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COMPETITION LAW MODERNIZATION: AN EVOLUTIONARY TALE?

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Modernization, a process of reform dating from the late 1990s, is the most important change in competition law in recent years[1] if not since 1958. Articulated through Regulation 1,[2] it is characterized by decentralization of enforcement to National Competition Authorities and an increasing emphasis on economic analysis. Building on the seminal work of Gerber[3] and Goyder[4] who both provide historical accounts of the development of competition law and policy up to the late 1990s, this chapter adopts an institutional perspective to examine changes in relation to the governance of the two most paradigmatic aspects of competition law—private market behaviour pertaining to restrictive agreements and the abuse of market dominance.[5] In the first

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[1] See generally S Brammer, *Co-operation between National Competition Agencies in the Enforcement of EC Competition Law* (Hart, 2009); D J Gerber, 'Two Forms of Modernization in European Competition Law' (2008) 31 Fordham Int'l LJ 1235; H Kassim and K Wright, 'Bringing Regulatory Processes back in: The Reform of EU Antitrust and Merger control' (2009) 32 WEP 738; I Maher, 'Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network' (2009) 7 Comparative European Politics 414; I Maher, 'Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement?' (2008) 31 Fordham Int'l LJ 1713; A Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You: Part I' (2003) 24 ECLR 604; A Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You Part II: Between the Idea and the Reality: Decentralization under Regulation 1' (2003) 24 ECLR 657; J S Venit, 'Brave new World: The Modernization and Decentralization of Enforcement under Arts 81 and 82 of the EC Treaty' (2003) 40 CML Rev 537; S Wilks, 'Agencies, Networks, Discourses and the Trajectory of European Competition Enforcement' (2007) 3 European Competition Journal 437.

[2] Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Arts 81 and 82 of the Treaty, [2003] OJ L1/1 (hereinafter Regulation 1).

[3] D J Gerber, 'The Transformation of European Community Competition Law?' (1994) 35 Harv Int'l LJ 97.

[4] D Goyder, *EC Competition Law* (5th edn, Oxford University Press, 2009).

[5] Arts 101 and 102 TFEU respectively (previously Arts 81 and 82 EC).

edition, this author noted the path dependencies inherent within the governance structures of competition law within which 'progress' is constrained by institutional forms and earlier policy choices in order to explore the evolution of competition law and intellectual property rights.[6] In relation to modernization which significantly changes governance pathways in the competition sphere, it is necessary to ask if these recent changes can be explained at all in evolutionary terms given the extent to which they constitute a break from the past. While path dependencies are inherent within bureaucratic governance structures, in this instance it is not clear to what extent they constrained the new institutional forms and policy choices that characterize modernization.

The chapter falls into four sections: a brief reflection on competition policy as a policy apart; an examination of the idea of evolution; an outline of the development of competition law and policy prior to modernization; and a reflection on modernization in the evolution of competition law before concluding that while diversity is a necessary hallmark of the regime and was necessary for evolution of the law to take place, convergence may prove the most lasting outcome.

A. COMPETITION POLICY: A POLICY APART?

Ten years ago, it was categorical that competition policy could be seen as a policy apart within the Community (as it then was), mainly due to the luxury of power enjoyed by the Directorate General for Competition (DGComp[7]) manifest in its enforcement and especially its sanctioning powers. Majone's analysis[8] of the Commission as an institution with limited resources but one which has been able to increase its influence through increased regulation, did not hold true in quite the same way for the experience of DGComp which had enjoyed extensive regulatory powers since the early 1960s. Efforts to decentralize were apparent from the 1990s as concerns about lack of resources and personnel became more acute especially in the expectation that states previously members of the Soviet bloc would, within a relatively short period of time, become Member States of the EU.[9] In addition to extensive enforcement powers, the Commission also has unparalleled legislative powers in relation to the control of public undertakings and liberalization of markets.[10] However, following challenges to their exercise,[11] the liberalization process begun in the early 1990s after the

[6] I Maher, 'Competition Law and Intellectual Property Rights: Evolving Formalism' in P Craig and G de Búrca, *The Evolution of EU Law* (Oxford University Press, 1999) 598.

[7] Before the Kinnock reforms, known as DGIV and now known as the Department for Competition.

[8] G Majone, 'Market Integration and Regulation: Europe after 1992' (1992) 43 Metroeconomica 131.

[9] Gerber (n 1 above) 1237.

[10] See generally D Geradin (ed), The Liberalization of State Monopolies in the European Union and Beyond (Kluwer Law International, 1999).

[11] Case 188–190/80 *France, Italy and the UK v Commission* [1982] ECR 2545; Case C-202/88 *France v Commission (Terminal Equipment)* [1991] ECR I-123; Cases C-271/90, C-281/90, and 289/90 *Spain, Belgium and Italy v Commission* [1992] ECR I-5833.

introduction of the Single Act has predominantly been adopted through conventional law-making processes involving the Council and Parliament.[12]

The status of competition policy as a policy apart is now less apparent for three reasons. First, as a result of liberalization, the role of competition policy within the EU in general and the internal market in particular became more obvious. The nature of competition law as something primarily of relevance to multinational businesses changed. The privatization that followed on from the reforms of the early nineties had a direct impact on national political and employment strategies as well as on consumers' lives in ways previously unprecedented such that by the time of the French 'non' in the European Constitution referendum, the market liberalizing policies of the EU manifested in part through its competition policy, was one of the factors in securing a negative vote.[13] Secondly, the convergence of national competition laws with those of the EU in the nineties and noughties partly as a response to the opportunities and challenges of the 1992 programme and arising out of the demands prior to accession for new Member States, brought a competition law and policy discourse to the national domain—or at least created the potential for one to emerge.[14] Finally, as I have argued elsewhere,[15] decentralization of enforcement with the shift towards networks and away from hierarchy in the enforcement of competition law is separate from but in fact mirrors governance initiatives under the somewhat ill-fated Lisbon agenda[16] which is a reminder that governance in the competition sphere has significant similarities with governance means found in other European policy spheres.

Competition law and policy—in particular state aid—has come under severe pressure during the current economic crisis with the need for the Commission to agree bail-out arrangements for troubled banks bringing its regulatory role to the fore in political discussions. Lyons suggests that banks remain a special sector of the economy necessitating bail-outs and mergers.[17] Geradin, a practitioner and academic and also the former competition Commissioner, Kroes, have presented competition law as part of the

[12] Art 114 TFEU (previously Art 95 EC). See E Szyszczak, *The Regulation of the State in Competition Markets in the EU* (Hart, 2007) 133–138.

[13] S Seeger, 'From Referendum Euphoria to Referendum Phobia—Framing the Ratification Question' (2008) 10 EJLR 437, 445. For a discussion of the tensions underlying the liberalization process arising out of different conceptions of the role of the state in the market see, T Prosser, *The Limits of Competition Law: Markets and Public Services* (Oxford University Press, 2005) chs 6, 7, 8.

[14] This arguably is one of the best examples of Europeanization of national laws. See generally M Drahos, *Convergence of Competition Laws and Policies in the European Community* (Kluwer Law International, 2001); I Maher, 'Alignment of Competition Laws in the EC' (1996) 16 YEL 223.

[15] Maher, 'Regulation and Modes of Governance' (n 1 above).

[16] W Kok, *Facing the Challenge: The Lisbon Strategy for Growth and Employment: Report from the High Level group chaired by Wim Kok* (Official Publication of the EC; 2004); K Armstrong, I Begg, and J Zeitlin (eds), 'Governance and Constitutionalism after Lisbon' (Special Issue) (2008) 46 JCMS 413–450; D Hodson and I Maher, 'The Open Method as a New Mode of Governance. The Case of Soft Economic Policy Co-ordination' (2001) 39 JCMS 719.

[17] B Lyons, 'Competition, Bail Outs and the Economics Crisis' (CCP Working Paper 09–04) see <http://www.uea.ac.uk/polopoly_fs/1.112187!CCP09–4.pdf>.

solution to the economic crises with continuing enforcement of the anti-trust rules and active oversight of state aid essential to ensuring a stable recovery.[18]

Finally, it is still important to bear in mind those characteristics of competition law that to a greater or lesser degree still distinguish it from other areas of the law.[19] It can only be defined by reference to another discipline—economics—and economics remains fundamental to it with economic analysis a feature of case law.[20] It is a subsystem of law whose instrumental nature and mixed criminal and civil identity (depending on the enforcement methods used) means that those values of effectiveness and efficiency that characterize competition enforcement as much as other regulatory regimes, can collide or at least be in tension with values of due process that characterize other fields of law such as evidence, criminal law, and human rights.[21] It is also characterized by a strong episteme of transnational lawyers and officials with a shared vision of competition law and a common discourse framed predominantly by a consumer welfare model of competition law.[22]

B. EVOLUTION

The risk with adopting an evolutionary perspective is that of delivering a 'just so' story where the narrative, while coherent in itself, in fact has no relationship to reality.[23] This paper aims to avoid this in relation to modernization—in the first instance by setting out three fairly obvious but nonetheless important factors.

First, law changes—this is a truism. Thus writing about legal change almost begs the question. But in fact it is important to understand what changes have occurred and how in order to better understand what influences legal change. Lewis and Steinmo note that the term 'evolution' is often used simply to denote change or a connected pattern of historical events.[24] They suggest taking a closer look at evolutionary theory (or at least specific aspects of it) in order to refine this notion of change. While they are approaching the issue from a political science perspective some of their insights

[18] D Geradin, 'Managing the Financial Crisis in Europe: Why Competition Law is Part of the Solution, Not of the Problem' (2008) Dec issue 1 Global Competition Policy 1; N Kroes, 'Enforcement Policy and the Need for a Competitive Solution to the Crisis: Address to the Irish Centre for European Law Dublin, 17 July 2009 Speech/09/348.

[19] See generally I Maher, 'Regulating Competition' in C Parker, C Scott, N Lacey, and J Braithwaite (eds), *Regulating Law* (Oxford University Press, 2004) 192–194.

[20] D B Audretsch, W J Baumol, and A E Burke, 'Competition Policy in Dynamic Markets' (2001) 19 IJIO 613.

[21] K Yeung, *Securing Compliance* (Hart, 2004) ch 5.

[22] F van Waarden and M Drahos, 'Courts and (Epistemic) Communities in the Convergence of Competition Policies' (2002) 9 JEPP 913.

[23] The phrase comes from Rudyard Kipling's children's stories that sought to explain how certain animal characteristics—such as a spotted coat—came about by reference to particular events that occurred to one particular individual animal see R Kipling, *Just So Stories for Little Children* (Oxford University Press, 1902).

[24] O Lewis and S Steinmo, *Institutional Analysis and Evolutionary Theory*, European University Institute, 18 August 2008. See also C Zimmer, *Evolution: The Triumph of an Idea* (HarperCollins, 2001) 235 quoted in A C Hutchinson, *Evolution and the Common Law* (Cambridge University Press, 2005) 235.

are useful for a legal analysis that draws on historical institutionalism. In particular, they raise three issues that for our purposes are of particular relevance to the modernization of competition law. First, evolutionary biologists see diversity as a key driver of change.[25] This raises the question of the nature and role of diversity in the process of modernization in competition policy, given that one of the commonly understood reasons for it was the convergence of competition norms in Europe. Convergence implies similarity but does not imply uniformity. It describes a process defined in part by continuing diversity that may or may not disappear over a period of time.[26] Secondly, evolution implies gradual, path-dependent change. The modernization of competition law has many of the hallmarks of a big bang: how can we speak of evolution in that context? This is especially the case where there is punctuated equilibrium[27]—major change but without large-scale environmental shocks. One final comment: Lewis and Steinmo point out that evolutionary theory is not about prediction given that the chance of random variation is always a possibility. In fact evolution has no goal.[28] Using an evolutionary lens rather is to better understand the forces and dynamics that shape the world. So, the aim in this chapter is not to make any predictions as to the future but instead to reflect on how our understanding of the institutional framework of competition law is deepened by an evolutionary analysis.

A second obvious factor to address is that change happens but when it happens is important for a number of reasons. First, changes which may be beneficial at one time (or indeed in one geographical space), may not be so or indeed may not be possible at another time. For example, it would probably be very difficult to suggest the sort of reforms found in Regulation 1 in the deeply economically uncertain times of today when protectionism is becoming more politically attractive and competition less so than was the case when it was in fact introduced and the European and world economies were performing (relatively) well. Change may occur fortuitously at particular times and not necessarily because that was the optimal time. We cannot assume change is always an improvement because random chance (or unexpected consequences as regulatory scholars would term them) is always possible. For example it is doubtful whether the latest Treaty reforms would have been embarked on quite so enthusiastically if the difficulties of adoption were known then. Change may be possible at a certain point not necessarily because of any exogenous shock but simply because of relative stasis in the environment, combined with innovation endogenously, creating space for new ideas to be aired. *When* change occurs also affects *how* it occurs. This is especially the case in a multi-level polity like the EU where the standing of policy and policy actors within the policy arena has an impact on the duration, emphasis, nature, and outcome of negotiations.

[25] Lewis and Steinmo, ibid.

[26] Drahos (n 14 above) 8.

[27] See S. Krasner, 'Approaches to the State: Alternative Conceptions and Historical Dynamics' (1984) 16(2) Comparative Politics 223 at 243.

[28] Hutchinson (n 24 above) 123.

A third factor to consider in relation to evolution is that institutions matter, not because they alone determine policy but they mediate those forces (economic, political), which may shape policy.[29] The term 'institution' is not limited to organizations but extends to rules (formal and informal) and procedures which constrain and reflect the policies that they are called on to implement.[30] An institutional analysis of legal change is especially useful for an evolutionary account because it provides a conceptual framework within which to consider change. The level of responsiveness among institutions is shaped by the fact that institutions respond within their existing frameworks and values, building on existing experience—even where change is radical. In turn, future developments are shaped by earlier choices because, for example, of the costs associated with redesign, the 'paper' routes, and administrative responsibilities being clearly defined with personnel assigned at appropriate stages. Thus while providing a framework within which to focus on change, institutional analysis also focuses on the creation of pattern which limits the scope for change and removes any implicit notion of constant, inevitable, and predictable progression, instead allowing for a more prosaic consideration of how organizations, practices, and informal rules are likely to shape and limit the responses of institutions which in turn draw on internal organizational experience without necessarily adequate reference to those external events which triggered change in the first place.

Bulmer notes that this sort of historical institutionalism implies path dependency but has difficulty explaining episodes of sudden transformation (punctuated equilibrium).[31] Evolution, especially when coupled with historical institutionalism with its implication of path dependencies, does imply pattern and gradual change. However, a closer look at when and how change can occur shows that it can be episodic. The modernization process in competition law can be cast as one of sudden transformation, even allowing for the period of roughly four years between the Commission White Paper[32] on reform and the enactment of Regulation 1 with rigorous debate and negotiation in between. It is fair to say that it was unexpected, with even Mario Monti—the then Commissioner who oversaw the transformation—saying that in 2000 he would never have envisaged a new competition regime by 2003.[33] In addition,

[29] K Armstrong, 'Regulating the Free Movement of Goods: Institutions and Institutional Change' in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Clarendon, 1995) 165.

[30] S Steinmo and K Thelen, 'Historical Institutionalism in Comparative Politics' in S Steinmo, K Thelen, and F Longstreth (eds), *Structuring Politics* (Cambridge University Press, 1992) 2–3.

[31] S Bulmer, 'Politics in Time meet the Politics of time: Historical Institutionalism and the EU Timescape' (2009) 16 JEPP 307, 308.

[32] EC Commission, White Paper on Modernization of the Rules Implementing Arts 85 and 86 of the EC Treaty, 28 April 1999.

[33] M Monti, 'New European Antitrust Regime: Implications for Multinationals, The Fall 2004 Antitrust Symposium—The New European Antitrust Regime: Implications for Multinationals—Remarks: Panel Discussion' (2005) 13 Geo Mason L Rev 269, 271. At the same time, a tone of urgency can be found in the conclusions of the House of Lords Select Committee when reviewing the reform in 2000, although at that time it was not clear how long the radical reforms proposed would take to become law and the Committee rightly expressed concerns about the problems of Commission workload and delays in its decision-making and the need to reform competition law enforcement in the light of enlargement see House of Lords Select Committee on the European Union, Reforming EC Competition Procedures, HL 33 1999/2000 15 February 2000, 145–149.

the change that has been engendered both procedurally (decentralized and directly applicable Treaty rules) and substantively (more economics-based approach) marks a major shift in the governance and approach to EC competition rules and their enforcement. Modernization thus is a critical institutional event that challenges what Bulmer describes as the fallback position of path dependence in historical institutionalism.[34] The *longue durée* of historical institutionalism lends itself to longer timeframes for evaluating the outcomes of change, their embeddedness, and their effectiveness. Evaluating that change requires a long timeframe so the emerging pathways can be properly evaluated and understood. On this basis, we are probably still too close to explain for example the puzzle of the apparent effectiveness of the European Competition Network despite its weak structural base;[35] we do not yet have enough information on how national courts are giving effect to EC competition laws;[36] the extraordinary push to encourage private enforcement actions;[37] and how the shift to a more economics-based approach can meet the challenges of these recessionary times. Nonetheless, at this seven-year juncture, a look at modernization through the evolutionary lens should help to explain the drivers of change and in particular the role of diversity as both a driver and a characteristic of the new regime.

C. THE EVOLUTION OF COMPETITION LAW AND POLICY

Competition policy has always enjoyed prominence within the EU. The preamble refers to the need for action in order to guarantee *inter alia* fair competition[38] while Article 3(g) EC listed as one of the activities of the Community the establishment of 'a system ensuring that competition in the internal market is not distorted'. This provision was removed in the most recent Treaty at the insistence of France following the negative vote in the referendum on the Constitutional Treaty.[39] However, a Protocol is attached to the Treaty indicating that the reference to the internal market in Article 3 includes a system for ensuring undistorted competition.[40] It is not clear

[34] Bulmer (n 31 above) 309.

[35] Wilks (2007) (n 1 above) 442.

[36] Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council, Report on the Functioning of Regulation 1/2003 COM(2009) 206, final, SEC(2009) 574 final, 16, 78–89; K Wright, 'European Commission Opinions to National Courts in Antitrust Cases: Consistent Application and the Judicial-Administrative Relationship' (2008) CCP working paper 08–24 <http://www.uea.ac.uk/polopoly_fs/1.104682!ccp08–24.pdf>.

[37] EC Commission, White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008) 165, 2 April 2008; EC Commission Staff Working Paper SEC(2008) 404.

[38] Preamble EC Treaty and now the Treaty on the Functioning of the EU.

[39] S Seeger, 'From Referendum Euphoria to Referendum Phobia—Framing the Ratification Question' (2008) 10 EJLR 437, 445.

[40] Protocol No 27 TEU. Art 51 TEU gives equal status to Treaty Articles and Protocols. House of Lords European Union Committee, *The Treaty of Lisbon: An Impact Assessment* 10th Report of Session 2007–08 vol 1 [9.13]–[9.18]; M Dougan, 'The Treaty of Lisbon 2007: Winning Minds not Hearts' (2008) 45 CML Rev 617, 653.

whether this political and legal fudge represents a downgrading of competition policy within the EU. What can be said is that it brings to the fore sensitivities around competition law arising out of different conceptions of the role of the state in the market,[41] sensitivities that can be lost in the technocratic discourse of competition law. The change in wording also confirms the view that while competition policy mainly remains above the political fray as a highly technocratic field enforced by (largely) independent executive agencies, Commissioner van Miert's statement that 'competition is politics' still resonates in some contexts at least.[42]

Articles 101–109 TFEU[43] elaborate on these aspirational provisions, with Articles 101 and 102 prohibiting cartels and abuse of market power, respectively. Article 103[44] requires the Council to adopt measures to clarify the functions of the Commission and Court and ensure compliance with Articles 101–102 by making provision for fines. In addition, Article 105[45] gave the Commission power to investigate infringements and propose measures to bring them to an end. This could be done through a reasoned decision which could authorize Member States to take measures, the conditions of which the Commission would determine, that would remedy the situation. Thus the Treaty itself gave the Commission a central role in enforcement.

The development of competition law was contingent on underlying policy which seeks to advance several objectives. Three objectives were identified by the Commission: to keep the market open and unified; to maintain a level of competition in the common market such that EC objectives could be achieved; and to ensure fairness in the market.[46] One of the hallmarks of modernization is the shift towards a more economics-based approach to competition law whereby competition law focuses on efficiency-orientated values. Thus market integration is no longer driving the policy to the same degree and fairness (essentially economic freedom—a core value in particular in the ordoliberal tradition which was so influential on competition law in its early years[47]), is also given less emphasis by the Commission at any rate.[48] This can be seen in the 2004 guidelines issued by the Commission on Article 101(3) where the objective of the provision is identified as the protection of competition in order to enhance consumer welfare and to ensure an efficient allocation of sources.[49] As a tool of

[41] See generally Prosser (n 13 above).

[42] S Wilks and L McGowan, 'Competition Policy in the European Union: Creating a Federal Agency?' in G B Doern and S Wilks (eds), *Comparative Competition Policy* (Oxford University Press, 1996) 254 quoting Commissioner van Miert.

[43] Previously Arts 81–89 EC.

[44] Previously Art 87 EC.

[45] Previously Art 89 EC.

[46] EC Commission, Ninth Report on Competition Policy at 9 and see generally T Frazer, 'Competition Policy after 1992: The Next Step' (1990) 53 MLR 609, 611.

[47] D Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon, 1998) 233 *et seq*.

[48] For a discussion of the shifting relationship between these values see G Monti, *EC Competition Law* (Cambridge University Law, 2007) ch 2.

[49] Commission Communication, Guidelines on Art 81(3) of the Treaty, [2004] OJ C101/97 [13].

integration, competition policy was—and continues to be albeit to a lesser degree—shaped by the overall integration agenda of the EU; the nature of those subject to the competition prohibitions especially but not exclusively, large multinationals; the complex and divergent societies within which that policy is to be applied; and the institutional context within which the norms are applied. This means that even though the antitrust provisions have remained a constant in the Treaty since 1958, competition policy has changed over time, and most significantly, in the process of modernization.

David Gerber's 1994 article provided a map explaining the evolution of competition law up until that year, using a similar approach to Weiler in his seminal *Yale Law Journal* article.[50] He divides the evolution of EU law into three phases: in the first fifteen years the foundations of the competition system were established—in particular early legislation (Regulation 17[51]) secured extraordinary powers for the Commission. First, it could fine undertakings engaged in anticompetitive activities up to 10 per cent of their worldwide turnover,[52] its decisions being subject to review by the Court which can vary, reduce or cancel the fine.[53] This power remains extant and in fact the size of fines in recent years for major breaches of EC law has exceeded 1 billion Euros.[54] Second, it was given the sole power to exempt restrictive agreements that met the conditions set out in Article 101.[55] Thus the structure of that provision, where the absolute prohibition in the first paragraph is alleviated by the possibility of exemption in the third paragraph if certain conditions are met, shaped institutional relationships. The Commission, as the sole body with power to award exemptions was placed at the centre of competition policy formation and legal enforcement although it quickly became apparent that it did not have the resources that would be necessary to carry out this latter function efficiently.

Only Germany had an effective competition law at the time,[56] so other Member States were apparently willing to delegate upwards while German theory (ordoliberalism) and approach to competition law proved highly influential.[57] Given

[50] Gerber (n 3 above); J H H Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403. For a slightly different mapping of competition law see A Weitbrecht, 'From Freiburg to Chicago and Beyond—the First 50 Years of European Competition Law' (2008) 29 ECLR 81. In the first edition of this book I undertook a similar mapping exercise in relation to the development of competition law and intellectual property law see Maher (1999) (n 6 above).

[51] Reg 17/63 [1959]–[1962] OJ Sp Ed 87.

[52] ibid Regulation 17, Art 15.

[53] ibid Regulation 17, Art 17.

[54] Commission Decision 13 May 2009 COMP 37/990 Intel D(2009) 3726, final in case COMP/C3/37.990. On appeal, T-286/09, pending.

[55] ibid Regulation 17, Art 9.

[56] Brammer (n 1 above) 8. She notes that four of the then six Member States had competition laws but only France and Germany had a prohibition based regime with only Germany with an effective and sufficiently resourced Authority.

[57] S Quack and M-L Djelic, 'Adaptation, Recombination, and Reinforcement: the Story of Antitrust and Competition Law in Germany and Europe' in W Streek and K Thelen (eds), *Beyond Continuity: Institutuional Change in Advanced Political Economics* (Oxford University Press, 2005).

the importance of the German economy within Europe, such influence is hardly surprising although it was reinforced by the fact the head of DGComp, up until the Kinnock reforms, was always a German.[58] This influence may in part help to explain that it was the Germans who held out the longest on the most controversial aspect of the modernization package which was the jurisdictional divide between domestic and European competition rules.[59]

This radical delegation of powers to the Commission was followed by fifteen years of cautious enforcement while the Commission sought to educate itself, the states, and subjects of the prohibitions as to the nature and scope of the competition rules. At the same time, the prohibition on restrictive agreements in particular was interpreted very widely and in a highly legalistic fashion that underpinned the domination of legal discourse (and lawyers) in the DG. Competition law was firmly established as a motor of integration, using the anti-trust rules to break down vertical arrangements in particular which divided the market on national lines. The quality of reasoning in these cases from a competition perspective was much criticized[60] but the Court was a stout supporter of the Commission in this strict, legalistic, and integrationist approach to competition law enforcement.

The second phase identified by Gerber is that from the oil crisis to the Single European Act, although there is no clear watershed between the two phases. DGIV as it then was, consolidated its position as the engine-house of competition policy, supported by a slightly more critical Court.[61] Competition law continued to be used as a motor for integration with competition concerns particularly in relation to vertical market arrangements being underplayed. The Commission emerged from a learning phase—assisted by notification of agreements to it—by enacting a series of block exemption regulations particularly relating to vertical agreements—those between actors at different levels of the market.[62] While the notification system allowed for learning, it was simultaneously overwhelming, with the DGComp never really recovering from the initial notification of 36,000 agreements in 1963 when Regulation 17 came into force.[63] Notification triggered immunity until the date of the decision creating a major incentive to notify.[64] Block exemption regulations did not fully alleviate the problem of backlog because the approach was highly formalistic, creating a straitjacket leaving very little flexibility for firms and so limiting their capacity to fall

[58] See generally, M Cini, 'Norms, Culture and the Kinnock Reforms' in D Dimitrakopolos (ed), *The European Commission* (Manchester University Press, 2004); H Kassim, '"Mission Impossible", but Mission Accomplished: The Kinnock Reforms and the European Commission' (2008) 15 JEPP 648; N Kinnock, 'Accountability and Reform of Internal Control in the European Commission' (2002) 73 PQ 21.

[59] Kassim and Wright (n 1 above) 746–747.

[60] Summed up in a highly influential Article by B Hawk, see 'System Failure: Vertical Restraints and EC Competition Law' (1995) 32 CML Rev 973.

[61] See also Quack and Djelic (n 57 above) 269.

[62] Art 105(3) TFEU (formerly Art 85(3) EC).

[63] Goyder (n 4 above) 41.

[64] Regulation 17, Art 15(5).

within the exemption necessitating notification. This formalism further underlined the dominance of lawyers within DGComp.

Third, in the period after the Single Act, DGIV focused on state activity in the market-place developing rules on public procurement, state monopolies, and state aids.[65] The first Merger Regulation after a marathon of 17 years became law,[66] conferring additional powers through streamlined procedures on the Commission. The test adopted—that of creating or strengthening a dominant position—was similar to that found in German competition law underlying continuing German influence. The Court in the meantime became less activist. Faced with expanding competence and under-resourcing the Commission continued to block exempt agreements and resorted increasingly to soft law measures such as comfort letters to reduce the notification backlog which nonetheless remained a feature.[67] The post-Single Act phase was given further impetus after the Maastricht Treaty. There was an increased (but unsuccessful) emphasis on decentralization of enforcement.[68] With the realization of much of the 1992 programme, there was recognition that market integration may no longer need to be the core of policy development in areas such as competition.[69] Finally, a related development was the emerging alignment of national competition rules with Community competition rules.[70] Weitbrecht dates this third phase from the introduction of the Merger Regulation and, while acknowledging that most date the modernization process as starting in the mid-nineties, he sees it as part of this phase.[71] Nonetheless, it is helpful to distinguish between the market liberalization phase triggered by the Single Act and the later emergence of reforms in the field of anti-trust enforcement given that the political salience of the former is greater and is very loosely allied to the single market. Thus the fourth phase can be dubbed modernization.

D. MODERNIZATION

Modernization is indicative of something more than mere reform—with some commentators even dubbing this phase a revolution.[72] It is, by its very name, a process

[65] EC Commission, Twenty Fifth Annual Report on Competition Policy (1995) 11.

[66] Council Regulation (EC) 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, [1989] OJ L395/1; J S Venit, 'The EEC Merger Regulation: Europe Comes of Age or Caliban's Dinner' (1990) 27 CML Rev 7. For a recent re-casting of the emergence of merger control at the European level see T Dooley, 'Incomplete Contracting, Commission Discretion and the Origins of EU Merger Control' (2009) 47 JCMS 483.

[67] On soft law measures in EC competition law see H A Cosma and R Whish, 'Soft Law in the Field of EU Competition Policy' (2003) 14 EBL Rev 125.

[68] Notice on Cooperation between National Courts and the Commission in Applying Arts 85 and 86 EEC, [1993] OJ C39/6; Notice on Coordination with National Authorities, [1997] OJ C313/3.

[69] EC Commission, Twenty Fifth Annual Report on Competition Policy (1995) 11.

[70] EC Commission 23rd Annual Report on Competition Policy (199) 81. L Laudati, 'The European Commission as Regulator: the Uncertain Pursuit of the Competitive Market' in G Majone, *Regulating Europe* (Routledge, 1996) 249; I Maher, 'Alignment of Competition Laws in the EC' (1996) 16 YEL 223.

[71] Weitbrecht (n 50 above).

[72] A Albors-Llorens, 'The Changing Face of EC Competition Law: Reform or Revolution?' (2002) 14 EBJ 31.

flagged by a departure from pre-existing ways of thinking and doing. At the same time, in evolutionary terms, there are path dependencies and an acknowledgement of that which has gone before. This is borne out by the discussion in the Commission White Paper that the reason reform was possible was precisely because of the experience it had developed over the previous forty years and the legal certainty available through the rich body of case law generated in that time was sufficient for a 'loosening of the reins' and a move away from a system of prior authorization.[73] The Commission claims of legal certainty were however treated with some scepticism.[74]

This phase can be dated from discussions in the mid-nineties onwards. Initially, discussions centered on the creation of an independent European competition agency separate from the Commission,[75] given that competition decisions were, and still are, taken by the College of Commissioners and not solely by the Competition Commissioner thus allowing for other policy issues to be raised when the matter is contentious.[76] The debate did not progress however. A single agency would have provided greater consistency in enforcement and ensured political independence but politically it was unattractive especially in the context of the principle of subsidiarity which was a strong part of political debate at the time, and the existence of several strong and powerful national competition authorities (NCAs), most notably in Germany.[77] Instead, in the late 1990s there was a move towards a twin-track approach of a softening of the limitations on vertical agreements moving away from the very strict rules to a more flexible approach based on a blacklist of unacceptable provisions in contracts and an explicit realization of the importance of market dominance in distribution arrangements, giving greater room for manoeuvre to firms and aligning the law with economic thinking.[78] This shift marked the formal beginning of a rebalancing of competition objectives with a move away from competition as a tool for market integration towards a greater emphasis on consumer welfare. This was a welcome reform and one achievable within the existing institutional structure for example the original 1965 Regulation allowing for the adoption of block exemptions is still a part of the *acquis*.[79]

Around the same time as the adoption of the new position on vertical agreements, another group of Commission officials promoted the adoption of a truly heretical idea—the repeal of Regulation 17 which lay at the very heart of anti-trust enforcement. The Fordham and Florence conferences in 1996 are seen as watershed moments with

[73] EC Commission (n 32 above).

[74] House of Lords Select Committee (n 33 above) [34]–[42].

[75] C-D Ehlermann, 'Reflections on a European Cartel Office' (1995) CML Rev 471.

[76] Laudati (n 70 above) 235.

[77] Wilks (n 1 above) 443; D Lehmkuhl, 'On Government, Governance and Judicial Review: The Case of European Competition Policy' (2008) 28 JEPP 139, 151.

[78] Regulation 2790/99, [1999] OJ L336/21. EC Commission, Green Paper on Vertical Restraints in EC Competition Policy COM(96) 721, final and EC Commission, Follow-Up to the Green Paper on Vertical restraints, [1988] OJ C365/3. R Whish, 'Regulation 1790/99: The Commission's "New Style" Block Exemption for Vertical Agreements' (2000) 37 CML Rev 887. The most recent version of the regulation is Commission Regulation 330/10, [2010] OJ L102/1 and Commission Guidelines [2010] OJ C130/1.

[79] OJ Sp Ed [1965]–[1966] 87.

criticisms from these events leading to the establishment of a hand-picked Working Group to look at the question of modernization set up by the deputy Director General of DGComp.[80] This led to the publication of the White Paper on Modernisation.[81]

1. SELF-REGULATION BY FIRMS

This proposal was based on three closely related ideas premised on the view that EC competition law was 'coming of age'.[82] First, after forty years, there was a body of law that could now be relied on by those subject to the rules. This reduced the need for the sort of close surveillance (in principle at least—honoured in the breach in practice) that pre-notification provided for. Rather than restrictive agreements being subject to scrutiny by the Commission, firms could now self-assess and decide on the basis of existing norms whether or not the agreement fell within Article 101(1) and if it did, how it needed to be modified to fall within Article 101(3). Most of these agreements were vertical and innocuous. They did not require nor need the amount of Commission time that notification required as the damage to competition was minimal. Firms now assumed the risk of compliance but that risk was relatively small. By reducing the time spent on relatively trivial vertical agreements, the Commission could turn its attention to the much more important (in competition terms) issue of cartels. These are usually horizontal agreements between competitors who cooperate with each other, eg to agree prices and/or to keep other actors out of the market. The tools used to achieve this end are information sharing and reprisals against those who fail to comply. The hallmark of such agreements is secrecy making it difficult if not impossible to detect them despite the arsenal of enforcement powers in the hands of the Commission. By changing focus away from vertical agreements to the more intractable but much more damaging cartels, DGComp would be developing a more economics-orientated competition law and deploying its limited resources where the real harm to competition arises. While efficient and effective enforcement was a driver for change, there is no doubt the Commission was also mindful of its limited resources and the strain that would be put on them by the further enlargement of the EU.[83]

2. A NEW ECONOMICS-BASED APPROACH

The second idea behind modernization was a new economics-orientated approach to competition law analysis. The focus on cartels as the 'cancer' to be removed[84] is only

[80] Kassim and Wright (n 1 above) 750. The annual Fordham and Florence conferences are fora where competition lawyers and policy-makers from Europe and North America gather to discuss topics of interest, leading to the publication of scholarly papers.

[81] See n 33 above.

[82] Weitbrecht (n 50 above).

[83] Albor-Llorens (n 72 above); House of Lords Select Committee (n 33 above) [98]–[102] and [142]–[144].

[84] Competition Commissioner Mario Monti referred to it as such in a speech see 'Fighting Cartels: Why and How? Address at the 3rd Nordic Competition Policy Conference' (Stockholm, 11/12 September 2000) SPEECH/00/295.

possible where there is a shift away from a pre-occupation with vertical agreements. The preoccupation with probabilities in merger regulation was also addressed through the introduction of a new substantive test emphasizing the impact on competition (significantly impedes effective competition in particular through creation or strengthening of a dominant position) rather than a pure market dominance test.[85] The General Court adopted a much stronger position on scrutiny with the Commission's nadir being the adoption of two judgments in the same week in 2002 annulling two of its merger decisions (*Tetra Laval* and *Airtours*) mainly on the basis that the economic reasoning was woeful.[86] The Commission at the press conference following the second of these decisions immediately announced that a chief economic advisor would be appointed—who would be independent of the Commission and would play devil's advocate in scrutinizing merger decisions.[87] A more economics-based approach was championed by Commissioner van Miert and his successor, Commissioner Monti, supported in particular in merger cases, by the General Court.[88] The ongoing discussions surrounding a different approach to defining and addressing abuse of market dominance is also couched very much in economic terms with one of the first steps in the process being the production of a discussion paper on market dominance by a group of economists offering blue sky thinking, at least insofar as it was not constrained by the current state of the law on Article 102.[89] The process culminated in the issuance of guidance on enforcement priorities for Article 102, indicating a shift by the Commission to a more economics-based approach.[90]

3. DECENTRALIZATION

The third idea behind modernization, and our primary focus, is that of decentralization. With firms self-assessing, the Commission was not creating a free-for-all for anticompetitive behaviour as a different enforcement mechanism other than notifica-

[85] Council Regulation No 139/2004 on the Control of Concentrations between Undertakings, [2004] OJ L24/22. Art 2(2). See generally, J Schmidt, 'The New ECMR: "Significant Impediment" or "Significant Improvement" ' (2004) CML Rev 1555.

[86] See generally, M Clough, 'The Role of Judicial Review in Merger Control' (2003–04) 24 Northwest J Int'l L 729 on Case T-5/02 *Tetra Laval* [2002] ECR II-4071 and Case T-342/99 *Airtours* [2002] ECR II-2585.

[87] For a discussion of the role of economists in competition agencies see L Froeb, P A Pautler, and L-H Röller, 'The Economics of Organizing Economists' (3 July 2008). Vanderbilt Law and Economics Research Paper No 08–18. Available at SSRN: <http://ssrn.com/abstract=1155237>.

[88] D Hildebrand, *The Role of Economic Analysis in the EC Competition Rules* (3rd edn, Kluwer Law International, 2009) 4.

[89] Report by the EAGCP, An Economic Approach to Art 82, July 2005 <http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf>. The discussion paper was in July, followed in September by a key speech from the Commissioner and then in December a working paper from the Commission see <http://europe.eu.int/comm/competition/antitrust/others/discpaper2005.pdf>.

[90] [2009] OJ C45/2. See M Kellerbauer, 'The Commission's New Enforcement Priorities in Applying Art 82 EC to Dominance Companies' Exclusionary Conduct: A Shift Towards a More Economics Approach?' (2010) 31 ECLR 175.

tion is used. Article 101(3)—the provision that can exempt restrictive agreements—has become directly applicable making it enforceable in its entirety by national competition authorities and courts.[91] This renders firms accountable (arguably) at a more appropriate national level where potentially market foreclosure behaviour—a major risk of restrictive agreements—may be more easily detectable. In other words, information asymmetries can be more appropriately addressed at national level. This is not a new idea. Article 102 and the general prohibition in Article 101 had direct effect and hence were enforceable in the national courts.[92] In 1993 the Commission had introduced a notice on cooperation with national courts in the competition sphere and followed it up in 1997 with a notice on cooperation with NCAs.[93] Both notices had little impact most notably because as soft law measures they were not binding. More fundamentally, neither the Courts nor the NCAs could apply the exemption provisions of the Treaty[94] rendering the assistance they could provide in a case severely limited. Many jurisdictions had not introduced legislation to authorize their competition authorities to apply the competition rules, such a step being required under the Treaty.[95] Experience in several Member States was extremely limited also in relation to competition law. For example even the UK did not introduce an effective competition law addressing private market behaviour until the late 1990s.[96]

In relation to national courts, it was unclear what regard was to be given to Commission decisions and to what extent parallel proceedings could continue in national courts when a matter was seized by both national courts and the Commission or the European Courts. This issue was addressed in the *Masterfoods* case where parallel proceedings had resulted in a Commission decision finding a breach of what was then Article 81 and a refusal to grant an exemption, with this decision being appealed to the General Court. In parallel, proceedings in the Irish High Court had refused to find an agreement void on the basis *inter alia* of a breach of the competition rules. This decision was appealed to the Supreme Court which made a preliminary reference to the European Court of Justice as there was a real risk of different decisions being issued by the General Court and the Irish Supreme Court—a court of last resort. The European Court held that, given the exclusive role of the Commission to grant exemptions, the Commission could not be bound by the decision of a national court and a national court could not take a decision running counter to one of the Commission, even if the Commission decision conflicted with a national judgment

[91] Regulation 1, Art 1(2).

[92] Cases 127/73 *BRT* v *SABAM* [1974] ECR 51; [1974] 2 CMLR 238; 209–213/84 *Asjes* [1986] ECR 1457.

[93] See n 68 above; R Whish, 'The Enforcement of EC Competition Law in the Domestic Court of the Member States' (1994) 15 ECLR 60.

[94] Laudati (n 70 above) 249.

[95] Art 84 EC.

[96] A MacCulloch and B Rodger, *The Competition Act: A New Era for UK Competition Law* (Hart, 2000); I Maher, 'Juridification, Codification and Sanction in UK Competition Law' (2000) 63 MLR 544.

taken at first instance. If a Commission decision was subject to appeal, national courts' duty of sincere cooperation required them to suspend their proceedings pending that appeal or to make a preliminary reference.[97] Thus the European Court underlined the pivotal and primary role of the Commission in EC competition law even in relation to national courts in the year following the publication of the White Paper at a time when debates surrounding the proposed decentralization of enforcement was intense.

(a) National courts

Thus within the new enforcement regime, national courts not only can now apply all of Article 101 and Article 102, using their own procedural rules and remedies, but have an express duty to do so where they fall within the ambit of the case.[98] This complements the enforcement role of their competition agencies, especially given their potential capacity to award damages to victims who have been subject to competition enforcement.[99] National courts are facilitated in their enhanced role through better and more direct communication with the Commission. They can ask the Commission for information or its opinion on the EU rules. The Commission can, if the coherent application of those rules requires it, submit written observations to a national court and with the court's consent, give oral evidence. Some national courts have requested this assistance.[100] And the European Court recently upheld the right of the Commission to submit written observations to a national court in proceedings flowing from an earlier Commission decision.[101] NCAs can also submit observations and act as *amicus curiae* where the court allows. In order to facilitate this dialogue between the court and enforcement agencies, the agencies can request relevant documents from the case to be forwarded to them. The corollary of this assistance is that the Member States (not the courts themselves) are to forward a copy of any Article 101 or Article 102 judgments to the Commission without delay. This obligation does not seem to have been honoured in practice in the first five years of the operation of the new regime with the Commission noting that as many as twelve Member States had not forwarded copies of any judgments.[102] While there may not have been any cases in some states, it is unlikely to be true of all of them.[103] In an effort to redress the information deficit,

[97] C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR I-11369.

[98] Regulation 1, Art 3(1). For a discussion of the role of courts in competition law see I Maher and O Stefan, 'Competition Law in Europe: The Challenge of a Network Constitution' in D Oliver, T Prosser, and R Rawlings, *The Regulatory State: Constitutional Implications* (2010, forthcoming).

[99] Regulation 1/2003, recital 7, Arts 15 and 16.

[100] For example the Commission was asked for its opinion by the Lithuanian Supreme Court in a case decided on 16 October 2009 see ECN Brief 01/2010 at 17 and to the Paris Court of Appeal in the Pierre Fabre case where the Court has since referred the matter to the ECJ see ECN Brief 01/2010 at 17.

[101] Case C-429/07 *X BV v Inspecteur Belastingdienst* [2009] nyr; K Wright, 'European Commission Interventions as *Amicus Curiae* in National Competition Cases: The Preliminary Reference in *X BV*' (2009) 30 ECLR 309.

[102] Commission Staff Working Paper (n 36 above) [83].

[103] For a discussion of the possible reasons for non-reporting see K Wright, 'European Commission Opinions to National Courts in Antitrust Cases: Consistent Application and the Judicial-Administrative Relationship' (2008) CCP Working Paper 08–24 available at <http://wwwueaacuk/polopoly_fs/1104682!ccp08–24pdf>, 18–19.

the Commission in 2010 started to publish an ECN brief which provides information on case law as well as decisions of the NCAs at national level.[104]

The five-year review also noted that stakeholders had raised the question of uneven application of the rules in national courts.[105] The challenge of consistency, most conspicuously highlighted in the *Masterfoods* case, is still an issue for judicial enforcement of Article 101 and Article 102 even allowing for the exchanges of information and cooperation with competition authorities provided for. Regulation 1 attempted to address this by codifying the ruling on *Masterfoods* as to the binding nature of Commission decisions as well as *obiter* comments in that judgment which noted that NCAs are bound by decisions of the Commission.[106] The challenge of procedural and sanctioning autonomy remains. While early fears of forum shopping as between Member States have not materialized to any great extent, the sharp divergence in potential sanctions raises fundamental questions as to the nature of competition law and, as a result, how due process is to be met. It is difficult to talk of legal consistency when a breach of the competition rules in Ireland can lead to a criminal record and imprisonment for company officers while no criminal sanction is possible in eg Sweden.[107] Thus while the jurisdiction of national courts has been rightly (I would suggest) extended to exempt agreements and their role more clearly articulated in Regulation 1 with the judgment in *Masterfoods* paving the way, the greater formalization of the role in primary legislation has also served to cast light on the information deficit as to what is actually happening in national courts in relation to the competition rules and, even if the substantive rules are common, there is a vast range of diversity as to procedures and sanctions that belies consistency. Thus the issue remains whether the hybridity of common and divergent rules is sufficient not just for the coherence of the law but for its standing as 'good' law.

The Commission has sought to further enhance the effectiveness of the competition rules by strongly advocating private enforcement actions.[108] In doing so, it is seeking to build on the decisions of the European Court that have indicated that an individual is entitled to damages for harm suffered as a result of a breach of the competition rules.[109] The Commission suggests the adoption of a wide range of procedural measures in order to facilitate enforcement actions as well as advocating that any decision by any NCA enforcing the competition rules should constitute irrefutable proof of breach of those rules in any follow-on damages action. This clearly lends itself to legal certainty and reduces the costs of such actions while suggesting mutual recognition of EU competition decisions taken by any NCA.

[104] See <http://ec.europa.eu/competition/ecn/brief/index.html>.

[105] Commission Staff Working Paper (n 36 above) [270].

[106] Regulation 1, Art 16.

[107] For Ireland see s 8 Competition Act 2002 and for Sweden see Competition Act 2008 discussed in H Andersson and E Legnerfält, 'The New Swedish Competition Act' (2008) 10 ECLR 563.

[108] Commission (n 37 above).

[109] Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, and Joined Cases C-295 and 298/04 *Manfredi* [2006] ECR I-6619.

In relation to enforcement of the competition rules through national courts, we do not see a big bang approach but rather a codification of an important ruling of the European Court and of its *obiter* comments clarifying the status of Commission decisions and of course, the preliminary reference procedure remains available in competition law cases. The innovation in the Regulation is to indicate that the NCA and the Commission can convey information to the national court although it is silent as to how this is actually to occur. It is for the court rules of each Member State to provide an effective mechanism for such information to be considered by a court. Unlike the competition agencies, there is no formal network of Courts with the Commission noting that such a network would sit uneasily with the important concept of judicial independence.[110] Instead, there is an informal network where matters of common concern are discussed.[111] Thus the major innovation seen for NCAs is missing in this context. What is clear is that the law is still evolving slowly in this field with gaps apparent in our knowledge of how and to what extent competition law is raised in national courts. These gaps are probably not as great as the lack of information would suggest since the amount of competition litigation may in fact be quite small despite the European Court's ruling that there is an entitlement to damages. Thus the lengthy discussions surrounding the question of private actions for damages can be viewed as the new frontier for competition law enforcement as the Commission seeks to expand the relevance of competition law for private parties and to facilitate such actions to ensure better compliance and deterrence (as well as compensation for victims). The complexity and variation of practices as well as the relative novelty of competition law in many Member States and the lack of a culture of private enforcement actions all point to an evolution that is incremental, slow, and uncertain despite the unstinting support of the European Court to the Commission and the codification of the law in Regulation 1.

(b) The European Competition Network

The major institutional innovation in the enforcement regime is the decentralization of enforcement to NCAs and their coordination through the European Competition Network (ECN). It is this innovation that appears to punctuate the long-standing equilibrium of highly centralized, highly legalized competition law enforcement heavily reliant on formal legal instruments and powers. In practice the transition to the new regime was remarkably smooth.[112] This may in part be explained by the fact that new governance techniques—in particular soft law instruments such as guidelines and

[110] Commission Staff Working Paper (n 36 above) 80.

[111] R Schmidbauer, 'The Institutions Involved in EC Antitrust Enforcement under Regulation 1 and the Green Paper on Damages Actions—An Overview, Critique and Outlook' (July 2006) available at SSRN <http://SSRN/com/abstract=914169>, 6; S Norberg, 'The Co-operation Between National Courts and the Commission in the Application of EC Competition Rules' (Luxembourg, 13 June 2003). Paper presented to the second conference organized by the Association of European Competition Law Judges.

[112] Communication from the Commission to the European Parliament and Council: Report on the Functioning of Regulation 1/2003 COM(2009) 206, final [7].

notices,[113] were already very well established and widespread.[114] The Network itself as a classic instrument of governance did mark a radical innovation as the allocation of cases, one of the key elements of enforcement strategy, was to be decided in a forum without legal personality with no hard rules as to how allocation was to be done and no basis on which to challenge the allocation before the European Courts with the Notice stating that decisions as to case allocation are not legally binding.[115] At the same time, an informal network of NCAs already existed and continues to exist.[116] In addition, the Advisory Committee which is consulted on Commission competition decisions before they are finalized and which consists of national representatives, has had a long-standing review function in relation to EU competition law.[117]

Nonetheless, despite these two fora and the Commission notice, prior to 2003 NCAs had played a very limited role in enforcement. The new regime explicitly and categorically empower them to apply the EU rules,[118] with all of Article 101 and Article 102 directly applicable.[119] These powers are given only limited statutory support. There is the vague obligation of close cooperation for the Commission and the NCAs with effective enforcement to be supported through the Network, itself only lightly sketched in the Regulation. Instead, as in other areas of substantive law, the detail is contained in (non-binding) guidelines.[120] Unusually, the guidelines and Regulation were accompanied by a joint statement from the Council and Commission.[121] The fact that both institutions regarded such a statement as necessary shows how radical a departure from existing institutional structures was the creation of the ECN and the concerns about adopting this form of governance technique in relation to decentralized law enforcement in the context of 28 different competition regimes with their own procedures.

Ehberlein and Newman's[122] analysis of transgovernmental networks is informative as to how and why a network like the ECN could emerge. They see these networks as having an evolutionary potential given their entrepreneurial and coalition-building

[113] Snyder defines soft law as rules of conduct which in principle have no legally binding force but nevertheless can have practical effects see F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques in T Daintith (ed), *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (Wiley, 1995) 64. For a discussion of soft law instruments in EU competition law see H Cosma and R Whish, 'Soft Law in the Field of EU Competition Policy' (2003) 14 EBL Rev 125.

[114] For a full treatment of this issue see Maher, 'Regulation and Modes of Governance' (n 1 above).

[115] EC Commission, Notice on Cooperation within the Network of Competition Authorities, [2004] OJ C101/43, [31].

[116] The European Competition Authorities Network consists of competition agencies from the EEA (the EU and Norway, Iceland, Liechtenstein as well as DGComp and the EFTA Surveillance Authority) and is a discussion forum.

[117] Regulation 1, Art 14. [118] Regulation 1, Art 5.

[119] Regulation 1, recital 4, Art 1.

[120] See generally Brammer (n 1 above).

[121] Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, Interinstitutional File 2000/0243(CNS) Brussels, 10 December 2002.

[122] B Eberlein and A L Newman, 'Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union (2008) 21(1) Governance 25–52.

capacity.[123] Such networks arise where there is dual delegation, ie power is delegated nationally by executives to agencies and to supranational institutions (in this instance the Commission).[124] There is some discussion in the literature as to who is the principal and agent in competition law. The Member States clearly delegated to the Union in 1958 and delegated enforcement powers more fully in 1962 in Regulation 17. Modernization can be cast as the Commission repudiating or at least re-casting that delegation.[125] They suggest that such networks emerge where there is a mix of functional interdependence and a reluctance or inability on the part of national governments to cede authority and resources to the supranational level. EU competition law is trans-jurisdictional in scope and the competition issues that arise are also frequently phenomena in several, if not all, Member States. At the same time, the Network was seen as a second best solution for ensuring consistency reflecting reluctance to delegate too much power to the combined NCAs and Commission who are obliged to work together with a relatively narrow legal base and firmly within the realm of soft law mechanisms in order to give effect to enforcement powers that are classically defined within the law.[126] Ehberlein and Newman note that transnational networks are often seen as second best as they signal a de-politicization of the field where states are unwilling to delegate upwards. However, they may be more than that as local regulators have information and resources (broadly conceived) not available at the supranational level.[127] Thus the NCAs have had powers delegated to them at the national level and so exercise some independence and can bring their direct formal authority to bear within the Network without the need to look for legislation *ex post*. In other words, they act within the shadow of hierarchy[128] and are at the high end of intensity for networks given their strong legal base and powers to share confidential information.[129]

Ehberlein and Newman suggest that such networks can only come about where two political logics are met. First, state preferences need to align in technically complex sectors.[130] Second, there has to be top-down activism by the international organization in particular to reassure states concerned about politically sensitive areas. These conditions were clearly met in relation to the Network. Competition law is a technically complex field. EU law has a very strong transnational character and it was the Commission that spearheaded the reforms. It now shares powers with both national courts and agencies that previously it had held exclusively (Article 101(3)) with the 'soft' solution of the Network as the mechanism for coordination rather than the creation of a super-agency or stronger institutional structure.

[123] ibid 45.
[124] ibid 26.
[125] Maher, 'Functional and Normative Delegation' (n 1 above); Wilks (n 1 above) 446, 450.
[126] Maher ibid 425. [127] See n 122 above 45. [128] ibid 32.
[129] A-M Slaughter, *A New World Order* (Princeton University Press, 2004) ch 4. See also, Maher, 'Regulation and Modes of Governance' (n 1 above).
[130] See n 122 above, 33.

The ECN is the primary mechanism through which the diversity (which Lewis and Steinmo identify as a key requirement for evolution[131]) inherent within the regime is managed sufficiently to ensure coherence and effectiveness in the law. There are five key factors underpinning this coherence and effectiveness. First, all the NCAs are enforcing the same substantive rules giving them a common purpose. They also retain the power to apply their own national competition rules. Thus the jurisdictional boundary between national and EU law is that if there may be an effect on inter-state trade then the EU rules apply. The constraint on the application of national law is that agreements allowed under Article 101 cannot be prohibited although stricter national rules relating to abuse of dominance can be applied.[132] Secondly, as well as sharing common substantive rules the Network is closed in nature with only twenty-eight members who have regulatory authority conferred on them both nationally and under Regulation 1, which in turn brings an authority to the work of the ECN. The NCAs and Commission have common (legal and market) discourses of competition[133] which in turn facilitates the emergence of a common culture. Thirdly, the legislative power to exchange confidential information between members[134] creates a high trust culture. It is essential for the effective operation of any competition agency that it retains confidential information and there are no leaks. It needs sensitive business information from firms in order to carry out its investigations and the agencies in Europe have very extensive powers to seize and remove documentation. The corollary of these powers is that information is, where appropriate, kept confidential. Thus if agencies are to share information relating to investigations, they must be able to trust each other that these high standards of confidentiality will be maintained by their counterparts. Fourthly, the Commission is—on paper at least—first among equals.[135] In other words, the Network has both horizontal and vertical elements.[136] As underlined by the Court in the *France Telecom* case,[137] the Commission has the power under Regulation 1 to remove a case from an NCA.[138] This lever operates contrary to the spirit of cooperation that informs the operation of the Network and is a last resort but nonetheless an important one and especially symbolically at the time of the setting up of the Network. Finally, the Network does not simply coordinate the practicalities of enforcement. It also has a policy role where matters of common

[131] See n 24 above and related text.

[132] Regulation 1, Art 3. Note the constraints on the application of national law do not extend to national merger rules or national laws that predominantly pursue an objective different from that in Arts 101 and 102, see Regulation 1, Art 3(3). See Brammer (n 1 above) 69 *et seq*. There is some concern raised by stakeholders as to the potential for stricter national rules in relation to unilateral conduct see the Communication (n 122 above) [22].

[133] Wilks sees these discourses as de-politicized (n 1 above) 452.

[134] Regulation 1, Recitals 16 and 32, Arts 11 and 12.

[135] Maher, 'Regulation and Modes of Governance' (n 1 above) 519.

[136] Wilks (n 1 above) 437.

[137] Case T-339/04 *France Télécom v Commission* [2007] ECR II-521.

[138] Regulation 1, Art 11(6).

concern are discussed and proposed legal developments are discussed. This further underpins the sense of common purpose and ownership of the network and facilitates convergence in particular of procedures with the professionalism of the network an important driver for convergence (in the case of the Network particularly in relation to procedures).[139]

At the same time, the fact that the NCAs apply the EU rules within their own jurisdictions, with their own procedural rules gives them a relatively high level of autonomy. For many, Regulation 1 conferred on them new powers that they had not previously enjoyed (although additional resources did not accompany those new powers[140]), and for less well-established agencies, being members of a supranational Network headed by the very powerful and highly regarded Commission gives them leverage and standing in their domestic regimes emphasizing the independent nature of their role while also giving them access to the expertise of more experienced NCAs in a confidential environment.

There is, as the Court noted, no legislative division of competence between members.[141] Instead, the guidelines set out three presumptions that govern case allocation, the aim being that only one agency deal with a case.[142] First, the NCA first seized of a case is most likely to be well placed to deal with it. Secondly, if it is not, it will be transferred to another NCA in a timely fashion and thirdly, if more than three states are involved the Commission will assume jurisdiction.[143] An NCA is well placed if the conduct in issue has an effect in its jurisdiction; it has the powers to bring the conduct to an end; and can gather the necessary evidence to prove the conduct is anti-competitive.[144] Formally, there is no precise legal obligation on an NCA to desist in investigating a case even if another NCA is also investigating it although continuation would run counter to the requirement of mandatory cooperation. Should an NCA prove recalcitrant, then the Commission can remove a case from them.[145] However, for the Commission to take such action would constitute systemic failure and it has not happened thus far. In practice, there is little discussion on case allocation, suggesting that the guidelines work well.[146]

The Network is virtual and operates through a secure intranet in English. It has no legal personality and the secretariat is very small. The Heads of the NCAs and DGComp meet twice a year. The plenary of NCA and DGComp officials responsible

[139] Ehberlein and Newman (n 122 above) 36.

[140] J Fingleton, 'The Distribution and Attribution of Cases Among the Members of the Network: The perspectives of the Commission/NCAs' in C-D Ehlermann and I Atanasiu (eds), *Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Hart, 2004).

[141] Case T-339/04 (n 137 above).

[142] Regulation 1, recital 18.

[143] Regulation 1, recital 18 and EC Commission (n 115 above) [6]–[8] and [14]. See S Brammer, 'Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation' (2005) 42 CML Rev 1383, 1385.

[144] R Smits, 'The European Competition Network: Selected Aspects' (2005) 32 LIEI 175, 179; EC Commission (n 115 above) [8].

[145] Regulation 1, Art 11(6).

[146] See generally, EC Commission, Annual Report on Competition Policy (2008) COM(2009) 374 final, 23.7 [114].

for the Network meet more frequently. Sectoral sub-groups deal with specific sectors of the economy, eg energy, transport, the liberal professions, with the number of groups varying depending on what is under discussion. There are about sixteen at the moment. As well as these sectoral sub-groups there are also Working Groups that deal with cross-cutting issues like due process and vertical agreements. They meet as (in)frequently as required. The Network has its own website on the DGComp site where the ECN brief can be accessed and statistics are provided on the cases being notified to the Network by its members.[147]

The lynchpin to the successful operation of the Network is the exchange of information.[148] This has a number of features. First, an NCA notifies the Commission when it opens an investigation and when it is about to take a decision.[149] In practice there are often informal exchanges with the Commission before formal notification. After notice of an imminent decision is made, the ECN unit in DGComp and the relevant sectoral unit review it within 30 days with informal discussion with the case handler if necessary. The notices are shared with other NCAs. Secondly, confidential information can be shared between NCAs during an investigation. However given the divergence in sanctions, information shared cannot lead to a custodial sentence or higher sanction than that allowed in the state providing the information. It can also only be used for the subject matter collected.[150] Thirdly, one NCA can ask another to carry out an inspection of premises or other fact-finding on its behalf.[151] Outside these formal mechanisms for exchange, the Network is an important forum through which members can share best practice, seek advice, and exchange views on policies. Such exchanges reinforce the sense of common purpose and culture and also mean that even though divergence of practice and procedural norms will remain a striking feature of the system, gradually it will move to one of at least informed divergence.[152] Budzinski writing about competition internationally has suggested that diversity has a value as it allows for innovation in thinking on economic theory.[153] A similar rationale can apply to law also. Thus diversity remains a challenge within the regime but it may, to some extent at least, be a strength even though it does cause some concern from a legal certainty perspective.

Enforcement of the competition rules by NCAs creates the potential for divergence in the law with NCAs having their own procedures and sanctions.[154] This risk is

[147] See Brammer (n 1 above) 134; Wilks (n 1 above) 440. See generally the ECN website: <http://ec.europa.eu/competition/ecn/index_en.html> and also the EC Commission, Annual Report on Competition 2006 [69].

[148] D Reichelt, 'To What Extent Does the Co-operation within the European Competition Network Protect the Rights of Undertakings?' (2005) 42 CML Rev 745 ; K Dekeyser and E De Smijter, 'The Exchange of Evidence within the ECN and how it Contributes to the European Co-operation and Co-ordination in Cartel Cases' (2005) 32 LIEI 161.

[149] Regulation 1, Art 11(3) and (4). As of the end of September 2010 NCAs had notified 1,256 investigations and 441 decisions. Clearly, not all investigations lead to formal decisions.

[150] Regulation 1, Art 12; Reichelt (n 148 above).

[151] Regulation 1, Art 22.

[152] Slaughter (n 129 above) 171.

[153] O Budzinski, 'Monoculture versus Diversity in Competition Economics' (2008) 32 Cambridge Journal of Economics 295.

[154] Riley (n 1 above); Smits (n 144 above).

exacerbated by the fact there is no definition of what an NCA is. All the Regulation says is that the Member States shall designate such an authority in such as way that the provisions of the Regulation are effectively complied with. Thus there is considerable variety as between NCAs and their powers and procedures. This is not necessarily a problem as the embeddedness of an agency within the national legal order is one of its strengths provided it is sufficiently independent from the executive to carry out its roles effectively. The European Court made it clear in Syfait that at least in relation to Article 267[155] references, it would not accept statutory statements as to independence from the executive but would examine substantively to see if an NCA was sufficiently independent to constitute a tribunal that can make a reference. In this instance, it decided that the Greek Authority was not such a tribunal because, despite the statement of independence in the legislation, the Court took the view that it was subject to Ministerial supervision and its members could be summarily dismissed or their contracts terminated.[156] The judgment did not seem to have any adverse effect on the operation of the Network—the level of independence required for a preliminary reference not being critical to the professionalism and autonomy of the NCAs. In fact, the Network has proved disciplined, generating very little adverse comment and is seen as operating well.[157]

Procedural and sanctioning variation gave rise to difficulty initially in relation to leniency programmes that give immunity from sanctions to whistleblowers in cartels. Because several Member States did not have any programme and an NCA can only offer immunity in its own jurisdiction, this undermined the effectiveness of cartel enforcement as whistleblowers were more reluctant to come forward.[158] An ECN Working Group devised a model programme and all heads of NCAs publicly committed to use their best efforts to align their own programmes with the model. This reform—again reliant on policy learning and voluntariness, has improved matters with only two jurisdictions now without a programme.[159] This shows the extent to which NCAs can coordinate their own systems to ensure better enforcement of the EU rules.

E. CONCLUSION

It is possible to examine competition law from an evolutionary perspective even if the process of change has been episodic rather than gradual. The changes wrought in relation to enforcement of EU competition rules by the Courts have yet to acquire traction in practice with the Commission continuing to debate with stakeholders how to devise an effective system of private enforcement of competition rules. The national

[155] Previously Art 234 EC.
[156] C-53/05 *Syfait v GlaxoSmithKline* [2005] ECR I-4609. See Maher and Stefan (n 98 above).
[157] Wilks, ibid 440 and 442; Communication (n 112 above).
[158] Brammer (n 143 above) 1408.
[159] Communication (n 112 above) [32].

courts have new powers and the relationship between the courts and the executive agencies at national and European level is also radical but in practice information on how (or if) these powers are playing out across the EU is limited suggesting that evolution in relation to judicial enforcement will remain gradual with diversity a continuing hallmark.

The creation of the ECN attracted far more attention than reforms relating to the Courts. This classic institutional form closely associated with governance methods supported by soft law measures, while drawing on techniques common in other areas of EU law and building on a tradition of soft law in the competition field, nonetheless has proved to be a radical change that has proved remarkably stable despite the wide diversity of procedures, sanctions, and practices found among its members. Radical change does not remove the importance of an institutional analysis but it does create a greater onus to explain that change in the light of the presumption of gradual path-dependence and the extent to which new institutions reflect or are a reaction to previous practice. The rapidly embedded network shows that diversity may be necessary for evolution, and ultimately that convergence born of the common culture and mission of the agencies may in the long term prove to be the most enduring outcome.

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