (2001).

its relationships to the substantive modernization process that accompanied it.

The seeds of modernization were sown in the 1990s by the fall of the Soviet Union. With that event, perceptive officials in the European Commission realized that the new independence of eastern European states was likely to lead to major changes in the process of European integration. It became clear that many of these States were likely to become members of the European Union ("EU"). Given that membership was already being expanded by the addition of new members in 1995,<sup>4</sup> this would represent a significant expansion in the workload of many director generals ("DGs"), including the competition directorate. Claus-Dieter Ehlermann, then director general of the Directorate-General for Competition ("DG Comp"), recognized that the existing procedural mechanism for the application of competition law was likely to be seriously challenged by this impending expansion.<sup>5</sup> Accordingly, DG Comp began a search for ways to respond to these changes. A central concern was that the competition DG would not be able to effectively deal with a significantly expanded workload. He responded by encouraging decentralization of administrative authority to the EU Member States and private competition litigation.<sup>6</sup> In addition to this basic idea, the Commission sought to improve informational and other forms of cooperation between the Member State authorities and the Commission, thus increasing the capacity of Member State authorities to take additional responsibility for competition enforcement.

These measures met with limited success. In particular, the admonition to increase private enforcement had little effect, presumably because the procedural mechanism provided little incentive for such suits. Any suit based on Article 81 of the

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4. See Europa, History of the European Union, [http://europa.eu/abc/history/index\\_en.htm](http://europa.eu/abc/history/index_en.htm) (last visited Feb. 22, 2008).

5. See Claus-Dieter Ehlermann, *Implementation of EC Competition Law by National Anti-Trust Authorities*, 17 EUR. COMPETITION L. REV. 88, 89 (1996) (arguing that the Commission alone would be unable to effectively enforce competition law in the larger European Union ("EU")).

6. See *id.* ("Two conditions must be fulfilled to allow enforcement of Community competition laws by national authorities: Member States must enact the appropriate legislation . . . and Member States must establish their own anti-trust authorities . . .").

Treaty Establishing the European Community<sup>7</sup> ("EC Treaty") centers on the exemption provisions in paragraph 3, and under European Council Regulation 17, only the Commission was authorized to grant such exemptions.<sup>8</sup> As a result, there was little incentive to incur the expenses of private litigation. Moreover, this was generally perceived as a function that state agencies should perform.<sup>9</sup>

With the expansion of EU membership to fifteen in 1995 and the growing realization that there were likely soon to be ten or more new Member States, the perceived need to respond to these changes increased. As it became clearer that change was likely, those who wanted to introduce changes in the system saw opportunities to influence such changes, and this fueled criticisms of the existing system. In effect, the impending expansion opened opportunities and encouraged those who wanted changes to express them, because change was now anticipated. For many, the only question was how far the changes would go and in which directions.

As we view this process of modernization, however, it is important to recall that at the time criticism of competition law procedures was limited. Member State authorities typically had few complaints. The Commission operated within its sphere, seldom causing problems for Member State authorities. There were complaints that the Commission was becoming too powerful and that the most important decisions were moving from the Member States to Brussels, but outside Germany this was of little concern to most Member State authorities.<sup>10</sup> In business and legal circles, there were occasional complaints about the uncertainty and complexity of Commission procedures, but they had relatively little salience prior to the early 1990s.<sup>11</sup>

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7. Consolidated Version of the Treaty establishing the European Community art. 81, O.J. C 224/1, at 37 (1992).

8. See Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87.

9. See DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 429 (1998) (explaining that bureaucrats almost exclusively enforce competition law in the European system).

10. See *id.* at 381 (noting the perception that important aspects of competition law were increasingly handled by the Commission in Brussels instead of by national competition authorities).

11. See Ehlermann, *supra* note 5, at 90 ("In retrospect, it is astonishing that the debate about a better use of national competition administrations did not begin before the early 1990s.").

As the potential effect of impending change was recognized, however, criticisms emerged along several fronts. One was the notification requirement for contracts that might violate Article 81 of the EC Treaty.<sup>12</sup> These notifications were originally designed to give the Commission information about cartels and to provide legal certainty to businesses. With the expansion of the Community, this system had become a major burden on the staff of the competition directorate. Moreover, it was not clear that it provided value sufficient to justify this burden.

A second main issue was the Commission's monopoly on exemptions under Article 81(3).<sup>13</sup> It had been a fundamental of competition law thinking that this exclusivity was necessary to provide coherence in the application of the law in this area. Given that these exemptions are very broadly worded, there was fear that if exemptions could be granted by other institutions, they might be granted inconsistently and perhaps in ways that favored domestic interests.

The growing complexity and formalism of the existing system presented a third set of issues. As the Community expanded during the 1970s and 1980s and the number of transactions subject to notification requirements increased significantly, it had become necessary to develop a set of procedural mechanisms for controlling the workload of the Commission and avoiding extensive delays. Thus the Commission introduced block exemptions, so-called "negative clearances," and other procedural devices that sought predictability by establishing formal criteria for assessing whether an agreement violated Article 81.<sup>14</sup> This led to an increasingly complicated procedural mechanism.

Pressure for change came from several sources. Large European business firms and their legal advisors voiced particular

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12. See Gerber, *Modernising European Competition Law*, *supra* note 3, at 122-23.

13. See Jürgen Basedow, *The Modernization of European Competition Law: A Story of Unfinished Concepts*, 42 *TEX INT'L L.J.* 429, 430 (2007) (noting some of the problems that arose as a result of the Commission's monopoly on granting exemptions).

14. See Mario Siragusa, *Rethinking Article 85: Problems and Challenges in the Design and Enforcement of the EC Competition Rules*, in 1997 *FORDHAM CORP. L. INST.* 271, 281-82 (Barry Hawk ed., 1998) (discussing the Commission's introduction of block exemptions for specified classes of agreements and how their terms are often rigid and limited in scope); see also Frank Montag, *The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View*, in 1998 *FORDHAM CORP. L. INST.* 157, 163-65 (Barry Hawk ed., 1999) (discussing block exemption procedures and the different types of notifications required by the procedures).

concerns about the costs and uncertainties of Commission procedures. Representatives of this group complained, for example, about the need to notify agreements, claiming that this imposed undue compliance costs and served little purpose. They also pushed for a streamlining of Commission procedures, particularly those regarding mergers.<sup>15</sup>

There was also significant pressure for change from outside Europe. One source was U.S. government officials, especially from the U.S. Department of Justice, who showed much interest in this process and complained that Commission procedures were unwieldy, costly and potentially discriminatory toward non-EU (i.e., U.S.) firms.<sup>16</sup> A second form of outside pressure began to emerge that was specifically "transnational." It came from what I will dub the transatlantic competition law group ("TCL Group"). This rather loose group includes competition lawyers heavily involved in EU competition law and mainly from large international law firms, top competition law officials from the United States and Europe, and occasionally a few academics.<sup>17</sup> The group began to take shape and develop continuity from about the time that the two modernization processes started—i.e., in the mid-1990s. One factor in its formation was the increasing frequency and intensity of contacts among members of the group, including a dramatic increase in the number and perceived importance of international conferences on international competition law issues. Another was the rapidly growing importance of transnational cooperation in competition law enforcement. A small number of these competition law experts became

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15. See, e.g., Siragusa, *supra* note 14, at 284 (proposing a "Rule of Reason Approach" to assess agreements in European competition law in conjunction with various procedural improvements); see also Montag, *supra* note 14, at 173 (discussing the need for a timetable as part of the notification procedure).

16. See William J. Kolasky, Dep. Asst. Att'y Gen., Antitrust Div., U.S. Dept. of Justice, Address before the Council for the U.S. and Italy Bi-Annual Conference: U.S. and EU Competition Policy: Cartels, Mergers and Beyond (Jan. 25, 2002), available at <http://www.usdoj.gov/atr/public/speeches/9848.pdf> (pointing out at least five key issues in the 2001 General Electric ("GE")/Honeywell merger case where the U.S. and the EU came to opposite conclusions).

17. See, e.g., Christopher Bright, *Deregulation of EC Competition Policy: Rethinking Article 85(1)*, in 1994 FORDHAM CORP. L. INST. 505, 524-27 (Barry Hawk ed., 1995) (criticizing the scope of Article 85(1) as exorbitant); Patrick Massey, *Reform of EC Competition Law: Substance, Procedure and Institutions*, in 1996 FORDHAM CORP. L. INST. 91 (Barry Hawk ed., 1997) (arguing that it is necessary to reevaluate EU competition law in light of various developments regarding national competition laws within EU Member States).



"regulars" at the most influential conferences—such as the Fordham International Antitrust Law and Policy Conference and the European University Institute ("EUI") competition law conference in Florence. This group does not represent an "interest group" in the traditional sense, and its "membership" is not fixed or formalized. Nevertheless, the regularity of contact among members of the group, a growing coalescence of views on relevant issues, and a perception of shared interests began to give the group identifiable contours in the mid-1990s, and this process has continued since then. Meetings of this group have provided the main international forum for modernization and a source of impetus and support for that process.<sup>18</sup>

### B. *Creating the Modernization Package*

In response to these concerns and pressures, the competition directorate began an internal review of its procedures.<sup>19</sup> The discussions were kept highly secret for more than a year, and there was apparently significant opposition to major change from high-ranking officials within the Commission.<sup>20</sup> This process eventually led to a degree of consensus within DG Comp, and in April, 1999, the Commission released a White Paper on procedural modernization.<sup>21</sup> On the basis of discussions of this White Paper, the Commission released a proposed regulation in September 2000.<sup>22</sup> The final regulation, Regulation 1/2003, was passed on December 16, 2002, and took effect on May 1, 2004.<sup>23</sup>

18. For a discussion of the growing importance of such groups in international legal development, see ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

19. See Karel Van Miert, Comm'r, European Directorate-General for Competition, Presentation of the 25th Report on Competition Policy to the European Parliament (May 30, 1996), available at [http://ec.europa.eu/comm/competition/speeches/text/sp1996\\_044\\_en.html](http://ec.europa.eu/comm/competition/speeches/text/sp1996_044_en.html).

20. See Alexander Schaub, *EC Competition System: Proposals for Reform*, in 1998 FORDHAM CORP. L. INST. 129, 148 (Barry Hawk ed., 1999) ("In the field of Articles 85 and 86, it is of particular urgency to look at the division of enforcement competences and at a possible reform of the procedural framework laid down in Regulation 17. For perhaps too long a time, this was taboo for the Commission.").

21. Commission of the European Communities, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, COM (99) 027 Final (Apr. 1999).

22. Commission of the European Communities, Proposal for a Council Regulation on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87, COM (2000) 582 Final (Sept. 2000).

23. Council Regulation No. 1/2003, O.J. L 1/1 (2002).

The plans for modernization required approval by the Council, and thus the Commission had to convince the Member States to support its proposals. The process of actually working out this agreement lasted almost two years. It was a closed and tightly controlled process, and the Commission put significant effort and resources into managing the process, with weekly meetings in Brussels at which specific topics were presented by the Commission and discussed by the representatives of the Member States. It is important to note that the Member States typically did not send members of the State's competition authority to be their main representatives, but rather officials from ministries such as commerce and finance. This is important, because these officials often knew little about competition law issues and had little incentive to take a serious interest in the outcomes, except insofar as they were directed to do so by their home offices. While competition law officials often accompanied the official representatives, they did not control the vote of their States.

This long deliberative process represented a clear "success" for the Commission. The Commission achieved its primary goals. It eliminated the notification requirement for contracts under Article 81, and it eliminated its monopoly over exemptions under Article 83 of the EC Treaty.<sup>24</sup> It established the idea that Member States would be primarily responsible for application of competition law and that the European Commission would only take enforcement action under limited circumstances.<sup>25</sup> The relationships among Member States would be structured in the form of a network of officials in which the European Commission acted as the dominant voice and the control organ.<sup>26</sup>

In one important respect, these meetings yielded more than the Commission originally anticipated. During the formal process of creating the modernization package, the Commission decided that it would be desirable (in its terms, "necessary") to require that EU competition law be applied to all conduct that had a European dimension.<sup>27</sup> This was a fundamental change in the

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24. *See id.* art. 3, O.J. L 1/1, at 1 (2002).

25. *See id.*

26. *See id.* art. 15, O.J. L 1/1, at 4 (2002).

27. *See* MODERNISATION PACKAGE, *supra* note 1, at 10.

existing system and radically strengthened the position and role of the Commission, but it occurred within the confines of the formal meeting process and under circumstances over which the Commission had significant control.<sup>28</sup> Among specialists in the area, the debates about this issue were generally known. In particular, German representatives are reported to have opposed the idea. After all, they had an important and well-developed competition law system that would lose much of its role and importance.<sup>29</sup> While mild resistance was reported from others, most Member States did not see this as particularly important and accepted the new centrality of EU law in this area. Henceforth competition authorities throughout Europe would generally apply EU law in all cases except where the conduct and its effects were basically limited to one Member State.

### C. Dynamics

This modernization process developed its own dynamics, and recognizing these dynamics provides a key to understanding the relationship between substantive and procedural modernization. There have been two basic readings of modernization. One focused on the dispersion of power and authority to Member States. Here the focus was often on the authority itself and the legal framework for relations within the network.<sup>30</sup> A second interpretation criticized the first on the grounds that it was too formalistic and that in practice the Commission actually augmented its power.<sup>31</sup> The two focused on different issues. I sug-

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28. See Council Regulation No. 1/2003, art. 8, O.J. L 1/1, at 2 (2002). Article 8 provides that national competition authorities must apply EU law (Articles 81 and 82 of the Treaty Establishing the European Community ("EC Treaty")) to activities "which may affect trade between the Member States." *Id.* The regulation prohibits national competition authorities from applying national laws that conflict with Articles 81 and 82 of the EC Treaty, yet allows national authorities to apply "stricter" national laws that apply to unilateral conduct. See *id.*

29. See Hannah L. Buxbaum, *German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement*, 23 BERKELEY J. INT'L L. 474, 489 (2005) ("German competition agencies, and many commentators, initially responded with strong criticism of the change in enforcement philosophy reflected in the Regulation.").

30. See, e.g., Ian Forrester, *Modernization of EC Competition Law*, 23 FORDHAM INT'L L.J. 1028 (2000).

31. See, e.g., Alan Riley, *EC Antitrust Modernisation: The Commission Does Very Nicely - Thank You! Part One: Regulation 1 and the Notification Burden*, 11 EUR. COMPETITION L. REV. 604 (2003); Stephen Wilks, *Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?*, 18 GOVERNANCE 431 (2005).

gest a third reading that recognizes both aspects of the process and analyzes the relationship between them. The process was both a decentralization of authority *and* an effort by the Commission to control the future development of competition law.<sup>32</sup>

The Commission controlled the process. It moved the proposals forward, managing the meetings and controlling the agenda. It framed the discussions as responses to its proposals. Not surprisingly, it was often pursuing what it understood to be its own interests in this process. This is not to say that the responsible officials viewed the Commission's interests as separate from the public good or from its public responsibilities. The officials undoubtedly considered the two to be basically identical. They were pursuing what they considered the best course, but that course was also consistent with perceived interests of DG Comp.

It quickly became clear that the Commission's role in orchestrating the process put it in a position to achieve support for its proposals from most Member States. Given that the Commission was controlling the procedure and the rules of engagement for discussions, it determined when delegations were given information about issues to be discussed and decisions to be made. Commission officials chaired the meetings and thus controlled the agenda, determined who would speak, and how issues were to be framed. A Member State that might be inclined to disagree with a Commission proposal could certainly be heard, but the costs of opposition might be high, and the governments of most Member States did not have sufficient interest in the issues to incur such costs.

In general, it appears that Member State governments typically had limited interest in the reforms. The Commission emphasized its portrait of the modernization process as a devolution of authority to the states, and this was generally attractive to at least most governments. It seemed to give Member State governments additional freedom from "Brussels" at a time when the principle of subsidiarity was a central and popular political theme. It also accorded Member State decision makers increased status. Such factors generally militated against major ef-

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32. For an insightful discussion of the dynamics of the Commission in similar contexts, see John Usher, *The Commission and the Law*, in *THE EUROPEAN COMMISSION* 103 (David Spence ed., 2006).

forts to block or question the Commission's agenda. As a consequence, Member States generally played a relatively passive role in the process of agreeing on the modernization package.

The major exception to this general claim about the relative lack of aggressive interest by Member State representatives was Germany. German competition officials are known to have opposed some of the main points in the process.<sup>33</sup> For example, they resisted the abolition of the notification requirement as well as the requirement that European law be applied to all conduct with a transnational dimension.<sup>34</sup> Germany's interests differed from those of most other States. The German Federal Cartel Office ("FCO") was the first well-developed competition authority in Europe, and it had long been the most important competition authority in Europe.<sup>35</sup> For the FCO, the changes represented a loss of power and influence. Moreover, Germany had a highly influential corps of professors in the competition law area, and this group generally urged resistance to the changes, primarily on the ground that they would increase uncertainty and undermine the effectiveness of competition law.<sup>36</sup> They brought significant pressure on the German government to resist many of the key changes proposed by the Commission.

Finally, an important part of the dynamics of procedural modernization has been the emergence and consolidation of the TCL Group. That process has facilitated the development and consolidation of relationships within this group. It provided a specific institutional context that brought members of the group together on a regular basis. Moreover, the discussions were in reference to a defined set of goals, and they made obvious to the participants that there was a large set of issues in which the interests of the Commission, large transnational law firms, and the representatives of certain Member States such as the United Kingdom could be aligned.

## II. SUBSTANTIVE MODERNIZATION

The substantive modernization process is less defined than

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33. See ALISON JONES & BRENDA SUFRIN, EC COMPETITION LAW 1032-33 (2001); Buxbaum, *supra* note 29, at 475.

34. See, e.g., JONES & SUFRIN, *supra* note 33, at 1032-33.

35. See *id.* at 1032-33; Buxbaum, *supra* note 29, at 482.

36. See Buxbaum, *supra* note 29, at 489.

its procedural counterpart, and thus it is important to identify what I mean by the term. In this Article, I use the term "substantive modernization" to refer to the project in which the Commission has changed the basic means by which competition law's conduct norms are given content and thus changed the substantive law itself. This process covers roughly the same time period as does the procedural modernization process, but it has not been formally organized as a "modernization" project. As a result, it is less easily perceived as a distinct process. It had neither a fixed point of departure nor a predetermined plan, but rather it has taken shape over time, as those in favor of substantive change have recognized opportunities and added objectives to their agenda.

As with procedural modernization, it is necessary to recall that in the years immediately before the process commenced—i.e., the mid-90s—there had been relatively little criticism of the existing substantive law. In general, officials of the competition directorate seemed confident that a workable and effective body of principles and methods had been developed.<sup>37</sup> There was little questioning of the goals of competition law, and there was frequent praise for the European Court of Justice ("ECJ") and the Commission for the way in which they developed the role of competition law to support and enhance economic integration in Europe. This does not mean that everyone was satisfied. There were complaints about the lack of predictability in the methods that the Commission and the courts used in determining and applying the substantive competition law norms,<sup>38</sup> but there had been few calls for basic changes in the substantive law. There was a general sense that the substantive law that had been developed by the ECJ and the Commission was an appropriate and effective legal framework for European conditions.<sup>39</sup>

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37. See Karel Van Miert, Comm'r, European Directorate-General for Competition, Address at BASF Headquarters: The Future of Competition Policy (Nov. 18, 1997), available at [http://ec.europa.eu/comm/competition/speeches/text/sp1997\\_064\\_en.html](http://ec.europa.eu/comm/competition/speeches/text/sp1997_064_en.html) ("[T]he question that we in the Commission have to answer is, 'to what extent should a policy that has been so successful in the past be changed?'").

38. See Siragusa, *supra* note 14, at 279-84; see also Alberto Pera & Mario Todino, *Enforcement of EC Competition Rules: Need for a Reform?*, in 1996 FORDHAM CORP. L. INST. 125, 140-42 (Barry Hawk ed., 1997).

39. See Forrester, *supra* note 30, at 1036-37 (describing European competition law's success and noting that many were content with the system and did not want to risk the uncertainty that could result from giving more power to national authorities).

A. *Defining the Process: Towards a "More Economic Approach"*

The substantive modernization process includes two components, though they are often not clearly distinguished. One involves a significant narrowing of the goals of competition law. In place of the set of goals developed over time in European case law that sought to protect the process of competition as well as to foster economic integration in Europe, the new conception of competition law posits one central goal—"consumer welfare" as understood by neoclassical economics.<sup>40</sup> The second component of substantive modernization follows from this narrower conception of competition law's goals. It posits that neo-classical economics provides not only the goals of competition law, but also its standards and methods. Taken together, these two intellectual developments have moved the language, methods, and perspectives of neoclassical economics to a central position within European competition law and made formal economic methodology the central organizing structure for thinking about competition law and the central means for defining the goals and methods of competition law. This package has come to be referred to in Europe as the "more economic approach."

The significance of this change is somewhat masked by the term "more economic approach." That term suggests that the changes are limited and involve only a gradual change of emphasis. It implies that there is merely an increased use of a support tool that has been employed in the past. At one level, this is accurate. Economic reasoning has been used throughout the development of competition law in Europe, and the changes do increase its use. The "more economic approach" is, however, far more than this gradualist image suggests. Economics has long been used on an ad hoc basis to analyze fact situations and to make predictions about the consequences of particular conduct (e.g. mergers) and thereby aid the process of norm-application. The assumption embodied in the "more economic approach movement" is, however, that neo-classical economics itself provides the norms and goals for European competition law and that it also furnishes the principal methods for applying those

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and courts); see also Barry Hawk, *EU Modernisation: A Latter-day Reformation*, GLOBAL COMP. REV., Aug./Sept. 1999, at 12, 12.

40. See ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 81-89 (1978) (examining the intellectual background of the "consumer welfare" goal).

norms. It is this more fundamental and far-reaching aspect of the use of economics that represents the core of the "more economic approach."<sup>41</sup>

### B. *Impetus for Change*

Calls for a more American-style approach to competition law in Europe began to penetrate the academic literature in the 1980s. The law and economics revolution in antitrust law in the United States had shown its force, and a few European writers found its ideas attractive. Professor Valentine Korah of University College, London, was particularly prominent, as she argued for increased use of economics along the lines that were becoming orthodox in the United States.<sup>42</sup> For years, however, such arguments gained limited support.

Yet in the mid-1990s these arguments began to be viewed more favorably. The so-called "Chicago school arguments" that had dramatically changed U.S. antitrust law in the 1980s now began to fall on receptive ears.<sup>43</sup> Some within the Commission also began to take them seriously. In particular, attacks from this analytical perspective on the legal treatment of vertical restraints in Europe began to find favor. Articles criticizing the Commission's approach to vertical restraints were discussed ever more widely, and an article on the subject by Barry Hawk that appeared in 1996 became a focus of attention.<sup>44</sup> Hawk had been a Professor in the United States, but at the time he was a partner in a large U.S. law firm as well as the organizer of the Fordham Corporate Law Institute's annual competition law conference. He argued openly for importing the U.S. approach to these is-

41. See David J. Gerber, *The Future of Article 82: Dissecting the Conflict*, in 2007 EUR. COMPETITION L. ANNUAL (Claus-Dieter Ehlermann ed., forthcoming 2008).

42. See Valentine Korah, *From Legal Form Toward Economic Efficiency—Article 85(1) of the EEC Treaty in Contrast to U.S. Antitrust*, 35 ANTITRUST BULL. 1009 (1990).

43. See Karel Van Miert, Comm'r, European Directorate-General for Competition, Address to Danish Competition Council: The Role of Competition Policy in Modern Economics (Nov. 10, 1997), available at [http://ec.europa.eu/comm/competition/speeches/text/sp1997\\_061\\_en.html](http://ec.europa.eu/comm/competition/speeches/text/sp1997_061_en.html).

There are those who criticise much of our current practice and approach. And whilst I believe that the Commission has negotiated its way very successfully through the many conflicting pressures on it over the years, I do accept that some criticisms are valid. We need to address ourselves to them.

*Id.*

44. See generally Barry Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 COMMON Mkt. L. REV. 973 (1995).



sues into European competition law.<sup>45</sup> For him and others, a form-based approach to vertical agreements was inappropriate because the effects of such agreements depended on specific circumstances. What was necessary, they argued, was an effects-based approach in which there were no, or few, legal conclusions to be drawn from the form of an agreement. Legal conclusions could only be drawn when the factual circumstances had been analyzed from an economist's perspective.

Several factors contributed to this new willingness of the Commission to respond positively to arguments that it had previously not taken very seriously. Many of these factors emanated from the same sources that were also promoting procedural modernization. One was the formation and development of the TCL Group mentioned above.<sup>46</sup> EU and U.S. officials were now meeting together frequently, often attending the same conferences that also featured large-firm lawyers from the United States and Europe. For example, although the annual competition law conferences of the Fordham Corporate Law Institute had started in 1974, the dramatic increase in the role and importance of competition law on a global scale during the 1990s significantly increased attendance at these meetings and increased their prestige. This, in turn, encouraged additional meetings, most notably the annual seminar at the European University in Florence organized by Claus-Dieter Ehlermann, former director general of DG Comp. As such meetings increased in scope and importance and became more frequent, the participants increasingly came to form a recognizable group with reasonably well-defined boundaries and a shared discourse. These meetings provide a forum in which members of the group become well acquainted with top Commission officials. The meetings serve many very valuable purposes, and they also have provided opportunities for U.S. antitrust officials and practitioners to criticize the Commission and to put pressure on it.

As the TCL Group took shape and as the law firms represented in the group grew rapidly in size and resources, the pressures on the Commission also grew. This led the Commission to seek a more readily defensible basis for its decision making prac-

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45. *See id.* at 973.

46. *See supra* note 17 and accompanying text (discussing the definition and formation of the transnational competition law group ("TCL Group")).

tice. A more economic approach, at least in the context of vertical restraints, seemed to promise a more specific reference point for decisions, one that would be both more intellectually sound and more predictable.

Another factor was the relative economic performance record of the United States compared to Europe in the 1990s.<sup>47</sup> This was a decade of dramatic economic growth in the United States, but European economic performance lagged behind. For many in European business, this led to a call for reduced interference from the Commission in business activities, specifically in the area of competition law enforcement.<sup>48</sup> The law and economics revolution in U.S. antitrust law had significantly reduced the enforcement of the antitrust laws in virtually all areas other than cartels, and business leaders argued that a similar evolution in European competition law was necessary for Europe to compete with the United States in terms of economic development.<sup>49</sup>

Finally, there were private interests at play. For economists, management consultancy firms and big-firm lawyers from the United States there were significant incentives to favor the increased centrality of economics. It promised both groups opportunities to "sell" their skills and knowledge to a vast new market.

### C. *Shape of the Process*

The shape of the substantive modernization process differed significantly from the contours of procedural modernization. It was a slow process that took shape over time, as participants observed the progress of procedural modernization and recognized opportunities for change. The initial step involved revisions in one specific, but major area—the law relating to vertical restraints. Relying primarily on the new learning that had marched through U.S. antitrust law on this subject, and responding to criticisms noted above, the Commission proposed new

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47. See UNION OF INDUS. AND EMPLOYERS' CONFEDERATION OF EUROPE [UNICE], EUROPEAN BUSINESS SAYS: BARCELONA MUST REVITALISE THE LISBON PROCESS 2 (2002) ("If the EU had achieved the same rate of growth as the US over the last 10 years, its total GDP would have been roughly 17% higher in 2001 than it actually was.") [hereinafter UNICE REPORT].

48. See, e.g., *id.* at 2-3.

49. See Korah, *supra* note 42, at 1009; see also Hawk, *supra* note 44, at 973.

guidelines on vertical restraints law in 1997.<sup>50</sup> They introduced the proposition that the legality of this type of agreement would no longer be determined primarily by reference to the particular form of the agreement, but could only be determined by reference to its effects under the specific circumstances in which it was used. These effects would be determined by factors such as the characteristics of the market, the relationships among the contracting parties, and their market power. After intensive public discussion of these issues, the guidelines were enacted and presented as a major change in Community competition policy.<sup>51</sup>

Once this basic proposition had been successfully implemented in the area of vertical restraints, there was increasing pressure to use it in other areas of competition law. In 2001, the Commission enacted similar guidelines relating to horizontal agreements.<sup>52</sup> These guidelines reflected the Commission's new position that "consumer welfare" as understood by neoclassical economics would be the primary standard for applying Article 81. The variety of issues that had been taken into account under the exemption provisions in paragraph 3 of that Article were now brought within one analytical framework. This standard was also the basis for a revision to the merger regulations that the Commission enacted in 2002.<sup>53</sup>

With the completion of these changes, the law relating to unilateral conduct (abuse of a dominant position) was the only major area in which the reach of the new approach was as yet unclear. In 2005, the Commission's competition directorate is-

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50. See Commission of the European Communities, Green Paper on Vertical Restraints in EC Competition Policy (Jan. 22, 1997), available at [http://europa.eu/documents/comm/green\\_papers/pdf/com96\\_721\\_en.pdf](http://europa.eu/documents/comm/green_papers/pdf/com96_721_en.pdf); see also Commission of the European Communities, Proposal for a Council Regulation (EC) Amending Regulation No 19/65/EEC on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices and Proposal for a Council Regulation (EC) Amending Regulation No. 17: First Regulation Implementing Articles 85 and 86 of the Treaty, COM (98) 546 Final (Sept. 1998).

51. See Commission Regulation No. 2790/99, O.J. L 336/21 (1999); Commission Notice, O.J. L 291/1 (2000) (Guidelines on Vertical Restraints).

52. See Commission Notice, O.J. L 3/02 (2001) (Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements).

53. See Commission of the European Communities, Commission Notice on Appraisal of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings (Dec. 2002), available at [http://ec.europa.eu/comm/competition/mergers/review/final\\_draft\\_en.pdf](http://ec.europa.eu/comm/competition/mergers/review/final_draft_en.pdf).

sued a working paper that sought full application of that approach here as well.<sup>54</sup> This final step has met with greater resistance than the others, and it is still being hotly debated in Europe.<sup>55</sup>

#### D. *Dynamics of Process*

The Commission has played the central role in substantive modernization, as it did in procedural modernization, but its role there differs significantly from its role in modernizing procedures. In contrast to the procedural context, the Commission has not needed formal political decisions by the Council to achieve the changes that it has made so far (changing Article 82 of the EC Treaty is more complicated). Here it has been in a position to make changes on its own, simply announcing changes in the analytical framework it is applying to cases and then applying that analysis in actual cases.

For the Commission, the process of change acquired a momentum of its own that has pushed it to continue and expand the process. Once the argument is accepted that the goal of competition law should be defined by neoclassical economics, there is a strong incentive to apply that logic and that approach throughout competition law. As we have seen, the Commission started with vertical restraints, but this led, perhaps inexorably, to the application of the same analysis into other areas of competition law.

Another source of momentum in the process has been the deepening perception that previous methods for determining and applying competition law might actually impede rather than foster economic development in Europe. The magnitude of this change in the perceived value of competition law is critical to understanding the modernization process. From its inception,

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54. See European Commission, DG Competition, DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (Dec. 19, 2005), available at <http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf>.

55. See Ulf Boge et al., *Monopolization Versus Abuse of a Dominant Position*, in 2003 *FORDHAM CORP. L. INST.* 341 (Barry Hawk ed., 2004); Eleanor M. Fox, *Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The U.S./E.U. Divide*, 2006 *UTAH L. REV.* 725, 729 (2006); John Vickers, Paper for the Eighth Annual EU Competition Law and Policy Workshop at the European University Institute: How Does the Prohibition of Dominance Fit with the Rest of Competition Policy? (Jun. 6, 2003), available at [http://oft.gov.uk/shared\\_oft/speeches/spe0303.pdf](http://oft.gov.uk/shared_oft/speeches/spe0303.pdf).

competition law was generally viewed as a means of improving the competitiveness of European industry.<sup>56</sup> It was seen as a tool by which obstacles to competition could be eliminated, thereby improving the efficiency of European markets, benefiting consumers and improving the performance of European firms. This improved performance was assumed to better prepare European companies for competition outside of Europe.

During the course of the 1990s, however, two sets of factors altered this perception for a significant group of officials and lawyers. One was a perspective on competition law that had been developed among writers in the U.S. law and economics movement. From this perspective, competition law, indeed any form of government activity, is just a form of regulation and, as such, it necessarily represents an interference with the free functioning of the economy and, ipso facto, a detriment to economic efficiency.<sup>57</sup> A second set of factors involved external circumstances. As the U.S. economy grew rapidly in the 1990s and European economies struggled, Europeans worried increasingly that they had to change the way things were done in order to keep pace with developments in the United States. This led to measures designed to foster the competitiveness of European industry, including, for example, the so-called "Lisbon Program" enunciated by the Commission in 2000. Under these circumstances, a competition law that was perceived as stricter than U.S. antitrust law seemed to be an obstacle.<sup>58</sup>

The impending expansion of the EU into Eastern Europe increased the impact of both of these factors. Since many of the new entrants had long had economies in which the competition process was marginalized, there was much concern in Brussels that a competition law that was not firmly grounded in economic methodology could be used by national officials and courts in these States for purposes other than the protection and development of competition. In this context, the "more economic ap-

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56. See GERBER, *supra* note 9, at 420 (providing historical background of competition law in Europe).

57. See, e.g., Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 23-25 (1984) (elaborating on the perspective that competition law interferes with economic efficiency).

58. See UNICE REPORT, *supra* note 47, at 2 (noting that EU growth lags behind that of the United States and calls for more free and open markets to stimulate investment and growth).

proach" promised a means not only of unifying competition law analysis throughout an expanded Europe, but also of more easily identifying non-competition-oriented divergences among national competition regimes.

Several prominent conflicts between EU and U.S. competition authorities also encouraged DG Comp leaders to adopt a posture for competition law analysis that would be more in line with U.S. law. In particular, the highly publicized conflict over the proposed merger between General Electric ("GE") and Honeywell led to pressure on the Commission to move toward this kind of convergence.<sup>59</sup> In that case, U.S. antitrust authorities approved a merger between two U.S. companies that would have been possibly the largest single merger in history, but the Commission prohibited the merger, with the result that it was abandoned. This infuriated important groups in the United States and led to strong criticism by lawyers, business groups and U.S. government officials.

EU institutions also contributed to the pressure for change. In particular, a set of three merger decisions by the Court of First Instance in 2002 forced the Commission to reconsider its methodology.<sup>60</sup> In those cases, the Court rebuked the Commission for failing to substantiate its analysis of the probable effects of proposed mergers. While the Court did not directly mandate a more economic approach, it put the Commission under pressure in ways that it had not previously experienced.<sup>61</sup>

Throughout this process of substantive modernization, the TCL Group has gradually become better defined, and its members have become more closely linked by common interests. The potential benefits of coordinating the two most important

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59. See David J. Gerber, *The European Commission's GE/Honeywell Decision: U.S. Responses and Their Implications*, ZEITSCHRIFT FÜR WETTBEWERBSRECHT, Jan.-Mar. 2003, at 87.

60. See *Airtours Plc. v. Commission*, Case T-342/99, [2002] E.C.R. II-2585, ¶ 294 (holding that the Commission made errors in assessing fundamental factors and, therefore, failed to prove that the merger of two tour operators would impede effective competition); *Schneider Electric SA v. Commission*, Case T-310/01, [2002] E.C.R. II-4071, ¶ 288 (finding that the Commission's analysis overstated the market shares of the merged companies); *Tetra Laval BV v. Commission*, Case T-5/02, [2002] E.C.R. II-4381, ¶ 337-38 (annulling the Commission's decision because the Court found lack of horizontal, vertical and conglomerate anti-competitive effects).

61. See David J. Gerber, *Courts as Economic Experts in European Merger Law*, in 2003 *FORDHAM CORP. L. INST.* 475, 480-83 (Barry Hawk ed., 2004) (explaining that the Court employed its own economic expertise to find that the Commission's economic analysis was inadequate).

competition law systems have provided an impetus for increased cooperation. In addition to the shared interest in a more effective and efficient competition law regime for the United States and Europe, substantive modernization has also benefited individual members of this group. For example, American lawyers and competition law officials benefit because the convergence is based on the U.S. model. The EU has essentially moved toward an approach that is already the basis for U.S. substantive anti-trust law. As noted above, this enhances the value of the expertise of U.S. attorneys and thus tends not only to promote their influence in the area, but also to increase the market value of their services. For economists, the incentives are direct and significant. It greatly increases their role in competition law and with this the value of their expertise.

### III. *EXPLORING THE RELATIONSHIP BETWEEN FORMS OF MODERNIZATION*

These two modernization processes are related in important ways. Each conditions the other. Each has derived benefits from the progress and impact of the other, and each has been shaped by the other. While the impact of procedural modernization on its substantive analogue has often been more direct, the role of substantive change in supporting procedural modernization has been no less important. Above all, the mutual interdependence of the two processes is critical to understanding each.

Some basic facts suggest the dimensions of the relationship. The two processes started at approximately the same time—in the mid-1990s, with procedural modernization taking a defined shape a few years earlier than substantive modernization. They continued over roughly the same period, reaching their most intense phases at about the same time in the years bracketing 2000. Procedural modernization developed somewhat faster than its substantive analogue. The individuals and groups that have driven and shaped the two processes have also often been the same or overlapping. These basic facts suggest likely interdependence, and they point to some of the connections between the two processes.

Each modernization process both fostered the proposition that change was positive and benefited from acceptance of that proposition. As each proceeded, it reinforced the image that

fundamental change was not only positive, but also necessary. Taken together, they stood for the proposition that modernization was a positive good in and of itself. Both processes contributed to this image in the language they used and in the pressures they exerted. Accordingly, if modernization was desirable in one area of competition law, it was assumed to be valuable in related areas. This helps explain the momentum in each form of modernization and how "success" or "progress" in one encouraged efforts in the other. Frequent discussion of the need to modernize procedural aspects of competition law helped open the door for change in substantive law. For many it became natural to ask not whether there should be fundamental change in substantive law, but what that change should be. It made modernization "fashionable" and thus provided support and incentives for decision makers to move in that direction. This, in turn, led to a perception that those opposed to change were, at best, "old-fashioned."<sup>62</sup>

We can also discern more specific forms of interaction between the two forms of modernization. For example, procedural modernization supported and encouraged substantive modernization by putting the process of change in motion. It performed a kind of "icebreaker" function by decreasing initial resistance to change and thus also making talk of change easier and more easily acceptable.

It also created an institutional mechanism that announced and repeatedly confirmed and emphasized the need for change. It represented a specifically authorized process of institutional reform and as such produced official texts, formally legitimated procedures of modernization and legislative outcomes. This left little room for complaints that the Commission was making important changes on its own and without legitimization, and thus it tended to obscure the issue of legitimacy with regard to the Commission's parallel efforts in regard to substantive modernization. Without this formal mechanism of procedural reform, the Commission might have been on shakier political ground in pushing for dramatic changes in substantive law.

As the process of procedural modernization proceeded, it

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62. See, e.g., Brian Sher, *The Last of the Steam-Powered Trains: Modernising Article 82*, 25 EUR. COMPETITION L. REV 243, 243-46 (2004) (likening unreformed Article 82 of the EC Treaty to the last of the old fashioned steam-powered trains).



also demonstrated the relative ease with which the Commission could overcome whatever resistance there might be to such changes. At the outset of the process there was little basis for assessing the potential resistance to modernization, and many expected it to be significant.<sup>63</sup> Yet the Commission's success in achieving its objective in procedural modernization demonstrated that it was in a position to overcome whatever resistance it was likely to encounter. This gave the Commission confidence that it could make changes in the substantive area, and it increased the perception among others that such efforts were likely to be successful, which, in turn, enhanced the expected payoffs for those efforts.

The introduction of mandatory application of EU law in Article 3 of Council Regulation 1/2003 ("Article 3") represents an even more specific means by which procedural modernization provided support for substantive modernization. On one level, this requirement is a procedural issue. It answers the question of which law an institution must apply. Once this principle was accepted, however, it gave further impetus to substantive modernization, because it created a new criterion for evaluating Europe's substantive law. It now became important for substantive law to be capable of producing uniformity in language and outcomes across a broad range of institutions, both national and European. This meant that the principles of competition law had to be both appropriate for consistent application by this set of institutions and abstract enough to be efficiently communicated and thus "shared."

The newly crafted criteria increased the perceived need for consistency in the application of competition law and thus provided a strong impetus for substantive law change. The need for uniformity was a primary justification for procedural modernization, especially the inclusion of Article 3: the same rules on competition should apply throughout the EU. Given that the Commission and its supporters pushed hard for this in the procedural modernization process, they were impelled to create substantive principles that were likely to make it effective. This subtly transformed procedural issues into substantive issues. In

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63. *See*, Forrester, *supra* note 30, at 1028 (arguing that the new system will lead to forum shopping, inconsistent application of the law, and difficulty in acquiring a definitive, central ruling from the Commission).

order to achieve consistency, the many institutions that would be applying Community competition law would need not only the same procedures applying the same general legal principles, but they would also need the same analytical principles for giving content to competition law's often vague concepts. Having the same rules would not be enough, unless the decision makers also applied the substantive methods in giving content to these laws and in applying them.

These considerations made a more economics-oriented approach particularly attractive. Neo-classical economics provides a consistent methodology and a language that is used and applied by most economists throughout the world. This coherent package thus represented an intellectual framework for achieving consistency. Moreover, this methodology and language can be shared effectively at two levels. Basic principles of "efficiency" and "consumer welfare" are readily shared by non-specialists, and the more sophisticated aspects of the intellectual framework are readily shared throughout an internationalized economics profession."<sup>64</sup>

While procedural modernization helped to foster substantive change, substantive law changes also supported procedural change. In particular, the introduction of mandatory application of EU substantive law reveals ways in which the processes are intertwined and mutually reinforcing. If economics is to provide the basic methodology for applying competition law, and if an important justification for assigning it this role is that it provides consistency in application of the rules, then it calls for institutional arrangements that can deliver this consistency. This, in turn, calls for a high degree of organization among the decision makers as well as mechanisms for sharing information among them. In order for such an organization to function effectively, a higher level of centralization is also necessary in order to coordinate information flows and decisional systems and thus minimize divergent applications. In the context of enlargement, this was especially attractive, because many were concerned about the capacity of new Member States to understand and apply the more judicially framed and case-based methodology that had been developed in competition law. These factors together sup-

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64. See A.W. Coats, *Conclusion to THE POST-1945 INTERNATIONALIZATION OF ECONOMICS* 395-99 (A.W. Coats ed., 1996).

ported the Commission's request for an institutional and procedural structure that would enable the Commission to control both information flows and administrative decisions. The European Competition Network ("ECN") was created in response to these perceived needs.

In addition to these reciprocal reinforcement effects, shared influences have knitted together the two processes. "Shared influences" here refers to factors that have influenced both processes. Where decisional influences are shared, the increased strength of a factor in one domain tends to increase its influences in the other, and vice versa.

One important shared influence has been U.S. antitrust law. Both European modernization processes have been influenced by U.S. antitrust law and have moved European competition closer to U.S. law.<sup>65</sup> Procedural modernization has created an institutional framework for competition law in Europe that is far closer to U.S. law than the previous procedural mechanism was. For example, by eliminating the notification requirement of Regulation 17 that had played such a major role in competition law, the procedural mechanism of European competition law acquired the same basic form as that in the United States. Similarly, in making EU law generally applicable throughout Europe, except where conduct is essentially local, the modernization process created a distribution of powers in Europe that looks much more like U.S. law. Finally, the changes have been accompanied by efforts to increase private enforcement, again bringing the system into closer conformity with the situation in the United States.

In the substantive area, convergence between the two systems may be even more extensive and profound. Substantive modernization has gradually moved European Community law toward what can be seen as an American "model". In most areas it has largely abandoned the multi-faceted, case-based analysis of competition law issues in favor of an efficiency-based model that in most substantive law areas differs little in its goals and methods from U.S. antitrust law.

This movement toward a more American-style competition law in Europe has sometimes been explicitly intended, while at

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65. See, e.g., Margaret Bloom, *The U.S. and EU Move Towards Substantial Antitrust Convergence on Consumer Welfare Based Enforcement*, 19 ANTITRUST BULL. 18, 19 (2005).

other times it has been only indirectly indicated. At one level, it represents a response to U.S. experience. For example, elimination of the notification requirement was frequently justified by reference to the fact that U.S. antitrust law operates quite effectively without the need for a notification system. More generally, the move has taken place in a context in which U.S. economic "successes" since the early 1990s have been seen as a challenge to European policy makers, who have sought to "catch up" to U.S. competitiveness. These successes conferred a kind of "model" role on U.S. legal policies.

On another level, this model role is based on confidence in its intellectual foundations. Key decision makers in the Commission increasingly have found the logic and policy claims used in the U.S. system to be persuasive. The economic orientation of the U.S. model has been seen as cogent, convincing and intellectually sound, and thus it has encouraged emulation.<sup>66</sup>

Finally, the geo-political situation has fostered a model role for U.S. antitrust and encouraged emulation of the U.S. system. One element of this situation is the power of U.S. institutions—both public and private. U.S. antitrust authorities play central roles in the discussion of international issues, and they have been supported by the significant resources and political weight of the U.S. government. They have generally pushed hard for adoption of U.S. characteristics in European competition law. A second, and related, element is the desire to avoid legal clashes between U.S. antitrust law and European competition law such as occurred, for example, in the GE/Honeywell case mentioned above. Finally, the impetus to move toward a U.S. substantive law model has been justified on the grounds that economic globalization requires some common model on which the EU, the United States and other countries can converge, and that if there is to be such a model, it would have to be the U.S. model.<sup>67</sup>

The two processes shared not only a common "model," but also a common opponent, namely, a group we can call the "tra-

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66. See, e.g., Mario Monti, European Comm'r for Competition, Comments to the Speech of Hew Pate: Antitrust in a Transatlantic Context, Brussels, Belg. (Jun. 7, 2004) ("[W]e have a great debt to the United States in helping us to forge our developments, including very recent ones, in antitrust policy and enforcement.").

67. See David J. Gerber, *United States of America*, in *LIMITS AND CONTROL OF COMPETITION WITH A VIEW TO INTERNATIONAL HARMONIZATION* 411, 446-47 (Juergen Basedow ed., 2002).

ditionalists." Resistance to both forms of modernization came from basically the same sources, and Germany was particularly prominent in this resistance.<sup>68</sup> German officials and scholars generally and often energetically opposed procedural modernization, and in so doing they became a target for the Commission and its supporters. As the Commission's substantive agenda became clear, German officials and scholars also tended to be among the most prominent critics of aspects of that agenda. This naturally increased incentives for supporters of both forms of modernization to attack the German positions and German thinking in these areas. "Sharing" the same opponent provided mutual support among both groups of modernizers and helped to link their efforts.

In addition to sharing models and opponents, procedural and substantive modernization also shared legitimacy claims. The Commission had well-defined legal and political authority to pursue procedural modernization, which included the need to achieve the assent of the Member States and which provided formal opportunities to contest the Commission's plans. With regard to its substantive agenda, however, the situation has been less clear. The Commission is authorized to interpret the Treaty as it wishes, provided, however, that it remains within interpretations sanctioned by Community courts. There is at least some question as to whether the Commission's changes in the fundamental goals and principles of competition law are consistent with its obligations to remain within interpretations sanctioned by the courts. Moreover, again unlike its procedural agenda, the Commission's substantive agenda is not generally subject to effective contest by other organs of EU governance such as the Council or the European Parliament. For the Commission to make fundamental changes in the interpretation of competition law may, therefore, at least test the limits of legitimacy. In the specific case of Article 82, pursuit of that agenda may require a change in the governing treaty provisions, and this would provide a formal framework for contesting that legitimacy.

Given that the Commission was pursuing both processes simultaneously, the Commission's heightened power and success

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68. See Buxbaum, *supra* note 29 and accompanying text (explaining that Germany's well developed competition law system would lose much of its role and importance because of modernization).

in procedural modernization tended to support the legitimacy of its efforts in substantive modernization. This effect was enhanced by the fact that both the groups and interests supporting the Commission and those opposed to some of its plans were either identical or overlapped significantly. The two processes have thus "shared" legitimacy in the sense that the legitimacy of pursuing one set of goals (procedural) has supported the pursuit of another set of goals.

Finally, the two processes have been linked by the development and consolidation of the TCL Group, which has been strengthened by each and which has, in turn, supported each. This group has supported both procedural and substantive modernization. This has allowed the pooling of interests and energies among group members and provided a means for mobilizing support for each project. It has concentrated efforts and established a shared incentive structure that has tended to focus the deployment of resources within the group.

### *CONCLUSION*

This Article has shown some of the ways in which procedural and substantive modernization have become intertwined. It has identified some of the ways in which each has conditioned the other and shown that neither is fully understandable without perceiving its relationship to the other.

Recognizing this interaction yields valuable insights and frames potentially important questions regarding the role of competition law in European integration and about the current dynamics of the integration process itself. For example, it raises issues about how to interpret and assess each of the modernization processes. If, as the analysis here shows, procedural modernization has supported and facilitated substantive law changes, this needs to be taken into account in assessing the strength of support for those substantive changes. It has become common for supporters of the "more economic approach" to portray an efficiency-based interpretation of EU competition law as a set of ideas that has swept to quick and total acceptance within Europe. Yet this interpretation of the past few years may overstate the case when one considers the derivative nature of at least some support for that process. This is particularly significant, because it may lead to questions about the degree to which na-

tional judges, who are not subject to the pressures involved in these processes, can be expected to follow the substantive changes proposed by the Commission.<sup>69</sup>

This analysis becomes all the more useful when the political and economic dimensions of the two processes are taken into account. Procedural modernization has focused largely on matters that have limited interest for the general public and for most governments and businesses. On the other hand, substantive modernization impacts the very process of European integration itself and touches fundamental issues in economic and political life. Therefore, to the extent that support for substantive modernization has derived from the process of procedural modernization, a Commission project with low public policy valence has supported and legitimated a set of changes with significantly higher public policy importance.

Relating the two modernization processes also sheds light on the dynamics of each and on the role and power of institutions and groups involved. For example, it reveals additional aspects of the so-called "democracy deficit" issue in Europe—i.e., the issue of how much power officials should have who are neither elected nor subject to effective control by those who are elected.<sup>70</sup> Viewing the two modernization processes together highlights the extent and nature of the Commission's power. The Commission has been able to change fundamentally both substance and procedure in European competition law with minimal effective input from many of those affected by those changes.<sup>71</sup> This may be desirable, but the importance of competition law to the European economy and the process of economic integration calls for recognition of the dynamics behind such decisions.

Finally, analyzing the relationships here allows us to more

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69. See Mario Siragusa, *A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules*, 23 *FORDHAM INT'L L.J.* 1089, 1100 (2000) (arguing that national courts will inconsistently apply Articles 81 and 82 of the EC Treaty).

70. For discussions regarding the European Union's democracy deficit, see Martin Nettesheim, *Developing a Theory of Democracy for the European Union*, 23 *BERKELEY J. INT'L L.* 358, 361 (2005); Stephen C. Sieberson, *The Proposed European Union Constitution - Will it Eliminate the EU's Democratic Deficit?*, 10 *COLUM. J. EUR. L.* 173 (2004).

71. See Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 *COLUM. L. REV.* 628 (1999) (explaining that the European Community has not established legitimate democratic hierarchical supervision over its supranational entities).

clearly identify who has benefited from this double helix process. The European Commission has augmented its power in important ways. The procedural modernization process has put it in effective control of most significant competition law issues throughout Europe. The requirement that EU competition law be applied to virtually all potential competition-threatening conduct has dramatically reduced the independent role of national competition laws and national competition authorities. The Commission has become the control instance for this entire body of law by virtue of its control of the ECN and the control of national authorities that results from the ECN structure.

Substantive modernization has augmented this consolidation of the Commission's power because it creates a single methodology for determining and applying competition law that is to a large extent controlled by the Commission. In essence, it requires all decision makers to apply conduct standards according to principles established by the Commission. The national courts are not subject to the Commission's control, of course, but they will be subject to significant pressure to apply the rules and principles established by the Commission and applied by all national competition authorities. The use of economics represents in this context a lever of control and a means of increasing the institutional influence of the Commission.

The intertwined modernization processes have also benefited other groups. Economists, for example, have been major "winners" in the process. It is their language and methodology that has been introduced in the substantive modernization process and anchored by the procedural modernization process. This has dramatically increased the role and importance of economists within the European competition law system and, accordingly, augmented the market value of economists' services. Since economists typically provide these services through consultancy firms, it has also enhanced the role of these firms.

The changes have similarly benefited U.S. law firms (and European lawyers associated with U.S. firms). As EU competition law has moved closer to a U.S.-style system, the value of knowledge about how to operate within such a system is correspondingly increased. U.S. lawyers know how to operate in a system in which economics plays the roles it is increasingly being asked to play in Europe, and they have "first mover" advantages in using economics-based knowledge in the competition law con-



text. They can, in effect, "sell" those advantages in Europe. This also, in turn, contributes to the consolidation of law firms within Europe, as large firms with U.S. style structures and experience provide services that are more difficult and costly for traditional European legal practitioners to provide.

It is important to identify the incentive structure of these groups and institutions. This is not because their interests might be inconsistent with the public's interest in effective application and development of competition law. The assumption should be that the public officials involved do operate in what they consider the public interest. I know of no serious observers who would doubt that proposition. Rather, the objective of this analysis is to identify the dynamics of change in European competition law, and these incentive sets are part of that analysis.

The analysis here has examined the relationship between processes of change in the area of competition law. It has revealed some of the factors involved in these processes, but certainly not all. The objective has been to identify the interactions between these two processes and point to some of the ways in which such an analysis may be beneficial. The relevance of the analysis goes well beyond competition law, because the factors we have identified here can influence the future course of European integration.