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### The Transformation of European Community Competition Law

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## The Transformation of European Community Competition Law?

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David J. Gerber\*

In a 1991 article entitled *The Transformation of Europe*, Joseph Weiler analyzed the profound changes that have occurred in the institutional structure of the European Community during the past two decades.<sup>1</sup> The cumulative effect of these changes has been, he claimed, to “transform” the Community, to alter its basic characteristics. In this Article, I focus on the competition law system of the Community—one of its central pillars—and ask whether it also has changed in fundamental ways. I conclude that it has and that it is in the process of changing even more fundamentally, with potentially profound, and as yet largely unrecognized, implications for the future of Europe—and beyond.

Conventional descriptions of Community competition law project a different image; intimations of fundamental change rarely surface and then only at the margins of discourse. The dominant theme is the “maturation” of Community competition law,<sup>2</sup> and the focus is on whether conceptual and doctrinal questions have been “answered” or “clarified” and on whether competition law procedures have been made fairer or more efficient. These are important issues, but they are not the focus of my inquiry.

I seek instead to apply a different conceptual lens—a lens designed to detect changes in the operation of the competition law system and in the forces affecting it. While Community officials understandably

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1. Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991). While I do not suggest that this Article deserves to be considered a “companion piece” to Professor Weiler’s seminal article, I have taken inspiration from that work. I seek here to apply to the specific area of competition law some of the insights and vocabulary he developed there in analyzing the Community as a whole. Nevertheless, although Professor Weiler and I share similar objectives and starting points, the methodology I employ here is often quite distinct from his, providing an analytical perspective that may prove valuable in analyzing other aspects of the Community’s legal development.

2. See, e.g., D.G. GOYDER, *EEC COMPETITION LAW*, pt. III & *passim* (1988); Jonathan Faull, *The Enforcement of Competition Policy in the European Community: A Mature System*, 15 FORDHAM INT’L L.J. 219 (1992); Jean-Francois Verstryngne, *Current Antitrust Policy Issues in the EEC: Some Reflections on the Second Generation of Competition Policy*, 1984 FORDHAM CORP. L. INST. 673 (1985).

emphasize continuity in the development of competition law rules and while analysis of doctrinal problems is obviously important, there is also a pressing need to examine the system as an operative whole—the relationships among its components, the factors influencing its operation, and the stresses and strains upon and within it.

When viewed from such a perspective, the competition law system looks less like a smoothly running machine that is routinely solving ever more problems and more like a troubled organism struggling with extraordinary difficulties. The system now operates far differently than it did only a few years ago, but critically important changes at the systemic level remain masked by continuities at the levels of formal legal and institutional discourse.

## I. INTRODUCTION

From its inception, the Community's competition law system has been "special." It has been used to protect competition, but unlike national competition law systems, its primary objective has not been to obtain the generic benefits associated with competition such as lower prices to consumers and technological progress. Rather, it has been understood primarily as part of a program designed to achieve the specific goal of unifying the European market.<sup>3</sup> This "unification imperative" has shaped institutional structures and competences within the system, supplied much of its legitimacy, and generated the conceptual framework for the development and application of its substantive norms.

The efforts to achieve this goal have centered on "juridical" processes. The European Court of Justice has played a central role in shaping and directing the system, and legal rather than political language has tended to dominate the discourse of the system. Furthermore, most observers understand the central decisions as either articulations or applications of generally applicable norms derived from interpretation of authoritative texts.

These two defining features of the Community competition law system—integration as the dominant goal and juridical processes as the central source of guidance in decision-making—have both mutated. The impending elimination of the unification imperative and the

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3. References here are numerous. See, e.g., Barry E. Hawk, *Antitrust in the EEC—The First Decade*, 41 *FORDHAM L. REV.* 229, 231 (1972) ("Single market integration, and the elimination of restrictive practices which interfere with that integration, is the first principle of EEC antitrust law . . ."); see also CHRISTOPHER BELLAMY & GRAHAM D. CHILD, *COMMON MARKET LAW OF COMPETITION* 15–16 (3d ed. 1987).

weakening of the “juridical” components of the system in favor of “political” components are transforming the system.<sup>4</sup>

As yet, however, this transformation has been little noticed. In a unified market, the goal of unification loses its meaning, but the implications of this loss of meaning remain virtually unexplored. Similarly, there has been little, if any, recognition of the potential impact on the system of a weakening of its specifically “juridical” processes.

My goal here, then, is to identify fundamental changes in the Community competition law system and to analyze factors influencing those changes. The discourse of “clarification” and “continuity” that dominates discussions of competition law serves valuable functions, but often it also obscures fundamental modifications of that system. By directing attention to these sometimes unperceived changes, I hope to foster the analysis and discussion that will be necessary for an effective and timely response to them.

I also seek to bridge a gap between two communities. During the last decade in particular, the study of European Community law has been enriched by a broadening of the perspectives applied to it. Often consciously drawing on social science thought, scholars such as Koenaad Lenaerts, Hjalte Rasmussen, Martin Shapiro, Eric Stein, and Joseph Weiler have added valuable dimensions to our understanding of Community legal processes.<sup>5</sup>

Thus far, however, these perspectives have been applied almost exclusively to the constitutional dimensions of Community law, with little attention to substantive legal areas.<sup>6</sup> They are seldom evident, for example, in the study of Community competition law, where the relevant community of experts tends to focus on describing conceptual and procedural developments, with little attention to interdisciplinary or what I call “systemic” issues.<sup>7</sup> In this Article, I explicitly draw on

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4. The objective here is to distinguish between those components of the system that operate as part of the process of establishing and applying generally applicable norms (here, the juridical components) and those that are the result of the political mediation of the interests of states and Community institutions.

5. See, e.g., KOENRAAD LENAERTS, *LE JUGE ET LA CONSTITUTION AUX ÉTATS-UNIS D'AMÉRIQUE ET DANS L'ORDRE JURIDIQUE EUROPÉEN* (1988); HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE* (1986); Martin Shapiro, *The European Court of Justice, in EUROPEAN POLITICS: INSTITUTIONS AND POLICYMAKING IN THE “NEW” EUROPEAN COMMUNITY* 123 (Alberta M. Sbragia ed., 1992); Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981); Weiler, *supra* note 1. For early discussion of the role of social science in understanding the development of the Community, see Karl Kaiser, *L'Europe des Savants: European Integration and the Social Sciences*, 4 J. COMMON MKT. STUD. 36 (1965).

6. For an important exception, see FRANCIS SNYDER, *NEW DIRECTIONS IN EUROPEAN COMMUNITY LAW* 63-99 (1990).

7. Social scientists seldom hazard into the domain of competition law, in large part because of its more “technical” characteristics and the resulting difficulty of access to the relevant doctrine.

the knowledge and insights of both the social science and competition law communities to fashion an analytical framework in which the contributions of the two communities are interwoven and, therefore, complement and enrich each other.

This analysis focuses on the competition law *system*, by which I mean the interplay of institutions and language (texts) relating to the goal of protecting competition. I am concerned with how Community decision-makers perceive problems relating to restraints on this process and respond to those perceptions. The texts as well as institutions are important in this analysis, but the critical issue is the dialectical relationship between texts and institutional actors. In this relationship, texts define and configure power relationships, and, in turn, institutions manipulate texts and their interpretation in order to achieve institutional, other political, and even private goals.<sup>8</sup>

## II. THE FOUNDATIONAL MODEL<sup>9</sup>

The basic elements of the Community's competition law system were developed over the first decade and a half of its existence. During this period, the basic goals of the system were formulated and its institutional relationships forged. This system has been undermined by recent changes in its operational context, and it is necessary to understand how it was created in order to appreciate the forces now changing it.

The Treaty of Rome<sup>10</sup> includes brief substantive principles relating to restraints on competition but provides little guidance for the construction of a system to apply those principles. Article 85(1) prohibits agreements that restrain competition, giving examples of agreements in this category, and article 85(3) provides criteria for exemption from this prohibition. Article 86 is similarly general. It prohibits the abuse of a market-dominating position and gives several examples of abuse. These articles apply only to conduct that affects trade between the Member States. Article 90 then adapts the principles contained in these provisions for application to state-owned enterprises. The treaty

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8. The concept of "system" is commonly used to refer broadly and loosely to a nation's legal institutions—hence, e.g., the U.S. legal system. I use it here, however, to analyze how norms and institutions interact relative to a particular set of objectives—here, the protection of competition. The concept thus becomes more specific, functional, and, I submit, analytically valuable, because it focuses analysis on the characteristics and consequences of that systemic interaction.

9. The periodization scheme employed in this Article is similar to that used by Professor Weiler, but only because that scheme seems most effective in capturing the evolution of the competition law system. I am indebted to Professor Weiler, however, for some of the related terminology. See Weiler, *supra* note 1.

10. Treaty Establishing the European Economic Community [EEC Treaty], Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]. Unless otherwise indicated, all article references are to the Treaty of Rome, which became effective on Jan. 1, 1958.

framers envisioned (in articles 87 through 89) that Community institutions would create a system to develop, apply, and enforce these principles.

Not only does the treaty itself provide little guidance for the construction of such a system, but there is little evidence that the framers had any well-developed conceptions of how such a system might look. When the treaty was signed, there had been little experience in Europe with the use of law to protect competition.<sup>11</sup> The only Member State that had paid serious attention to competition law was Germany, but its competition law system was not yet in operation during the drafting of the Treaty of Rome.<sup>12</sup> Moreover, although there were competition law provisions in the laws of the European Coal and Steel Community, relatively little relevant experience had been acquired in applying them.<sup>13</sup>

The treaty thus identified the central problems of competition law and provided general principles of response, but the institutions of the Community were left to construct the competition law system. Gradually, these institutions constructed such a system, guided by changing perceptions of both Community needs and their own interests and reflecting shifting power configurations among the institutions.

#### A. *Integration and the Goals of Competition Law*

The goal of a unified market dominated this process of construction because it was *the* central impetus for the "new Europe." To begin to appreciate the centrality and force of this idea, one need only recall that economic cooperation was the last remaining hope for a cooperative Europe that would banish the specter of that continent's nationalist past. Attempts to move toward political union had been rejected, and the plans for a European Defense Community had been defeated.<sup>14</sup> If there was to be a new Europe, it would have to be built on economic cooperation and integration.

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11. For descriptions of competition law in Europe during the postwar period, see, e.g., ANTI-TRUST LAWS: A COMPARATIVE SYMPOSIUM (Wolfgang Friedmann ed., 1956); Stefan A. Riesenfeld, *The Protection of Competition*, in 2 AMERICAN ENTERPRISE IN THE COMMON MARKET: A LEGAL PROFILE 197 (Eric Stein & Thomas L. Nicholson eds., 1960); Hans Thorelli, *Antitrust in Europe: National Policies after 1945*, 26 U. CHI. L. REV. 222 (1959).

12. The German system was introduced in 1957 by the Gesetz gegen Wettbewerbsbeschränkungen [GWB], 1957 Bundesgesetzblatt [BGBl.] I 1081 (F.R.G.).

13. See generally COMMON MARKET AND AMERICAN ANTI-TRUST 22-30 (James A. Rahl ed., 1970). See also STUART A. SCHEINGOLD, THE RULE OF LAW IN EUROPEAN INTEGRATION: THE PATH OF THE SCHUMAN PLAN (1965).

14. For a description of the situation, see, e.g., RICHARD MAYNE, THE RECOVERY OF EUROPE: 1945-1973 235-304 (Anchor Books 1973) (1970); see also ERNST B. HAAS, THE UNITING OF EUROPE (1958).

In addition to this political goal of replacing conflict with cooperation, the Common Market was seen as serving a variety of economic goals.<sup>15</sup> The Member States were still recovering from the ravages of the Second World War, and economic integration was widely viewed as necessary for rapid economic growth. An integrated market would allow firms to acquire sufficient size to compete effectively on world markets, and consumers would benefit from a larger market with its concomitant economies of scale.

Many Europeans also saw economic integration as the only means of dealing with the combined economic and political power of the United States.<sup>16</sup> Integration represented a means of regaining independence, power, and status vis-à-vis the country that had assumed world leadership in the wake of two world wars.

From its inception, Community competition law has served as a means of achieving this economic integration. Articles 85 and 86 were included in the Treaty of Rome in order to combat restraints on competition that could interfere with the creation of the Common Market.<sup>17</sup> Moreover, the focus in constructing the competition law system during the 1960s was not on protecting competition for the sake of its generic benefits,<sup>18</sup> but on creating a unified market.<sup>19</sup> Consequently, this goal structured competition law thought and institutions.

This does not mean that there was no interest in obtaining the generic benefits of competition. Both the Commission and the Court referred at times to the potential benefits—lower prices, more rapid technological progress, etc.—anticipated as a result of improved competition.<sup>20</sup> These references were imbedded, however, in a discourse and practice that focused on economic integration.<sup>21</sup>

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15. For discussion, see, e.g., U.W. KITZINGER, *THE POLITICS AND ECONOMICS OF EUROPEAN INTEGRATION* 21–59 (Frederick A. Praeger, Inc. 1963) (1961).

16. See, e.g., MAYNE, *supra* note 14, at 203–34.

17. The so-called “Spaak Report” of 1956, which served as the basis for the drafting of the Treaty of Rome, emphasized this function. See COMITÉ INTERGOUVERNEMENTAL CRÉÉ PAR LA CONFÉRENCE DE MESSINE, *RAPPORT DES CHEFS DE DÉLÉGATION AUX MINISTRES DES AFFAIRES ÉTRANGÈRES* 16–23 (1956).

18. It is important to remember that socialist thought was still highly influential in many parts of Europe at this time, and thus there were political disincentives to associating competition law too closely with the protection of the competitive process as such.

19. See, e.g., GOYDER, *supra* note 2, at 44.

20. See, e.g., the Court’s opinion in cases 56 and 58/64, *Consten and Grundig v. Commission*, 1966 E.C.R. 299, 339–40, and the Commission’s Action Programme for the Second Stage of the Common Market (Nov. 1962), *Common Mkt. Rep. (CCH)* ¶¶ 201–21 (Feb. 1963).

21. The following quote from the Commission reflects how deeply the idea was imbedded:

Although it is evident that the competition policy of the Community must be directed towards the creation and proper operation of the common market, its effectiveness would, nevertheless, be considerably improved if it were carried out in conjunction with more active competition policies at the national level and with the removal of certain obstacles to the

Furthermore, there was little reason to distinguish between these two goals; they were related and mutually reinforcing.<sup>22</sup> To the extent that competition law eliminated obstacles to the flow of goods, services, and capital across European borders, for example, it served the cause of unifying the market while simultaneously benefiting consumers by increasing the number of actual and potential competitors in European markets.<sup>23</sup>

### *B. Characteristics of the System*

Those entrusted with constructing the Community's competition law system were faced with two fundamental questions about its role. The first was how large a role competition law should play: could—and should—it be seriously enforced? Except in Germany, competition law played a minimal role, if any, in government policy and in business decision-making in Europe. As a result, it was widely assumed that Community competition law provisions would not be seriously enforced.<sup>24</sup> That competition law came to play such a significant role may be explained, at least partially, by the recognition that it represented a potentially valuable tool for achieving the Community's central mission of economic integration.

The second issue concerned the nature of the system—was it law or was it politics? Here two quite different images of competition law drawn from fundamentally different national experiences confronted each other.<sup>25</sup> The German participants tended to view the competition law system as fundamentally juridical; legal analysis should be the

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free play of the market in various sectors, such as the fixing of prices and the placing of orders by public authorities.

COMMISSION OF THE EUROPEAN COMMUNITIES, FIRST REPORT ON COMPETITION POLICY 12 (1972).

22. Some types of violations are, of course, more closely associated with the integration imperative than others. See Joel Davidow, *Competition Policy, Merger Control and the European Community's 1992 Program*, 29 COLUM. J. TRANSNAT'L L. 11, 13 (1991).

23. But see C.W.F. Baden Fuller, *Economic Issues Relating to Property Rights in Trademarks: Export Bans, Differential Pricing, Restrictions on Resale and Repackaging*, 6 EUR. L. REV. 162 (1981) (arguing that the focus on vertical restrictions actually may have impeded integration).

24. See GOYDER, *supra* note 2, at 65. Many did not view the competition law provisions as law at all, but rather as general policy principles. See, e.g., 1 HANS VON DER GROEBEN & HANS VON BOECKH, KOMMENTAR ZUM EWG-VERTRAG 258–69 (1958). It was also widely believed that if Community competition law were to be applied, its application would be limited either almost exclusively to the very largest firms or to firms that engaged primarily in transnational business. See ROBERT LECOURT, L'EUROPE DES JUGES 82 (1976).

25. For discussion of the conflict between the German and French positions during the negotiation of the Treaty of Rome, see HANNS JÜRGEN KÜSTERS, DIE GRÜNDUNG DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT 364–69 (1982). According to Küsters, the other delegations ranged between these two positions, with the Dutch closer to the German position and the Italians closer to the French. *Id.* at 364.



primary guide to decision-making.<sup>26</sup> Objectivity and neutrality of the juridical process were necessary for achieving any effective progress toward integration and for establishing the legitimacy of Community institutions. Moreover, "ordoliberal" thought, which emphasized the need for a constitutional framework for economic policy, strongly influenced their opinions.<sup>27</sup> In addition, they had recently worked through these issues in a decade-long controversy over the introduction of their own competition law.<sup>28</sup>

The competition law systems of the other Member States, if any, usually were based on an "administrative control" or "industrial policy" model in which political rather than juridical processes were dominant.<sup>29</sup> The French, for example, tended to see competition law in political terms, preferring to base decisions on the evaluation by Community officials of the needs of the Community and its Member States at a given time.<sup>30</sup> They were steeped in the values and methods of *dirigisme* and *planification* and conceived competition law in that light.<sup>31</sup>

The conflict between these two conceptions of competition law was most intense in the early 1960s. By the late 1960s, however, governmental changes in France and the example of the "German miracle" of economic development had weakened resistance to a juridical conception of competition law.<sup>32</sup> Nevertheless, the conflict has never been

26. See Hans Kutscher, *Über den Gerichtshof der Europäischen Gemeinschaft*, 16 *EUROPARECHT* 393-413 (1981). For a representative statement of dominant German perspectives on this general issue, see WALTER HALLSTEIN, *EUROPE IN THE MAKING* 30-55 (Charles Roetter trans., 1972).

27. For discussion of ordoliberalism, see David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 41 *AM. J. COMP. L.* (forthcoming 1994) and *GERMAN NEO-LIBERALS AND THE SOCIAL MARKET ECONOMY* (Alan T. Peacock & Hans Willgerodt eds., 1989). Ordoliberalism was the dominant version of neo-liberalism in Germany, and European competition law was generally perceived in the context of such neo-liberalism. See, e.g., JACQUES HOUSSIAUX, *CONCURRENCE ET MARCHÉ COMMUN* 7 (1960).

28. See generally Ivo E. Schwartz, *Antitrust Legislation and Policy in Germany—A Comparative Study*, 105 *U. PA. L. REV.* 617 (1957). For detailed discussion of this legislative process, see RUDIGER ROBERT, *KONZENTRATIONSPOLITIK IN DER BUNDESREPUBLIK—DAS BEISPIEL DER ENTSTEHUNG DES GESETZES GEGEN WETTBEWERBSBESCHRÄNKUNGEN* (1976).

29. See David J. Gerber, *Law and the Abuse of Economic Power in Europe*, 62 *TUL. L. REV.* 64-66 (1987).

30. For discussion by the then President of the German Federal Cartel Office, see Eberhard Günther, *Die Ordnungspolitischen Grundlagen des EWG-Vertrages*, 1963 *WIRTSCHAFT UND WETTBEWERB* 191 [hereinafter *WuW*]. See also HERVÉ DUMÉZ & ALAIN JEUNEMAITRE, *DIRIGER L'ÉCONOMIE: L'ÉTAT ET LES PRIX EN FRANCE (1936-1986)* (1989).

31. "*Dirigisme*" refers to the French tradition of allowing governmental agencies to play a major role in directing private economic activity. "*Planification*" refers to the practice established after World War II whereby a governmental agency, the "Commissariat Général du Plan," created general, non-binding plans for major sectors of the French economy. Henri Guillaume, *Implications of the New Indicative Planning*, in *FRENCH INDUSTRIAL POLICY* 119, 124-26 (William J. Adams & Christian Stoffaës eds., 1986). For a detailed explanation of French values and methods in industrial policy, see generally Henri Aujac, *An Introduction to French Industrial Policy*, in *FRENCH INDUSTRIAL POLICY* (William J. Adams & Christian Stoffaës eds., 1986).

32. See generally Ulrich Everling, *Die Koordinierung der Wirtschaftspolitik in der Europäischen*

fully resolved, and its recent reactivation may make it more portentous now than ever before.<sup>33</sup>

### C. *Sculpting the System: The Political Process*

Given the dearth of experience with competition law in the Member States and the assumption that competition law would play as marginal a role in the Community as in the Member States, it is not surprising that the Council had little interest in becoming directly involved in the structuring of the system.<sup>34</sup> The Council was willing to allow the Commission to play the major role in shaping the competition law system, and the Commission seized the opportunity.

#### 1. Regulation 17 and the Power of the Commission

The preparation of an institutional framework for implementing articles 85 and 86 dominated the agenda of the Commission's competition law officials for approximately half a decade. The process involved extensive and sometimes difficult negotiations among the Council, the Commission, the European Parliament, and Member State governments, culminating in the 1962 enactment of Regulation 17, the blueprint for the institutional structure of the competition law system.<sup>35</sup>

Regulation 17 created a competition law system in which the enforcement and policy-making prerogatives were centered in the Commission and the role of national legal systems was marginalized.<sup>36</sup> The

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*Wirtschaftsgemeinschaft als Rechtsproblem, in DAS EUROPÄISCHE GEMEINSCHAFTSRECHT IM SPANNUNGSFELD VON POLITIK UND WIRTSCHAFT: AUSGEWÄHLTE AUFSÄTZE 1964–1984* 199 (1985).

33. See *infra* text accompanying notes 162–168.

34. The Council has the final legislative authority within the Community. It is an explicitly political body in which the Member States are directly represented and pursue their own national interests. The Council may not, however, initiate legislation. This must be done by the Commission, which is the bureaucracy of the Community and represents the interests of the Community as a whole. For further details on this structure, see, e.g., P.J.G. KAPTEYN & P. VERLOREN VAN THEMMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 103–31 (Lawrence W. Gormley ed., 2d ed. 1989).

35. Council Regulation 17/62, 1962 J.O. (204), amended by Council Regulation 59/62, 1962 J.O. (1655), Council Regulation 118/63, 1963 J.O. (2696), and Council Regulation 2822/71, 1971 O.J. (L 285) 49. For discussion, see, e.g., Arved Deringer, *The Distribution of Powers in the Enforcement of the Rules of Competition under the Rome Treaty*, 1 COMM. MKT. L. REV. 30 (1963).

36.

The Commission's preoccupation [with centralizing enforcement in its own hands] was understandable. The principles embodied in the competition rules were novel and almost revolutionary. They required fundamental changes in deeply ingrained habits of thought and patterns of economic conduct. The officials of the new competition Directorate-General did not trust businessmen, lawyers and judges to apply the rules correctly (or even, as the case might be, in good faith).

Ian Forrester & Christopher Norall, *The Laicization of Community Law: Self-Help and the Rule of Reason: How Competition Law Is and Could Be Applied*, 21 COMMON MKT. L. REV. 11, 13 (1984).

Treaty of Rome did not dictate such centralization, and prior to the enactment of Regulation 17, national authorities had applied the competition law provisions, sometimes actively.<sup>37</sup> Their marginalization was thus a critical step in constructing the system.

One component of this centralization project was article 9(3), which required that when the Commission began an investigation under the competition law sections of the treaty, national authorities had to cease their own enforcement activity under the treaty with regard to that conduct. This provision thus discouraged the Member States from initiating their own investigations because such actions would become futile if the Commission began its own inquiry.<sup>38</sup>

A second element was article 9(1), which provided that only the Commission could issue exemptions under article 85(3). This eliminated incentives to bring suit in national courts, because such courts could only rule on one of the two issues relevant to the application of article 85. The combined effect of these provisions was to eliminate any significant role for national legal systems in the enforcement of Community competition law.

The introduction of the notification procedure, which became a pivotal feature of the Community system, enhanced the centrality of the Commission's role. According to article 4(1) of Regulation 17, the Commission is to be notified of agreements that might violate article 85, and exemption from article 85(1) is contingent on the filing of such notification. This procedure gave significant power to the Commission because it meant that the most important practical issue was what the Commission would do about notified agreements. Businesses and their representatives had to turn to the Commission for guidance, and it was there that they could attempt to influence decisions.

In addition to greatly expanding the Commission's role, Regulation 17 also secured for the competition directorate (General Directorate IV or DG IV) a high degree of autonomy in decision-making. France had sought to require that DG IV obtain the approval of a majority of the members of a newly established advisory committee on competition law before sending its recommendations to the full Commission for final decision.<sup>39</sup> Representatives from each Member State would sit on this advisory committee, and thus the need for its approval would have subjected the Commission to a high degree of political influence. Competition law would have developed primarily as a reflection of

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37. See Grant W. Kelleher, *The Common Market Antitrust Laws: The First Ten Years*, 12 ANTI-TRUST BULL. 1219, 1221 (1967).

38. The importance of this provision increased as the Court read article 85(1) very broadly and thus increased the scope of the Commission's competence.

39. For discussion, see GOYDER, *supra* note 2, at 44-45.

political decisions by the Member States rather than through juridical processes. This requirement was, however, rejected in article 10(3). An advisory committee was established, but DG IV was merely required to consult with it before sending decisions to the Commission.

Finally, Regulation 17 gave the Commission extensive investigatory and enforcement powers. For example, article 14 vested the Commission with authority to enter into any premises relevant to a competition law investigation to examine the books and records of the firms involved, to make relevant copies, and to interview personnel. These powers made the Commission a formidable enforcement agency.

## 2. The Commission's "Special" Prerogatives in Competition Law

In 1965, the Council further buttressed the autonomy of the Commission in competition law matters by granting it broad powers to "legislate" without approval of the Council. Regulation 17's notification procedure had caused a flood of notifications to the Commission and had placed an enormous burden on a small office. In response, the Council granted the Commission the authority to issue group or "block" exemptions under article 85(3) in certain situations without the Council's approval.<sup>40</sup> Moreover, the Council included language in Regulation 19/65 indicating that it favored such delegation, and the Commission later began to issue additional block exemptions.<sup>41</sup>

DG IV is the only directorate to have such power, and some consider it unlikely that the Council would initiate such a practice today. Nevertheless, what began as a response to a specific and temporary need (to respond to the flood of notifications) now plays an important role in the system because it further shields DG IV's decision-making authority from political intervention.

The Community's political institutions thus created an institutional framework for competition law which centralized authority in the Commission and minimized the roles of national competition officials and national courts. Moreover, at the Community level it reduced Member State political influence by protecting DG IV from undue political interference.

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40. Council Regulation 19/65, 1965 J.O. (533). Block exemptions exempt firms from liability for violating article 85(1) where the specific conditions of the block exemption are met. For discussion, see BELLAMY & CHILD, *supra* note 3, at 130-34.

41. Among the block exemptions issued pursuant to Regulation 19/65 are those for exclusive distribution (Commission Regulation 1983/83, 1983 O.J. (L 173) 1), exclusive purchasing (Commission Regulation 1984/83, 1983 O.J. (L 173) 5), motor vehicle distribution (Commission Regulation 123/85, 1985 O.J. (L 15) 16), patent licensing agreements (Commission Regulation 2349/84, 1984 O.J. (L 219) 15), and franchising agreements (Commission Regulation 4087/88, 1988 O.J. (L 359) 46).

### D. The Court Defines Its Role

The one institution in the system whose role was not subject to definition by the political process was the Court of Justice. The Court had to mold its own role, and, not surprisingly, it chose to put itself in a leadership position. Viewing itself as the principal "motor of integration,"<sup>42</sup> the Court took advantage of the special circumstances offered by competition law and made that system an important "vehicle" of integration whose strength would, in turn, further amplify the Court's own power.<sup>43</sup>

The Court's definition of its role in the competition law system was part of the broader process of defining its role within the Community, and here timing was a critical factor. The first significant competition law cases came to the Court in the mid-1960s, just as General De Gaulle's resistance to Europeanization threatened to impede integration and destroy the Community.<sup>44</sup> DeGaulle changed the "constitution" of the Community by demanding a unanimity requirement for virtually all Council decisions, thus hobbling the Community's political organs.<sup>45</sup> As a consequence, the Court was the only institution capable of maintaining the momentum of integration.<sup>46</sup> Moreover, the crisis of confidence resulting from these events encouraged the Court to assert a bold leadership role.

The Court thus structured the competition law system to serve as a central tool for promoting integration.<sup>47</sup> It articulated a broad conception of competition law as central to the process of integration, and its decisions in this area sought to make that conception viable and convincing.

42. See, e.g., KAPTEYN & VERLOREN VAN THEMATT, *supra* note 34, at 169-73; Hjalte Rasmussen, *Between Self-Restraint and Activism: A Judicial Policy for the European Court*, 13 EUR. L. REV. 28, 29, 37 (1988); Trevor C. Hartley, *Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community*, 34 AM. J. COMP. L. 229, 247 (1986).

43. For a recent comprehensive discussion of theoretical approaches to the Court's role in European integration, see Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993).

44. See, e.g., Joined Cases 56 & 58/64, *Etablissements Consten, S.A.R.L. v. Commission*, 1966 E.C.R. 299.

45. This refers to the so-called "Luxemburg Accord." See generally KITZINGER, *supra* note 15, at 90-96 & 220-42.

46. See Kutscher, *supra* note 26, at 402.

47. According to Ulrich Everling, a former judge of the European Court of Justice, "[i]n evaluating the case law of the Court it is necessary to recognize that the competition rules of the Community serve the central objective of the Community, namely the opening of the markets of the Member States . . . ." Ulrich Everling, *Zur Wettbewerbskonzeption in der neueren Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, 40 WUW 995, 1000 (1990) [hereinafter Everling, *Wettbewerbskonzeption*]. All translations are by the author, except as otherwise noted.

The role the Court sculpted for itself in this competition law system centered on intellectual leadership.<sup>48</sup> Rather than limiting itself to ruling on the facts of individual cases, the Court frequently enunciated broad principles and values. It looked to the future and aimed at guiding the Commission in its development of competition policy.<sup>49</sup> As one commentator has suggested, the Court began to provide the Commission with “windows of opportunity” in which the Court indicated its willingness to support particular lines of development of competition law doctrine.<sup>50</sup>

Reflecting the centrality of the goal of integration, the Court made teleology the cornerstone of its interpretative strategy.<sup>51</sup> As in its constitutional case law,<sup>52</sup> the Court interpreted the treaty’s competition law provisions in light of its own conception of what was necessary to achieve the integrationist goals of the treaty. It conveyed a clear message that this goal-driven methodology was not merely to be one of many principles to be used in interpreting the treaty, but rather the dominant interpretative method.

The Court’s teleological discourse carried centralist values. The Court saw a strong Commission as necessary for achieving integration, and thus it molded competition law doctrine so as to increase the power of the Commission in relation to national authorities. For example, it consistently expanded the geographical scope of article 85, thereby increasing the jurisdictional prerogatives of the Commission and reducing those of the Member States,<sup>53</sup> and it relied on integrationist goals in justifying this expansion.<sup>54</sup>

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48. This role had no precedent in European national competition law systems. To the extent that there had been judicial involvement at all in European competition law systems, the courts had functioned primarily as administrative courts, whose primary role was to develop and apply a principled set of controls on the discretionary action of administrative bodies. *See, e.g., Gerber, supra* note 29, at 64–66.

49. The point here relates not to the source of ideas, but to the influence within the system of authoritative pronouncements of those ideas. As Eric Stein and others have pointed out, the Commission often is the source of new ideas that are then given authoritative force through inclusion in the decisions of the Court. *See Stein, supra* note 5, at 24–25.

50. GOYDER, *supra* note 2, at 413.

51. For a definition of “teleology” in the competition law context, see, e.g., Ethan Schwartz, *Politics as Usual: The History of European Community Merger Control*, 18 *YALE J. INT’L L.* 607, 619 (1993) (describing the Court’s “teleological approach” as interpreting “the intent of the Treaty’s drafters in light of some ‘perceived spirit’ of the Treaty, thereby giving an integrationist meaning to the text”).

52. For discussion, see, e.g., RASMUSSEN, *supra* note 5, at 8–17 & *passim*.

53. According to article 85(1), agreements can violate the treaty only where they “may affect trade between Member States,” but the treaty provided little indication of what that phrase meant. The Court consistently has expanded this concept of “effect on trade.” *See, e.g., GOYDER, supra* note 2, at 96–105.

54. *See Hawk, supra* note 3, at 247.

*E. The Commission and the Birth Pangs of Competition Policy*

The centrality of the Court's role was also tied to the enormity of the task faced by the Commission. In effect, DG IV had to create an entire substantive and procedural system and explain it to governmental and business leaders who frequently were either unfamiliar with such norms or doubted their legitimacy.<sup>55</sup> Moreover, due to the lack of experience with competition law in most Member States, decision-makers in DG IV did not have a broad base of knowledge on which to draw in determining what those norms should be. Finally, the unanimity requirement in the Council meant that the Commission could not depend for political support on a majority of the Council and thus had to avoid taking action that might unduly offend individual Member States.

As a consequence, the Commission moved very carefully during the foundational period. It had to establish a base of experience to guide its judgments and a political foundation for confidence in its procedures that would support effective enforcement in the future. For much of the period it focused its efforts on procedural issues, most notably the creation of Regulation 17. Enforcement was approached delicately, as shown, for example, by the Commission's unwillingness to levy fines until late in the period.<sup>56</sup>

Under these circumstances, the Commission had little choice but to seek a cooperative relationship with the Court. Both needed cooperation, because neither could achieve its goals independently.<sup>57</sup> Except where national courts request specific interpretations from it, the Court can only pursue its own goals when the Commission takes enforcement action. Similarly, the Commission cannot accomplish its mission without the Court's support of its interpretations and applications of the Treaty.

In the cooperative relationship that evolved, the Commission tended to follow the lead of the Court, thereby taking advantage of the Court's symbolic status and its relative immunity from political pressure.<sup>58</sup> The Court's decisions were understood as applications by a neutral, non-political body of juridically determined principles and therefore were largely shielded from such pressure. The Commission could thus achieve a degree of political security by operating in the Court's "tow."<sup>59</sup>

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55. See *supra* note 24.

56. See *infra* text accompanying note 96.

57. See Harry G. Schermers, *The European Court of Justice: Promoter of European Integration*, 22 AM. J. COMP. L. 444, 445-47, 450-51 (1974).

58. See, e.g., GOYDER, *supra* note 2, at 415-16.

59. This is not to suggest that the Commission did not produce its own initiatives. The

In this interplay between Court and Commission, the integration imperative was pivotal because it represented a common goal for the two institutions. Each saw an expansive reading of the competition provisions as critical to its own role in moving the Community toward integration. As a consequence, they developed the Community's substantive law in the service of this goal.

### *E. Substantive Principles of Competition Law*

The overriding importance of economic integration as a goal for both the Court and the Commission configured not only the institutional arrangements of competition law, but its substantive content as well. In contrast to national competition law systems, whose primary objective typically is to secure generic benefits associated with competition, Community competition law was shaped to eliminate private restraints on trade across national borders.

The emphasis in Community competition law on vertical relationships (e.g., manufacturer-retailer) between firms is the most important example of this objective.<sup>60</sup> While national legal systems generally focus on horizontal agreements (i.e., those among competitors) because they represent the most obvious distortions of the market, Community competition law has focused on vertical restraints, largely because these represent the most obvious obstacles to transborder trade.<sup>61</sup>

This concern led the Commission to attack a variety of agreements that manufacturers and distributors were using to protect national markets.<sup>62</sup> Where manufacturers could use exclusive distributorships to isolate national markets and protect them from parallel imports, they could effectively use such agreements to re-erect through private means the barriers to trade that the Community had been created to eliminate. The Commission aggressively attacked such agreements, and the Court supported its attacks in broad language signaling that the

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Commission did create competition policy, and by the end of the period it had begun to enforce the competition rules with vigor. Nevertheless, it remained dependent on the Court, which was at the time the more secure institution. *See, e.g.*, GOYDER, *supra* note 2, at 83-95.

60. *See, e.g.*, 2 BARRY E. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* 403-573 (2d ed. 1990) [hereinafter HAWK, *COMPARATIVE GUIDE*].

61. This focus on vertical relationships sharply distinguished Community competition law from, for example, U.S. antitrust law. For discussion, see Spencer W. Waller, *Understanding and Appreciating EC Competition Law*, 61 *ANTITRUST L.J.* 55, 66-67 (1992), and Tim Frazer, *Competition Policy after 1992: The Next Step*, 53 *MOD. L. REV.* 609, 618-20 (1990).

62. *See, e.g.*, Case 19/77, *Miller Int'l v. Commission*, 1978 E.C.R. 131 (prohibiting an export/import ban) and Case 30/78, *Distillers v. Commission*, 1980 E.C.R. 2229 (prohibiting a pricing scheme establishing different prices for domestic and export sales).



Court would strike down any agreements used for these general purposes.<sup>63</sup>

A related problem involved the use of industrial property rights to achieve market separation. The Commission and the Court both attacked the use of industrial property rights by manufacturers to prohibit the importation of goods from other Member States and thus to separate markets. Both patents and trademarks were being used for such purposes, and they received priority attention.<sup>64</sup>

Together, the cases from the foundational period established the basic incompatibility with the Treaty of Rome of vertical agreements used to restrict or distort the flow of goods across national borders. The Commission's enforcement efforts were directed primarily at such agreements, and the Court frequently articulated broad principles designed to support those efforts.<sup>65</sup>

There was noticeably less concern with horizontal agreements. In part this was because such agreements were less obviously and directly related to the paramount goal of integration. In addition, enforcement action that might inhibit cooperation risked conflict with other policy goals. The Commission was concerned, for example, with ensuring that European firms be able to compete with their United States rivals. It thus sought to promote cooperative arrangements among such firms, particularly the small and medium-sized enterprises (SMEs) whose survival appeared to be threatened by international competition.<sup>66</sup>

The result was very cautious enforcement of article 85(1) against horizontal agreements. There was no question that cartels were generally forbidden by that article, and thus the Court and the Commission concentrated on balancing the competition-distorting effects of competitor agreements against other Community interests such as economic progress. They focused, for example, on distinguishing between "hard" agreements, which were basically anticompetitive, and "soft" agreements, which were basically designed to improve competitiveness. Moreover, the Commission tended to allow cooperative agreements between small and medium-sized firms and to concentrate enforcement efforts on agreements involving larger firms.<sup>67</sup>

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63. See, e.g., Case 56/65, *Société Technique Minière v. Maschinenbau Ulm GmbH*, 1966 E.C.R. 235. For discussion, see GOYDER, *supra* note 2, at 190-204.

64. For patents, see, e.g., Case 24/67, *Parke, Davis v. Probel*, 1968 E.C.R. 55. For trademarks, see, e.g., Case 40/70, *Sirena v. Eda*, 1971 E.C.R. 69. For discussion, see GOYDER, *supra* note 2, at 253-63.

65. See generally James M. Ellis, *The Legality of Exclusive Distributorships Under Common Market Antitrust Law*, 9 ANTITRUST BULL. 775, 782 (1964); Grant W. Kelleher, *The Common Market Antitrust Laws: The First Ten Years*, 12 ANTITRUST BULL. 1219, 1232-35 (1967); Klaus Newes, *The European Commission's First Major Antitrust Decision*, 20 BUS. LAW. 431, 436-39 (1965).

66. See, e.g., Hawk, *supra* note 3, at 231, 234-45; Ernst-Joachim Mestmäcker, *Concentration and Competition in the EEC*, 6 J. WORLD TRADE L. 615-47 (1972).

67. See, e.g., Hawk, *supra* note 3, at 249-65.

During this initial period, the Commission made little use of the abuse of dominant position provisions contained in article 86.<sup>68</sup> Although it began in the mid-1960s to make statements about how it might use that provision,<sup>69</sup> the Commission paid relatively little attention to article 86 until the early 1970s.<sup>70</sup> This was partly out of fear of hampering the growth of Member State firms. In addition, the lack of any well-accepted sense of how the provision should be applied made enforcement by a politically weak Commission highly risky. Article 86 is applicable to market-dominating firms, and the Member States were very concerned about any attempts to interfere with “national champions.”<sup>71</sup>

Throughout this period, the Commission was wary of taking action against Member States relating to their own interference with the competitive process. It recognized the potential threat to competition posed by governmental interference, but—presumably, again, because of political concerns—it generally avoided developing and enforcing treaty provisions relating to state aids, governmental monopolies, or government facilitation of private anticompetitive conduct.

### *G. The Role of National Legal Systems*

As we have seen, Regulation 17 sharply curtailed incentives to use national legal systems to vindicate rights provided by Community competition law.<sup>72</sup> Yet an important issue regarding the role of national legal systems remained: the relationship between Community competition law and national competition laws. How much authority did Member States retain in this area? Here the Court developed the basic principle that national competition authorities could apply their own laws independently of the Commission, provided that their activities

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68. The concept of abuse is not defined in article 86, but the following examples are provided:

- a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;
- b) the limitation of production, markets or technical development to the prejudice of consumers;
- c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
- d) the subjecting of the conclusion of a contract to the acceptance, by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

69. See, e.g., European Economic Community Commission, *Memorandum de la Commission de la Communauté Economique Européenne sur la concentration dans le Marché Commun* (Dec. 1, 1965), reprinted in *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 651–77 (1966).

70. For discussion, see Gerber, *supra* note 29, at 82–88.

71. See, e.g., WILLIAM J. ADAMS, *RESTRUCTURING THE FRENCH ECONOMY* 53–54 (1989).

72. See *supra* part II.C.1.

did not interfere with Community law.<sup>73</sup> Although not without ambiguity, this principle served as an effective coordinating tool by delineating the respective spheres of operation of national and Community authorities. Moreover, given that most national competition laws were still weak during this period, the issue remained of secondary importance in most Member States.

#### *H. The System Takes Shape*

As the institutions of the Community shaped the competition law system, their primary concern, as we have seen, was the agenda of economic integration; competition law was politically acceptable precisely because it was critical to achieving this goal. Yet the Community was new and politically weak. Recognizing this fragility, its institutions sought to construct a competition law system that avoided both excessive political influence of Member States on competition law development and threats to the economic interests of those states. This structuring of the competition law system corresponded to the political exigencies of the period, as the integration imperative both defined the competition law system and provided it with legitimacy.

The system that emerged from these circumstances had three dominant traits. First, enforcement was centralized in Community institutions, and the role of the national legal systems was minimized. Second, the system was conceived primarily in juridical terms. Decisions that were understood as based on generally applicable principles emanating from the Treaty of Rome were thought to be more unifying and stabilizing than political decisions. Finally, the system's substantive focus was on those practices that were most likely to be harmful to the integration process (e.g., vertical restrictions), whereas potential anti-competitive harms that were likely to engender political resistance from Member States generally were avoided.

### III. 1973 TO THE MID-1980S: FROM OIL SHOCKS TO "EUROSCLEROSIS"

The "oil shock" that rolled over Europe in the mid-1970s profoundly changed the economic and political context of competition law. The formation of the OPEC oil cartel and the concomitant quadrupling of the price of oil shifted massive economic resources from Europe and the United States to the Middle East, jarring European economies into

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73. See Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, 1969 E.C.R. 1; see also HAWK, *COMPARATIVE GUIDE*, *supra* note 60, at 43-46.

a recession that was followed by periods of stagflation that would persist for more than a decade.<sup>74</sup>

This new economic situation had important political consequences for the Community. The economic pie that had been steadily growing suddenly threatened to shrink. As unemployment increased, the democratic mechanisms that during the 1960s had dispensed the fruits of economic advancement throughout society now demanded that governments act to protect their nationals (firms as well as individuals) from economic harm. Member States that were supposed to cooperate to achieve common goals now found it more attractive to take from each other in what increasingly looked like a zero-sum game.<sup>75</sup> Governments became hesitant to support Community initiatives that might be seen as sacrificing their own national interests on the Community "altar."

This external jolt to intra-Community relations occurred just as the first expansion of the Community further increased internal obstacles to cooperation. The United Kingdom, Ireland, and Denmark joined the Community in 1973, bringing with them new cultural, political, and legal traditions. Moreover, particularly in the case of the United Kingdom, they also brought with them ingrained attitudes of suspicion, and sometimes hostility, toward the Community.<sup>76</sup>

By the 1980s the Community was suffering from "Eurosclerosis." In most substantive areas there was little apparent movement toward Community goals. Moreover, confidence in the future of the Community ebbed as failures to achieve significant progress led to repeated disappointments.

#### A. *The Court as "Savior"*

These economic and political stresses placed new demands on the competition law system that would eventually alter it in fundamental ways. In the short-run, however, they appeared to reinforce existing arrangements, particularly with regard to the role of the Court. Despite serious threats to the Community's future and perhaps to its very existence, both the Council and the Commission remained hobbled by political conflict and the "shadow of the veto,"<sup>77</sup> thus increasing pres-

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74. See, e.g., ALLAN M. WILLIAMS, *THE WESTERN EUROPEAN ECONOMY 40-50* (1987); WALTER LAQUEUR, *EUROPE IN OUR TIME: A HISTORY 1945-1992* 415-34 (1992).

75. See, e.g., Stuart Holland, *Europe's New Public Enterprises*, in *BIG BUSINESS AND THE STATE* 25-42 (Raymond E. Vernon ed., 1974).

76. For the situation in Britain, see ANTHONY KING, *BRITAIN SAYS YES* 19-31 (1977), and Simon Bulmer, *Britain and European Integration*, in *BRITAIN AND THE EUROPEAN COMMUNITY* 5-6 (Stephen George ed., 1992).

77. I have borrowed this evocative term from Professor Weiler, and his insights here are particularly apt. The veto affected *all* decision-making within the Community, not just Council decisions. See Weiler, *supra* note 1, at 2461-74.

sure on the Court to maintain the momentum of integration. As a consequence, the Court remained the principal "motor of integration" throughout the 1970s and into the 1980s.<sup>78</sup>

In playing this role, the Court relied heavily on the competition law system that had been constructed during the foundational period. That system was perceived as critical to the integration effort and thus enjoyed a large measure of political support.<sup>79</sup> This enabled the Court to use competition law in developing a symbolic discourse of Community progress, even as political events hindered more tangible forms of progress.

### 1. The Limits of Teleology

The Court continued to provide intellectual leadership by enunciating broad, future-oriented principles in several areas of competition law.<sup>80</sup> Moreover, it continued to expand the scope and enhance the intensity of competition law, relying on the integration imperative for both guidance and political support.

The force of the integration imperative and the widespread political support for the Court's use of competition policy in pursuing integration led, however, to decisions that would later undermine the Court's role in the competition law system. By the early 1970s the Court was paying less attention to the constraints of traditional legal methodology in reaching its decisions, and in so doing it began to erode the "juridical" conception of Community competition law that had supported that role.

The famous *Continental Can* decision revealed how far the Court was prepared to go in this direction.<sup>81</sup> For the first time in a litigated case the Commission sought to use article 86 to attack an acquisition. The Commission contended that the acquisition represented a change in the structure of the market that increased the dominance of the acquiring firm and thus constituted an abuse of that firm's dominant position within the meaning of article 86.<sup>82</sup> The Court agreed,<sup>83</sup> and thus sanctioned the apotheosis of the teleological method.

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78. See, e.g., Ulrich Everling, *Zur neueren EuGH-Rechtsprechung zum Wettbewerbsrecht*, 17 *EUROPARECHT* 301-02 (1982).

79. See, e.g., GOYDER, *supra* note 2, at 402.

80. The intellectual leadership of the Court in the system is also evidenced by the fact that the Member State courts paid great attention to the Court's decisions and very little attention to the decisions of the Commission. See Ernst Steindorff, *Europäisches Kartellrecht vor staatlichen Gerichten 1971-1978: Zur Entwicklung des europäischen Kartellrechts, Teil III*, 146 *ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT* 140, 142, 162 (1982) [hereinafter Steindorff, *Entwicklung III*].

81. Case 6/72, *Europemballage Corp. v. Commission (Continental Can)*, 1973 E.C.R. 215.

82. *Id.* at 226-29.

83. *Id.* at 242-45.

Traditional legal analysis provided little support for this use of article 86. The text of the treaty did not indicate that article 86 was applicable to acquisitions. On the contrary, it seemed to indicate that the article was not applicable to such cases. Article 86 referred to the "abuse" of economic dominance, and power could not be "abused" unless it was "used."<sup>84</sup> Yet in *Continental Can* there was merely a change of share ownership. At most, one could say that power was being "acquired." Historical analysis also revealed a clear legislative intent not to provide the Commission with authority to control mergers. Such a provision had been included in the Treaty of Paris (creating the ECSC) on which the framers of the Treaty of Rome relied for many of their ideas in this area, and yet they omitted any such reference.<sup>85</sup> Thus, both textual and historical analyses opposed the application of article 86 to mergers.

Nevertheless, the Court disregarded these modes of analysis and held that article 86 could be applied to mergers. Its justification was teleological. It held that the Commission could not accomplish its pro-integration goals without a tool to combat excessive economic concentration and that article 86 would, therefore, have to be interpreted to provide such a tool. In effect, the Court held that the teleological method could provide the basis for a decision even when the text of the Treaty and the clear intention of the drafters dictated the opposite result. The Court's message seemed to be that its own judgment of the needs of economic integration would dominate its decision-making, regardless of the dictates of more traditional "juridical" methodology.

## 2. Relations with the Commission

In some respects the Court's relations with the Commission remained as they had been during the foundational period. The Court continued generally to guide and support the Commission, providing "windows of opportunity" for the Commission to pursue and sustaining the Commission's attempts to expand the impact and substantive scope of the competition law provisions.<sup>86</sup>

Particularly after the mid-1970s, however, a subtle change occurred in the relationship between the Court and the Commission.<sup>87</sup> The

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84. See, e.g., Lazar Focsaneau, *La Notion d'abus dans le système de l'Article 86 du Traité instituant la Communauté Économique Européenne*, in *REGULATING THE BEHAVIOUR OF MONOPOLIES AND DOMINANT UNDERTAKINGS IN COMMUNITY LAW* 324, 336-40 (J.A. van Damme ed., 1977).

85. Treaty Establishing the European Coal and Steel Community [ECSC Treaty], Apr. 18, 1951, 261 U.N.T.S. 142 [hereinafter ECSC Treaty].

86. See generally Gordon Slyn, *EEC Competition Law From the Perspective of the Court of Justice*, 1984 *FORDHAM CORP. L. INST.* 383 (1985).

87. Others have noted the evolution of this pattern. See generally Ernst Steindorff, *Europäisches Kartellrecht und Staatenpraxis: Zur Entwicklung des europäischen Kartellrechts Teil II*, 142 *ZEITSCHRIFT*

Court began to demand more from the Commission, requiring that it present increasingly detailed evidence of the actual economic impact of alleged competition law violations rather than relying on formalistic criteria of anti-competitiveness.<sup>88</sup> The Court began regularly to annul Commission actions under articles 85 and 86 on the grounds that the Commission had provided insufficient evidence to support its claim that a particular restriction on a firm's freedom of action actually would have the effects which were attributed to it.<sup>89</sup>

One reason for the Court's increased rigor may have been a concern that the Commission might enforce Community competition law too aggressively, thus provoking resistance to competition law enforcement and impairing the effectiveness of what had become a critically important tool of integration. The Commission's enforcement efforts had intensified during the early 1970s, and the Court may have perceived the risk of a political "backlash."

The Court's move also reflected a new dynamic within the competition law system that was a response to the political and economic situations of the 1970s. The internal politics of the Community demanded at least the appearance of progress toward integration. Yet, the economic situation increased resistance to Community action that might impair the capacity of European firms to compete both internationally and against each other. The Court's response to these pressures was to supply political "progress" on a conceptual and symbolic level. While strengthening competition law doctrine, it also minimized the economic consequences of these substantive law measures by imposing more stringent evidentiary and procedural requirements on the Commission.<sup>90</sup>

### B. *The Commission's Balancing Act*

The evolution of the Commission's role in the competition law system reflects a similar dynamic. While political circumstances reduced the Commission's role in many areas to that of a "secretariat," competition law was an exception. The Commission had more autonomy here than elsewhere, allowing it to pursue its goals with less

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FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 525-26 (1978) [hereinafter Steindorff, *Entwicklung II*].

88. See generally Verstryngne, *supra* note 2, at 681.

89. See, e.g., Case 27/76, *United Brands Co. v. Commission*, 1978 E.C.R. 207; Case 86/82, *Hasselblad (GB) Ltd. v. Commission*, 1984 E.C.R. 883.

90. For a comprehensive discussion of these procedural reforms, see Helmut W. Kreis, *Commission Procedures in Competition Proceedings—Recent Reforms in Practice and Law*, 1983 FORDHAM CORP. L. INST. 145 (1984).

political interference.<sup>91</sup> Moreover, because competition law was viewed as essential to the process of integration, the Commission could also count on a degree of political support for its pro-integration activities in this area. Nevertheless, the Commission did not enjoy a political position that would allow it to enforce vigorously competition law norms.

### 1. The Policy Challenge

The new political and economic climate made the development of competition policy more complicated than it had been during the foundational period. During the earlier period, the goals of economic integration and economic growth generally called for the same basic policy measures because integration was seen as the primary path to prosperity. If the Commission succeeded in creating and administering the "neutral" rules needed to achieve integration, growth would automatically follow.

That image was shattered in the 1970s. The economic reversal undermined confidence in the steady improvement of economic conditions and ignited the fear of even more serious disintegration in the future.<sup>92</sup> Under the new economic circumstances, progress toward integration no longer seemed an adequate goal. While integration remained an important part of Community economic policy, it was recast as *a* "long-run" answer rather than *the* answer. There was political pressure on the Commission to take active measures in the short-run to protect European national economies and to strengthen the competitiveness of European firms.<sup>93</sup>

Thus, while competition law remained an important, even necessary, tool for achieving integration, DG IV officials increasingly were impelled to take into account the immediate economic situation of both the Community as a whole and the individual Member States. The result was a shift in the focus of policymaking away from "general" and "neutral" principles and toward immediate and specific policy objectives such as job creation.

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91. For discussion of the special prerogatives of the Commission in the competition law area, see GOYDER *supra* note 2, at 40-42.

92. See generally Thomas Sharpe, *The Commission's Proposals on Crisis Cartels*, 17 COMMON MKT. L. REV. 75 (1980).

93. See *id.* at 77-79.



## 2. Enforcement

The new situation presented DG IV with a dilemma. There was pressure on the Commission to enforce competition laws more aggressively than it had in the past in order to maintain the (faltering) momentum of integration.<sup>94</sup> Whereas during the foundational period the Commission's primary role had been to participate with the Court in "making law" (i.e., establishing competition law principles), by the 1970s the Commission had to pay greater attention to securing compliance with the norms that had been established. There was little point in having a sophisticated competition law if its dictates could be ignored with impunity.<sup>95</sup> Moreover, the new economic pressures increased the incentives for firms to do just that—engage in anticompetitive conduct. As a result, the Commission became more vigorous in seeking compliance. For example, it began to levy significant fines for violations of articles 85 and 86.<sup>96</sup>

Yet these concerns for greater enforcement arose at a time when the obstacles to effective enforcement were increasing. The expansion of the Community meant a major increase in the numbers of firms, markets, and transactions subject to the application of the competition laws, thus requiring a major "educational" effort to assure awareness and understanding of Community norms.<sup>97</sup> Moreover, there was little experience with competition law in the new Member States, and thus firms had to be convinced of the need to change practices such as cartel arrangements that had long been considered not only acceptable, but also normal.

In addition, DG IV was not in a position to increase significantly its enforcement activities. Its resources, for example, were augmented only marginally to respond to this situation. Equally important was the lack of political support for this aspect of DG IV's responsibility. The new economic pressures on the Member States made it difficult for the Commission to take regulatory action that might harm the competitiveness of European firms, and the Commission's unwilling-

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94. See, e.g., Steindorff, *Entwicklung II*, *supra* note 87, at 525.

95. See, e.g., Ernst Steindorff, *Zur Entwicklung des europäischen Kartellrechts (Teil I)*, 137 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 203, 209 (1973) [hereinafter Steindorff, *Entwicklung I*].

96. The first fine was levied in the Quinine cartels cases (Case 41/69, *ACF Chemiefarma NV v. Commission*, 1970 E.C.R. 661; Case 44/69, *Buchler v. Commission*, 1970 E.C.R. 733; and Case 45/69, *Boehringer Mannheim v. Commission*, 1980 E.C.R. 769). For a complete list of fines levied by the Commission in competition law cases, see LENNART RITTER, W. DAVID BRAUN, & FRANCIS RAWLINSON, *EEC COMPETITION LAW: A PRACTITIONER'S GUIDE* 721-34 (1991).

97. The Commission considered publicity exceptionally important in this context. See Frances Graupner, *Commission Decision-Making on Competition Questions*, 10 COMMON MKT. L. REV. 291, 294 (1973).

ness to increase funding for DG IV may have reflected concern that the directorate might become too aggressive in enforcing competition law norms.

DG IV's enforcement practices were shaped by this dilemma. The introduction of significant fines in a limited number of cases increased incentives for firms to take Community competition law seriously and sent the necessary "community-building" message that the laws were being used to integrate the market.<sup>98</sup> Relatively few firms, however, were harmed by these fines. The Commission's response thus reflected a common theme: the effort to establish community-building norms at low economic cost and with minimum political risk.

### *C. Substantive Directions*

During this second phase of competition law development, vertical restraints remained DG IV's substantive focus, reflecting the continuing perception that the system's central goal was integration and that such restraints were the chief obstacles to integration. Both the Court and the Commission continued to "extend" the application of article 85 in the area of vertical restraints,<sup>99</sup> although they increasingly operated within the discourse established by previous Court decisions.

The most dramatic development during this period, however, was the activation of article 86 and the concept of abuse of a market-dominating position. Seldom used during the foundational period, article 86 now became a focus of conceptual development and an active area of enforcement.<sup>100</sup> The Court's expansive, teleological reading of article 86 in *Continental Can*<sup>101</sup> signaled its willingness to support such a development, and throughout this period the Commission and the Court together broadened the application of the abuse concept.<sup>102</sup>

The new political and economic circumstances of the 1970s encouraged the development of article 86. The concern during the foundational period that article 86 might interfere with the objective of creating enterprises large enough to combat United States multinationals diminished, as technology, rather than mere size, became the key to international competitiveness.<sup>103</sup> Moreover, article 86 attracted political support as a response to the new inflationary pressures that arose

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98. By the early 1980s, there was general agreement that the vigor of enforcement had greatly increased over the previous ten years. Robert M. Feinberg, *The Enforcement and Effects of European Competition Policy: Results of a Survey of Legal Opinion*, 23 J. COMMON MKT. STUD. 373, 376 (1985).

99. See, e.g., GOYDER, *supra* note 2, at 213-17.

100. See, e.g., Anand S. Pathak, *Articles 85 and 86 and Anti-competitive Exclusion in EEC Competition Law: Part I*, 10 EUR. COMPETITION L. REV. 74, 84 (1989).

101. See *supra* part III.A.1.

102. For discussion, see Gerber, *supra* note 29, at 86-99.

103. For discussion, see generally Mestmäcker, *supra* note 66, at 637-47.

during the 1970s. While inflation was only a minor threat in the late 1950s and the 1960s, the oil crisis created powerful inflationary pressures, and the Commission used article 86 to discourage dominant firms from adding to these pressures.<sup>104</sup> Finally, the integration imperative supported this development, because article 86 cases typically involved vertical relationships that were not subject to article 85.

The activation of article 86 provided opportunities for both the Court and the Commission. Since that provision had been used sparingly during the foundational period, the Court could utilize it to maintain the intellectual momentum that had become such an important part of its role in the system. This allowed the Court, for example, to continue to rely on teleology in its decision-making. The development of article 86 also allowed the Commission to maintain the symbolic momentum of integration without subjecting itself to the political risks of significantly increasing enforcement under article 85.

While the Commission's enforcement emphasis continued to be on vertical restraints, it increasingly turned its attention to horizontal restraints during the 1970s.<sup>105</sup> By levying fines in several major and well-publicized cartel cases involving large (and often non-Member State) firms, it sent a message that it was not afraid to apply article 85 to horizontal restraints.<sup>106</sup> At the same time, however, the Commission was also emphasizing the need for cooperation among European firms, particularly small- and medium-sized firms, as a means of competing effectively with United States corporations.<sup>107</sup> Accordingly, it had to be careful not to allow competition law to become an obstacle to such cooperation.

#### D. *The Role of National Legal Systems*

The Community competition law system remained firmly in the hands of the Court and the Commission throughout this period. Community institutions made the important decisions, while national courts and competition officials continued to play a decidedly marginal role. Nevertheless, new factors entered the picture that eventually would alter the relationship between national and Community institutions.

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104. See, e.g., COMMISSION OF THE EUROPEAN COMMUNITIES, SECOND REPORT ON COMPETITION POLICY 25 (1973); COMMISSION OF THE EUROPEAN COMMUNITIES, THIRD REPORT ON COMPETITION POLICY 26-27 (1974).

105. See Paul Sutherland, *EEC Competition Policy*, 54 ANTITRUST L.J. 667, 669 (1985).

106. See *supra* note 96.

107. See, e.g., COMMISSION OF THE EUROPEAN COMMUNITIES, NINTH REPORT ON COMPETITION POLICY 60 (1979); René Joliet, *Cartelization, Dirigism and Crisis in the European Community*, 3 WORLD ECON. 403 (1981).

The critical conceptual move was the Court's declaration in *BRT v. Sabam* that the competition law provisions of the Treaty were directly applicable in national courts.<sup>108</sup> This decision allowed private firms to seek redress for harms caused by violations of Community competition law by bringing private suits in national courts. The decision opened the way for a shift in the locus of power within the competition law system from Community institutions to national courts, but the impact of the decision would not be felt for more than a decade.<sup>109</sup>

Another development with long-run implications was the growing tendency of Member States to create new competition law regimes or to revise existing ones along the model of the Community system. When Greece entered the Community in 1981, for example, it adopted a competition law modelled on Community competition law.<sup>110</sup> As other countries moved in that direction, a European "model" of competition law became discernible. In the 1980s, this increasing congruence among competition law systems would generate systemic forces that would have been barely imaginable without it.

### *E. Tremors of Change*

From the early 1970s through the mid-1980s, the competition law system did not appear to change significantly. Creation of a unified market remained the overriding objective that continued to structure the relationships between the Council and the Commission and shape the substantive contours of competition law. The urgency of utilizing competition law in the integration process may have even increased because progress seemed so elusive in other areas and because the risk of failure of that process may have seemed even more ominous.

Below the surface, however, new pressures and forces were forming. The respective roles of the Court, the Commission, and the Member States within the competition law system were beginning to change, but the full implications of these mutations remained concealed by the critical need to use competition law to maintain psychological momentum toward integration. All institutions had the same vital interest in achieving this goal, and thus the force of the integration imperative tended to support the system's structures and processes.

With the impending elimination of this imperative and the advent of new political and economic circumstances, these subterranean

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108. Case 127/73, *Belgische Radio en Televisie v. SV Sabam*, 1974 E.C.R. 51.

109. See *infra* text accompanying notes 188-193.

110. For a description of the Greek legislation, see Theofanis Christoforou, *Competition Law in Greece*, in [VOL. A] *COMPETITION LAW IN WESTERN EUROPE AND THE U.S.A.*, G/C 1-72 (D.J. Gijlstra ed., 1990).

changes would “erupt” and shake the foundations of the competition law system.

#### IV. MID-1980S TO EARLY 1990S: THE KALEIDOSCOPE TURNS

Beginning in the mid-1980s, the system that had been constructed during the preceding three decades began to show signs of fundamental change. Since then, changes in its operational context, as well as in its institutional framework, have altered competition law’s roles and challenged its identity. As with the transformation of the Community’s constitutional system described by Professor Weiler, these changes often have been kaleidoscopic, i.e., numerous small shifts in intra-systemic relationships over many years cumulate to create what appear as abrupt mutations of the system.

##### *A. The Scene Changes*

The most prominent change in the context of competition law has been the near unification of the Community’s internal market symbolized by the talismanic “1992.” Although the goal of achieving a single market by January 1, 1993 has not been fully achieved, most law-based obstacles to trade among the Member States have been eliminated.<sup>111</sup>

The process of eliminating these obstacles had been gradual and halting over three decades, failing to ignite major structural changes in the European economy.<sup>112</sup> The 1992 program engendered widespread confidence, however, that the single market actually would be achieved on or about January 1, 1993, and this confidence translated into rapid economic restructuring during the late 1980s and early 1990s.

A wave of mergers, acquisitions, joint ventures, and “strategic alliances” has significantly increased industrial concentration, in both national and European markets.<sup>113</sup> This, in turn, has brought with it the development of “Euro” law firms, and the Europeanization of financial, insurance, and other services. According to a 1991 commentary, “1992 has already become a reality through the implementation

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111. For a bibliography of the literature on the 1992 program, see Bahiyih G. Tahzib, *Selected Bibliography on Europe*, 11 MICH. J. INT’L L. 571 (1990).

112. For discussion of the barriers that still existed in 1988, see JACQUES PELKMANS & ALAN WINTERS, *EUROPE’S DOMESTIC MARKET* (1988).

113. See, e.g., Douglas E. Rosenthal, *Competition Policy, in EUROPE 1992: AN AMERICAN PERSPECTIVE* 293, 313–15 (Gary C. Hufbauer ed., 1990).

of company strategies (e.g., alliances, mergers, buy-outs, agreements to define 'Community-wide norms', etc.)."<sup>114</sup>

As the 1992 program was set in motion, the Single European Act of 1986 simultaneously introduced changes in the institutional framework of the Community's competition law.<sup>115</sup> That enactment broke the bottleneck of the unanimous voting requirement in the Council that had dominated Community institutional life since the 1960s.<sup>116</sup> While not eliminating the unanimous voting requirement, it significantly increased the range of issues for which qualified majority voting could be used.<sup>117</sup> This meant that, as Professor Weiler asserts, *all* decision-making was to be made "under the shadow of the vote."<sup>118</sup> It also increased the power and scope of authority of the Commission in several respects,<sup>119</sup> and addressed the problem of the "democratic deficit" in Community institutions by increasing the (still marginal) role of the European Parliament in the Community's legislative process.

Buoyed by the psychological success of the 1992 program, Community leaders reached agreement on further unification proposals at the Maastricht Summit in December, 1991.<sup>120</sup> That agreement focused on achieving a common currency by the end of the decade and expanding the scope of Community prerogatives. Although the luke-warm popular political response to Maastricht has slowed progress toward these ambitious goals,<sup>121</sup> stronger political and monetary integration is still the Community's near-term goal.

The impact of these changes in the context of competition law has been magnified by the actual and probable increases in the size of the Community and in the scope of application of Community law. Actual increases have been twofold. Spain and Portugal became members in

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114. HERVÉ DUMEZ & ALAIN JEUNEMAÎTRE, *LA CONCURRENCE EN EUROPE: DE NOUVELLES RÈGLES DU JEU POUR LES ENTREPRISES* 263 (1991).

115. Single European Act (SEA), Feb. 28, 1986, 1986 O.J. (L 169) 30, *reprinted in* 25 I.L.M. 506 (1986) [hereinafter SEA]. For commentary and description, see George A. Bermann, *The Single European Act: A New Constitution for the Community?*, 27 COLUM. J. TRANSNAT'L L. 529 (1989).

116. The majority voting regime has not been frequently used, but its mere existence changes the dynamics of Community decision-making. See, e.g., Martin Vasey, *Decision-Making in the Agriculture Council and the "Luxembourg Compromise"*, 25 COMMON MKT. L. REV. 725, 726-27 (1988); John T. Lang, *The Constitutional Principles Governing Community Legislation*, 40 N. IR. LEGAL Q. 227, 240 (1989).

117. For discussion, see Bermann, *supra* note 115, at 572-75.

118. Weiler, *supra* note 1, at 2461.

119. See, e.g., Bermann, *supra* note 115, at 568-75.

120. The treaty negotiated at Maastricht is known as the Treaty on European Union, and most of it is reprinted in 63 C.M.L.R. 719 (1992).

121. See Alan Riding, *Europe is Getting Jittery About Arranged Union*, N.Y. TIMES, Apr. 9, 1992, § 1, at 8; see also *Why the Danes Wouldn't*, ECONOMIST, June 6, 1992, at 52.

1986, increasing the population of the Community itself by almost 50 million.<sup>122</sup> In addition, the signing in 1992 of the European Economic Area agreement with the members of the European Free Trade Association (EFTA) calls for extension of the application of much of Community law (including competition law) to those countries.<sup>123</sup>

Probable future increases in the size of the Community are also significant because Community officials, governments, and businesses are forced to consider such increases in their long-range planning. Several EFTA members have filed applications for membership, and negotiations concerning membership were initiated with three of them (Austria, Sweden, and Finland) in February, 1993.<sup>124</sup> In addition, there has been pressure on the Community to consider the future membership of post-socialist countries such as Hungary.<sup>125</sup> These actual and probable extensions of the scope of Community law take on an additional dimension in the case of competition law because, with the exception of Sweden,<sup>126</sup> competition law either has been non-existent or has played a decidedly marginal role in the states to which Community law has been or soon may be extended.<sup>127</sup>

Finally, the Single European Act also changed the context of competition law by formally adding new policy goals and values that compete, at least potentially, with those of competition law. For example, it explicitly recognized industrial policy as a Community goal,<sup>128</sup> and it extended the Commission's authority in environmental and social areas.<sup>129</sup>

Taken together, these changes in institutional structures and constitutional relationships fundamentally alter the context in which the competition law system operates. Not surprisingly, they are also generating fundamental changes within that system.

### B. *The Changing Role of Adjudication*

The central mutation in the competition law system involves the Court's intellectual leadership. Beginning in the mid-1980s, judges

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122. For population figures, see 47 U.N. DEP'T OF ECON. & SOC. DEV., MONTHLY BULL. OF STAT. 5 (1993).

123. The text of the Draft Treaty on a European Economic Area is reprinted in 63 C.M.L.R. 921 (1992).

124. *The European Community: A Strange New Pattern of Stars*, ECONOMIST, Feb. 6, 1993, at 56.

125. *The Mandarin's Moment*, ECONOMIST, Dec. 19, 1992, at 16.

126. See generally David J. Gerber, *Antitrust Law and Economic Analysis: The Swedish Approach*, 8 HASTINGS INT'L & COMP. L. REV. 1 (1984).

127. For example, Spain and Portugal treated such problems, if at all, as a fairly marginal part of their commercial laws, and the post-socialist countries are only beginning to take such laws seriously.

128. See, e.g., SEA, *supra* note 115, at art. 130F-Q.

129. See, e.g., Bermann, *supra* note 115, at 558-61.

and former judges of the Court began articulating the notion that the Court should or would become less "activist." They have suggested that the Court may no longer need to play as aggressive a role as it played in the past and that other institutions are now in a position to carry more of the burden of integrating the Community.<sup>130</sup> Although the depth and ultimate impact of these views remain unclear, any such changes in the Court's self-perception necessarily influence its capacity for intellectual leadership.

Some observers have noted changes in the decisions of the Court that tend to reflect the Court's evolving conception of its role. In competition law, as in other areas of Community law, "[t]he Court, which in the first decades issued future-oriented judgments with generalized significance, today endeavors to limit itself to the statements required for the decision of the concrete legal controversy."<sup>131</sup> The Court's opinions tend to focus more narrowly on resolving the issues in the case under litigation through the use of existing concepts, preferably at relatively low levels of abstraction. To this extent, therefore, the Court's intellectual leadership role has diminished, for such opinions cannot "set the agenda" in competition law matters.

The Court's methodology has also evolved in accordance with this change in its leadership role. The teleological reasoning that the Court relied on so heavily during earlier periods has become less evident, as the Court turns increasingly to the manipulation of narrower principles drawn largely from its own previous decisions. Teleology is an appropriate tool for an aggressive court, while reasoning that relies primarily on the authority of existing concepts and decisions comports more easily with a more cautious role.

Reduced reliance on teleology, in turn, undermines the supportive link that the Court had established between teleology and pragmatic style. The predominance of the teleological method allowed the Court to avoid the need to create a well-defined conceptual grammar to support its reasoning. Its style could remain relatively imprecise and pragmatic because the primary criterion for interpreting and applying norms was their utility in achieving the single-market goal, and this goal did not require, or even easily permit, conceptual rigor.

One component of this methodological change has been a shift from the use of relatively formal criteria for evaluating conduct to increas-

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130. See, e.g., Thijmen Koopmans, *The Role of Law in the Next Stage of European Integration*, 35 INT'L & COMP. L.Q. 925 (1986).

131. Ulrich Everling, *Rechtsvereinheitlichung durch Richterrecht in der Europäischen Gemeinschaft*, 50 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 193, 208 (1986).



ingly "effects-based" criteria.<sup>132</sup> Whereas during earlier periods the Court often was willing to assess the legal characteristics of conduct by reference to the terms of the relevant agreements, it has increasingly demanded that such assessments be based on economic analysis of the likely consequences of such conduct under the specific circumstances of the case.<sup>133</sup>

This shift in analysis has important and largely unrecognized implications for the competition law system. Formal criteria are well-suited to application by the Court, because they allow decisions to be made on the basis of documentary analysis. They require neither detailed investigation of economic circumstances nor sophistication in economic analysis. It is a task for which lawyers are trained and with which judges are comfortable.

In contrast, courts are not well-adapted to evaluating the market effects of conduct. Judges typically have neither the training nor the experience to undertake such evaluations with confidence and expertise. In the case of the European Court, the problem is exacerbated by the diverse national origins of the judges, for each has different economic experiences and different vocabularies for interpreting such conduct.<sup>134</sup> In addition, the Court's procedures make detailed factual analysis of economic circumstances particularly difficult and inefficient due to the cumbersome fact-taking process and the need for translations.

As a result, the shift in methodology toward requiring additional economic analysis necessarily pushes the Court toward a more marginal role in the system. Because the Court is not in a position generally to carry out such analysis itself, it increasingly must rely on the Commission for the evaluation of economic facts and limit itself to assessing the adequacy of the Commission's procedures in making such evaluations.

The cumulative impact of these mutually reinforcing changes impels the Court to adopt a role in the competition law system akin to that

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132. For discussion, see, e.g., 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).

133. The idea itself is not new, but the tendency to expand its application has become noticeable in recent years. See Everling, *Wettbewerbskonzeption*, *supra* note 47, at 1004. For a potentially far-reaching manifestation of this tendency, see Case C-234/89, *Delimitis v. Henninger Bräu*, 1991 E.C.R. 935, discussed in K.P.E. Lasok, *Assessing the Consequences of Restrictive Agreements: A Comment on the Delimitis Case*, 12 EUR. COMPETITION L. REV. 194 (1991).

134.

The judges come from twelve different Member States with different histories, cultures, economic and social orders, and, above all, legal systems. They bring their varying traditions, methods and values to adjudication . . . This situation is important for understanding their decisions. The differing historical, economic and legal backgrounds of the individual judges are particularly influential in competition law matters that require economic evaluation. Everling, *Wettbewerbskonzeption*, *supra* note 47, at 996.

of an administrative court.<sup>135</sup> According to this conception of its role,<sup>136</sup> the Court's basic function is that of assuring that the Commission, as the executive organ of the Community, performs its functions correctly and operates within the rules and principles established for it by the Community's political organs.

The Court increasingly has articulated its own understanding of its role in such terms. For example, in the *Remia* case, it said,

Although as a general rule the Court undertakes a comprehensive review of the question whether or not the conditions for the application of Article 85(1) are met, it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking the Commission has to appraise complex economic matters. The Court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.<sup>137</sup>

This statement reveals a new conception of the Court's role in competition law matters that does not easily support the Court's intellectual leadership.

A narrowing of the Court's role in the competition law system is fueled not only by changes in the Court's general methodology and self-definition, but also by the impending evaporation of the single-market goal as the keystone of competition law. As we have seen, the Court structured its role in the competition law system around that goal, which was frequently a source of political support for the Court's role. As that goal recedes in importance, political support for bold steps in competition law is likely to weaken as well, and the intellectual force of competition law may be called into question. These increases in both political and intellectual uncertainty do not comport easily with a leadership role.

The creation of the Court of First Instance in 1989 added to this uncertainty.<sup>138</sup> The Court of First Instance now generally hears all cases

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135. For discussion of the emerging administrative law tradition within the Community, see Ulrich Everling, *Auf dem Wege zu einem europäischen Verwaltungsrecht*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT, Jan. 15, 1987, at 1.

136. For discussion of the differing conceptions of the role of administrative courts in Europe, see JÜRGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 97-205 (1992); Ulrich Everling, *The Court of Justice as a Decisionmaking Authority*, 82 MICH. L. REV. 1294, 1302-04 (1984) [hereinafter Everling, *Court of Justice*].

137. Case 42/84, *Remia v. Commission*, 1985 E.C.R. 2566, 2575.

138. For discussion of the impact of the Court of First Instance, see, e.g., Bo Vesterdorf, *The*

involving competition law decisions of the Commission, reducing the role of the Court of Justice in the competition law system to deciding appeals from the Court of First Instance and responding to questions from Member State courts. As a result, competition law cases have become a less prominent part of the Court's workload,<sup>139</sup> reducing the amount of time the judges spend on such cases and thus diminishing their expertise in, and familiarity with, competition law issues. Moreover, the Court of First Instance necessarily reduces the Court's control over developments within the system. Instead of one judicial voice, there are now two.

Finally, the sheer growth of case law may tend to reduce the opportunities for the Court to exercise intellectual leadership. The notion here is that once the "big" issues have been resolved and the basic conceptual framework has been established, a court has less room to play an aggressive role. There is simply more law, and this tends to restrict the Court's role. The importance of this issue is difficult to assess, however, because there is no a priori basis for assessing the degree to which existing conceptual structures constrain the development of legal doctrine. The rapid changes in economic and political circumstances in recent years might well have justified a continued high level of aggressiveness by the Court, but the Court has tended to prefer a more conservative course.

This change in the Court's role has ramifications for the entire competition law system. As the Court's role narrows, its methods and its discourse also become less influential. As the Court plays a lesser role in setting the agenda of competition law and shaping its central decisions, the Commission has less reason to structure its decision-making by reference to the Court's methods. Moreover, there is less reason for others, both inside and outside the system, to utilize the language and the methods associated with the Court.

### *C. The Commission's Changing Roles*

These changes in the role of the Court are intertwined with changes in the role of the Commission. Growth in the Commission's power, authority, and confidence have both reflected and contributed to the erosion of the Court's leadership role.

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*Court of First Instance of the European Communities After Two Full Years in Operation*, 29 COMMON MKT. L. REV. 897 (1992).

139. Cases attacking Commission enforcement of competition law provisions were especially prominent because they tended to involve far more factual analysis than other types of cases.

### 1. Formulating Policy

The evolution of the Commission's role can be seen in the changing influences on its policy-formulation function. When making policy, DG IV looks to a variety of sources for guidance and responds to many forms of influence, and the relative strength of these sources and influences is changing.

The Commission is, for example, less dependent on the Court than it was during earlier periods. As long as the Court was articulating broad pro-integration goals and competition law principles and enjoyed solid political support for that function, the Commission had to pay careful attention to the Court's agenda. Due to its own relatively insecure political position, the Commission was constrained to follow the Court's lead. Moreover, the Commission could rely on the Court to approve its policy choices as long as they were pro-integration (which they generally were). Furthermore, the Court's high status protected the Commission's initiatives from political attack. With the impending loss of the integration imperative and the Court's growing reluctance to articulate broad legal principles, there is less reason for the Commission to look to the Court for guidance, and the Court has less guidance to provide.<sup>140</sup>

Similarly, there is less reason for the Commission to construct policy within the constraints of the Court's methodology and discourse. When the Commission depended on the Court's support for the success of its own initiatives,<sup>141</sup> it was important to look to these sources in order to predict the Court's responses. Moreover, by using the Court's own discourse and methods the Commission increased the likelihood of influencing the Court's responses. As the Court's role narrows, these influences are correspondingly diminished, and thus its methods lose some of their force within the competition law system.

The expansion of the Community also contributes to this weakening of the influence of juridical methods. The newer Member States and those states likely soon to enter the Community typically either do not have competition law systems or have competition law systems that are (or until recently were) based on administrative control models.<sup>142</sup> As a consequence, decision-makers from these states often have little or no experience with a juridical conception of competition law and they tend to see competition law in political, rather than juridical, terms.

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140. See Koopmans, *supra* note 130, at 931.

141. For an example of a situation in which the Commission sought support for its proposals by reference to specific language in a Court decision, see Stephen B. Hornsby, *Competition Policy in the 80's: More Policy Less Competition?*, 12 EUR. L. REV. 79, 92 (1987).

142. For discussion, see, e.g., Gerber, *supra* note 29, at 64-66.

This reduction in the force of juridical discourse has occurred as the need to accommodate other goals in the formulation of competition policy has grown. For example, there has been increased pressure to consider industrial policy and trade factors in making competition policy decisions.<sup>143</sup> Furthermore, the SEA's sanctioning of social, environmental, and other goals requires the accommodation of these goals in applying Community competition law.<sup>144</sup> The need to integrate these goals provides opportunities for intellectual leadership within the competition law system, but thus far the Court has contributed little to this accommodation. Instead, to the extent that such integration is occurring at all, it is being driven primarily by the Commission and primarily on the basis of political considerations.<sup>145</sup>

## 2. The Enforcement Challenge

The Commission's enforcement role is also changing in ways that affect the entire system. Since DG IV is responsible for both policy formulation and enforcement, developments that affect one of these functions generally also influence the other. In particular, the institutional and economic changes of recent years have further taxed the Commission's capacity to induce compliance with competition law norms, and the minimal increase in the resources of DG IV has forced the Commission to adopt strategies to compensate for its lack of resources.

One new burden was the expansion of the Community to include Spain and Portugal, which significantly increased the population and area over which compliance must be induced. The inexperience with competition law in these countries added to the burden by increasing the difficulty of adequately informing firms of competition law norms and securing their willingness to respect those norms.

The cross-boundary business consolidations of the late 1980s and early 1990s have also "upped the ante" in the compliance game. As firms have increased in size, the fines imposed by the Commission have become less significant in relation to their financial resources and to

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143. For the role of trade factors, see, e.g., Jacques Bourgeois, *Antitrust and Trade Policy: A Peaceful Coexistence? European Community Perspective I*, 17 INT'L BUS. LAW. 58 (1989) and Rainer Kulms, *Competition, Trade Policy and Competition Policy in the EEC: The Example of Antidumping*, 27 COMMON MKT. L. REV. 285 (1990). For the role of industrial policy, see, e.g., Ernst-Joachim Mestmäcker, *Merger Control in the Common Market: Between Competition Policy and Industrial Policy*, 1987 FORDHAM CORP. L. INST. ch. 20 (1988); Rosenthal, *supra* note 113, at 331-33; *Industrial Policy in an Open and Competitive Environment: White Paper from the Commission to the European Council*, COM(90)556 final.

144. See, e.g., SEA, *supra* note 115, at ch. II, § II(III), art. 21 ("social policy"), § II(IV), art. 23 ("economic and social cohesion"), and § II(VI), art. 25 (environmental issues).

145. See generally, Hornsby, *supra* note 141, at 101.

the stakes involved in particular policies or transactions. This increases both the willingness and the capacity of such firms to resist or evade Commission enforcement efforts. Furthermore, the elimination of obstacles to the flow of goods and services across national borders provides additional incentives for firms to seek private contractual arrangements that would shield them from increased transborder competition.<sup>146</sup>

Finally, not only have the obstacles to effective enforcement increased, but support for competition law enforcement has also been compromised. Effective enforcement in the Community context presupposes general acceptance of competition law goals. Yet the imminent loss of the integration imperative and the perceived conflict of competition goals with industrial policy, trade, and other goals diminish the moral force behind competition law.

### 3. From Adjudication to Legislation

As enforcement obstacles and policy uncertainty have increased, the Commission has turned increasingly to legislation to accomplish its objectives. Until the 1980s, the Commission established competition law norms primarily through the process of adjudication. Relying heavily on notifications for its information,<sup>147</sup> the Commission evaluated individual fact situations in relation to the norms developed by the Court and to the Commission's own policy objectives. The Court was at the center of this process, because if the Court failed to support the Commission, it could effectively prevent the Commission from establishing the norms it sought to establish. During the 1980s, however, DG IV turned increasingly away from this procedure and toward legislation as a means of establishing competition law norms. Rather than depending on the Court to articulate norms of conduct in individual cases, it increasingly began to prescribe such norms itself. From formal and binding group exemptions to relatively informal and non-binding general notices, prescription has become the dominant means of establishing conduct norms.

This strategy has many attractions for DG IV. Prescription is generally quicker and less costly than adjudication, which helps to offset the growth of DG IV's workload in relation to its resources. It also addresses the increasing demands made by political and business groups for more "security" in competition law,<sup>148</sup> by providing com-

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146. See, e.g., Claus D. Ehlermann, *The Contribution of EC Competition Policy to the Single Market*, 29 COMMON MKT. L. REV. 257, 258-60 (1992).

147. The notification procedure no longer plays its original role and is often regarded as ineffective. As observers put it as early as 1984, "[c]learly notification does not work as a mechanism by which any party to an agreement caught by Article 85(1) can obtain an exemption under Article 85(3)." Forrester & Norall, *supra* note 36, at 14.

148. See, e.g., Verstrynge, *supra* note 2, at 684-85.

panies with clearer information about the types of conduct that will probably lead to Commission action. In addition, while adjudication relies on general principles, legislation allows for differentiation according to geographic regions and economic sectors, and this facilitates the development of industrial policy.<sup>149</sup> Finally, legislation tends to increase DG IV's power within the system; legislation is an independent act of the Commission in which the Court has no direct role.

The shift of power from the Court to the Commission has significant consequences for the operation of the system. When the Commission legislates, governments, firms, and lawyers look to the Commission rather than the Court for guidance and opportunities to influence the content of competition law norms. The process of legislative prescription by the Commission replaces the process of adjudication by the Court as the focal point of the system.

The characteristics of the Commission's legislation amplify this impact. For example, an important form of legislation, the block exemption,<sup>150</sup> is highly formalistic.<sup>151</sup> Block exemptions typically provide lists of acceptable, possibly acceptable, and unacceptable clauses. This induces firms to structure their agreements to conform to these checklists, leading to a relatively inflexible legal regime. Moreover, the exemptions often become virtually mandatory. According to one study, "Member States and their business communities tend to regard them not as waivers of the law but as compulsory codes of conduct."<sup>152</sup>

The case of block exemptions illustrates that legislation tends to broaden the existing prohibitions beyond levels established by the Court. In these exemptions, according to one expert, the Commission

goes exceptionally far beyond that which the European Court wanted to approve, and, on the other hand, regulates in a hair-splitting way the very last details . . . . The result is in the end a very broad prohibition . . . , but some ninety-five percent of the contracts affected are nevertheless allowed under block exemptions created by the Commission.<sup>153</sup>

This further alters the relationship between the Court and the Commission. It permits the Commission to augment its own power and

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149. *Id.* at 680.

150. See *supra* text accompanying notes 40–41.

151. See, e.g., Margot Horspool & Valentine Korah, *Competition*, 37 ANTITRUST BULL. 337, 356–57 (1992); Forrester & Norral, *supra* note 36, at 47.

152. Forrester & Norral, *supra* note 36, at 15.

153. Ernst Niederleithinger, *Schwerpunkte der Diskussion*, 201 SCHRIFTEN DES VEREINS FÜR SOCIALPOLITIK 56, 58 (1990).

position within the system and undermines the adjudicative role of the Court.

#### 4. The Impact of Merger Control

Another factor that has altered the role of the Commission within the competition law system is the Merger Regulation,<sup>154</sup> which was introduced in 1989 and represents the single most important addition to Community competition law since its inception. The Commission began to call for merger legislation in the early 1970s, but political opposition prevented enactment of such legislation for almost twenty years until the SEA's pro-integration impulses prevailed.<sup>155</sup> While the immediate problems associated with implementation of this new legislation have generated extensive commentary, relatively little attention has been paid to its impact on the system as a whole.<sup>156</sup>

The Merger Regulation provides, in essence, that "concentrations" (including both mergers and certain joint ventures) that have a "community dimension" are subject to Community regulation and removed from the jurisdiction of the national competition law authorities.<sup>157</sup> The Commission must be notified of such mergers *prior* to implementation, and the Commission may prohibit the merger where it would "create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it."<sup>158</sup>

The introduction of this system has fundamentally altered competition policy in Europe.<sup>159</sup> By centralizing authority to deal with large mergers, it has focused attention on the Commission and greatly enhanced its potential for influencing major business decisions. Whereas prior to the Merger Regulation this authority was scattered among the competition authorities of the Member States (many of which did not, in practice, make significant use of it), efforts to influence decision-making in this area now focus on DG IV. Moreover, because of its enormous political and economic importance, the Merger

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154. Council Regulation 4064/89, 1990 O.J. (L 257) 14 [*corrected version of 1989 O.J. (L 395) 1*].

155. For discussion of the background of merger control legislation in the Community, see RITTER ET AL., *supra* note 96, at 332-39.

156. For a useful list of articles, see Waller, *supra* note 61, at n.111. Some observers have paid attention, however, to this set of problems. See, e.g., Mestmäcker, *supra* note 143.

157. A "community dimension" is deemed to exist where the concentrating firms have a worldwide turnover of over 5 billion ECU and a minimum of 250 million ECU of sales within the Community, except where more than two-thirds of each firm's sales within the Community are from the same Member State. The regulation provides that the worldwide turnover figure can be reduced to 2 billion ECU beginning in 1994.

158. Council Regulation 4064/89, *supra* note 154, at 17.

159. DUMEZ & JEUNEMAÎTRE, *supra* note 114, at 264.



Regulation immediately became a focus of DG IV's own attention, occupying an exceptionally large part of DG IV's time, resources, and interest and shifting attention away from the conventional areas of DG IV's activity.<sup>160</sup>

The Merger Regulation also represents a shift of influence from the juridical components of the Commission's activity to its political elements. The Court plays virtually no role in the merger area, which is almost exclusively the province of the Commission. This allows political issues to dominate decision-making.<sup>161</sup>

Experience with the Merger Regulation substantiates this claim. By late 1991, the Merger Regulation had been in effect for almost two years, and some sixty-five mergers had been noticed under its provisions without Commission disapproval.<sup>162</sup> This lack of action had led to widespread speculation that the Commission did not have the political courage actually to use the Regulation to prohibit a merger.<sup>163</sup> In October of 1991, however, the Court issued an order prohibiting a merger involving a Canadian corporation, De Havilland, and a French/Italian consortium.<sup>164</sup> The result was a storm of protest from the French and Italian governments alleging that the Commission had been overly legalistic in applying the statute and should have paid greater heed to industrial policy factors.<sup>165</sup> This campaign was taken so seriously that the French government was rumored to be considering an effort to oust the entire Commission.<sup>166</sup> Not surprisingly, the Commission has not prohibited any mergers since then.

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160. For discussion of the merger task force and its influence, see Michael J. Reynolds, *The First Year of Enforcement under the EEC Merger Regulation—A Private View*, 1991 FORDHAM CORP. L. INST. 649 (1992).

161. DUMEZ & JEUNEMAITRE, *supra* note 114, at 264.

162. For background, see Hans-Jörg Niemeyer, *European Merger Control: The Emerging Administrative Practice of the EC Commission*, 15 FORDHAM INT'L L.J. 398, 399 (1992). There were cases in which the Commission's approval was conditioned on amendments to the relevant merger agreement. See *id.* at 399 & *passim*.

163. See, e.g., Terence P. Stewart & Delphine A. Abellard, *Merger Control in the European Community: The EC Regulation 'On the Control of Concentrations Between Undertakings' and Implementing Guidelines*, 11 NW. J. INT'L L. & BUS. 293, 349-50 (1990).

164. Case IV/M.053, *Aerospatiale-Alenia/de Havilland v. Commission*, 1991 O.J. (L 334) 42. See generally Andrew Wachtman, *The European Community Commission de Havilland Decision: Potential Problems in Community Merger Control are Realized*, 21 CAP. U.L. REV. 685 (1992); Michael J. Reynolds, *The de Havilland Case: A Watershed for EC Merger Control*, 10 INT'L FIN. L. REV. 21 (1991).

165. See, e.g., Boris Johnson, *De Havilland flak for Brittan*, DAILY TELEGRAPH, Oct. 7, 1991, at 21. For discussion, see Reynolds, *supra* note 160, at 696-99.

166. For discussion of the controversy, see, e.g., *EC: Parliament Divided Over the Decision on De Havilland/ATR*, AGENCE EUROPE, Oct. 10, 1991, available in LEXIS, World Library, TXTWE File.

The Merger Regulation has significantly affected perceptions of competition law and of the forces at play within it.<sup>167</sup> Its enactment underscored the perception that the interesting and important aspects of competition law were moving to Brussels and away from the national competition authorities. Merger control tends to be the most visible as well as the most economically and politically significant part of competition law, and its migration toward Brussels seemed to presage a time when important issues would be handled primarily at the Community rather than the Member State level.<sup>168</sup>

Yet this very expectation has tended to undermine confidence in Community competition law. The *De Havilland* case demonstrated the degree to which political forces can influence Commission decision-making and the difficulty of enforcing competition law provisions that might have significant adverse consequences on important Member States. The image of power moving to Brussels, combined with the apparent political vulnerability of the Commission's enforcement efforts, suggests a future in which competition law may play a minor and politicized role rather than its traditional major and juridical role.

### 5. The Commission and the System

During the last few years the Commission has strengthened and expanded its role in the competition law system. With a new confidence generated by the SEA and the approach of the internal market, it has moved to set the agenda for competition law and provide new momentum for the system. In doing so, the Commission has moved toward the center of the system while the Court has inched toward the margins. This expansion of the Commission's role is likely to have a fundamental impact on the system; it means that, in essence, a political institution has replaced a judicial institution as the driving force within the competition law system.

#### *D. Substantive Law: The "Public Turn"*

The changes within the competition law system have been accompanied by a dramatic shift in the system's substantive focus. The Commission has shifted the emphasis in competition law away from its traditional concerns with private conduct and toward the problem of government interference with the competitive process, and the Court

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167. See generally James S. Venit, *The "Merger" Control Regulation: Europe Comes of Age . . . or Caliban's Dinner*, 27 COMMON MKT. L. REV. 7 (1990).

168. For an argument that the Regulation is likely to encourage more attention by Member States to national merger controls, see Davidow, *supra* note 22, at 38-39.

has supported this change in focus. As the Commission stated in its 1990 report, “[w]hilst many barriers to intra-Community trade and competition are created by companies themselves . . . it is felt that at the present stage of economic integration in the Community the barriers are greatest in markets currently subject to state regulation.”<sup>169</sup>

This heightened concern for the role of governments has taken several forms. It includes, for example, the activation and development of article 90, which applies the competition law provisions of the treaty to “public” enterprises and enterprises enjoying “special or exclusive rights,” except to the extent that such application would obstruct the performance of the public function entrusted to such enterprises.<sup>170</sup> This provision was seldom used until the mid-1980s, but recently it has become an important part of Community competition law.<sup>171</sup>

The Commission has taken several important legislative steps to enhance the application of the competition provisions to state monopolies. In 1988, it issued a directive under article 90 which required the elimination of the monopoly rights of state-owned enterprises where they had specified negative impacts on competition.<sup>172</sup> The new directive extended and intensified the impact of prior directives, which required greater “transparency” for state-owned enterprises (i.e., disclosure of information regarding the state’s financial involvement in such enterprises).<sup>173</sup>

The Commission also has intensified the enforcement of article 90. For example, in the 1991 *Telecommunications Terminals* case<sup>174</sup> the Court held that British Telecommunications, a state monopoly, was not protected from the application of article 86 to certain activities that appeared to serve a public purpose. The Court distinguished between functions that were inherently governmental and those that were es-

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169. COMMISSION OF THE EUROPEAN COMMUNITIES, TWENTIETH REPORT ON COMPETITION POLICY 50 (1990).

170. Treaty of Rome *supra* note 10, at art. 90.

171. “Up until the entry into force of the Single European Act, Article 90 was rarely applied, but has recently become a key Treaty provision in connection with the deregulation of certain sectors and in terms of the equal treatment of private and public undertakings.” Claus-Dieter Ehlermann, *The Contribution of EC Competition Policy to the Single Market*, 29 COMMON MKT. L. REV. 257, 264 (1992) [hereinafter Ehlermann, *Contribution*]. See also Claus-Dieter Ehlermann, *Neuere Entwicklungen im europäischen Wettbewerbsrecht*, 26 EUROPARECHT 307, 319 (1991) (“Next to merger control, the application of Article 90 is one of the most important priorities of the General Directorate IV . . .”) [hereinafter Ehlermann, *Neuere Entwicklungen*].

172. Commission Directive 88/301, 1988 O.J. (L 131) 73.

173. Commission Directive 80/723, 1980 O.J. (L 195) 35, amended by Commission Directive 85/413, 1985 O.J. (L 229) 20.

174. Case C-202/88, *France v. Commission (Telecommunications Terminals)*, 1991 E.C.R. 1223. This has been described by the Director-General of DG IV as “one of the most important decisions the Court has ever given in the area of competition law.” Ehlermann, *Neuere Entwicklungen*, *supra* note 171, at 320.

entially commercial. This decision signaled that the Court would construe exemptions from the competition provisions for public monopolies very narrowly.

The Commission's intensified application of existing rules regarding state aids also reflects its new concern with the impact of governments on competition. The potential political cost of vigorous attacks on state aids had constrained enforcement of these principles until the 1980s,<sup>175</sup> but, supported by the impetus of the SEA, the Commission has made state aids a prominent feature of its recent enforcement activities.<sup>176</sup> Moreover, there has been increasing recognition that this area of law should be integrated with competition law rather than remain separate and distinct from it.<sup>177</sup>

The Court and the Commission also have developed new legal doctrines to address state interference with competition. Of primary importance is the line of cases prohibiting governments from interfering with the effective operation ("*effet utile*") of articles 85 and 86.<sup>178</sup> This obligation to refrain from interference began to take shape in the *INNO v. ATAB* case in 1977,<sup>179</sup> but it has only become important since the Court's 1985 decision in *Leclerc v. Au Blé Vert*.<sup>180</sup> The Court has held, for example, that governments may not require compliance with anticompetitive agreements. In the *Flemish Travel Agents* case, the Court ruled that the Belgian government could not prosecute a travel agent for violating a royal decree requiring compliance with trade association rules that prohibited price competition among travel agents.<sup>181</sup> This doctrine of *effet utile* has also been applied in cases in which the

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175. The Commission's role during this period was "mainly educational." GOYDER, *supra* note 2, at 376.

176. See, e.g., Ehlermann, *Contribution*, *supra* note 171, at 274-77.

177. As the then Commissioner for competition law, Sir Leon Brittan, put it in a 1992 speech, "these aspects of our competition policy are too often overlooked by commentators, and I think wrongly so." Sir Leon Brittan, *Competition Law: Its Importance to the European Community and to International Trade*, Speech at the University of Chicago Law School (Apr. 24, 1992).

178. For discussion, see Luc Gyselen, *State Action and the Effectiveness of EEC Treaty's Competition Provisions*, 26 COMMON MKT. L. REV. 33, 36-37 (1989).

179. Case 13/77, NV GB-INNO-BM v. Vereniging van de Kleinhandelaars in Tabak, 1977 E.C.R. 2115.

180. Case 229/83, Association des Centres distributeurs Edouard Leclerc v. S.A.R.L., 1985 E.C.R. I. ("Member States are . . . obliged under the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.").

181. Case 311/85, VZW Vereniging van Vlaamse Reisbureaus v. VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten, 1987 E.C.R. 3801. See also Case 136/86, Bureau National Interprofessionnel du Cognac v. Aubert, 1987 E.C.R. 4789 (holding that Community law precluded prosecution on the basis of a regulation establishing, inter alia, quotas for the sale of spirits).

government has encouraged or otherwise supported anticompetitive private activity.<sup>182</sup>

This shift toward public rather than private influences on the competitive process has been evident even within traditional areas of competition law. Under article 86, in particular, the Commission has centered its enforcement efforts on abuses of power by firms either owned or controlled by governments, or by those whose governmental protection has recently been eliminated as part of the privatization process. For example, in the *British Telecom* case, the Court held that a British telecommunications monopoly had abused its economic power by refusing to sell advertising time to a potential competitor.<sup>183</sup>

These influences have been less marked in the context of article 85, although some have noted a shift in emphasis from vertical restraints to horizontal restraints.<sup>184</sup> The Commissioner for competition law recently labelled such a shift as "inevitable" in the wake of the 1992 Program.<sup>185</sup> Even here, however, "public" and "political" issues have become increasingly important, particularly in regard to the evaluation under article 85(3) of so-called "crisis cartels," which often implicate the industrial policy concerns of the Member States.<sup>186</sup>

Finally, as mentioned above, the new and central role of merger control in Community competition law is highly political. Decisions regarding mergers are often a matter of great political concern, because they often involve issues of jobs, taxes, and economic power. As a result, governments demand to be heard, and political factors influence competition law decisions.

This brief review suggests the degree to which the substantive focus of competition law has shifted since the mid-1980s. For almost three decades the predominant, almost exclusive, focus of enforcement and intellectual development within Community competition law was private conduct, particularly vertical restraints on competition. During the last few years, however, concern about governmental activities has shaped the development of Community competition law.

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182. See, e.g., Case 66/86, *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs e.V.*, 1989 E.C.R. 803 (holding that government approval of collusive airline tariffs conflicts with the EEC treaty).

183. Case 41/83, *Italy v. Commission*, 1985 E.C.R. 873; see also Case 311/84, *Centre belge d'études de marché—Télémarketing SA v. Compagnie luxembourgeoise de télédiffusion SA*, 1985 E.C.R. 3261.

184. See, e.g., Hornsby, *supra* note 141, at 79.

185. Brittan, *supra* note 177, at 7.

186. See, e.g., Manfred Caspari, *EEC Enforcement: An Official View*, 54 ANTITRUST L.J. 599, 606-08 (1985) (surveying recent Commission decisions on cartels).

This change may have many implications.<sup>187</sup> The conceptual shift seems likely to be related, for example, to the enhanced role of the Commission in the system. Courts are appropriate agents for dealing with the application of general norms to private conduct, but they tend to be less effective where political issues are central. As the Commission's political position has been improved by the SEA, its willingness to accept the political risks associated with these issues has increased. Moreover, the prospect of enhancing its power within the system has provided an incentive for the Commission to move in that direction.

#### *E. National Systems: The Dilemma of Decentralization*

The role of national institutions within the Community competition law system has also begun to change. By the mid-1980s, the European Court had virtually eliminated conceptual limits on the scope of Community competition law. It had expanded the Treaty of Rome's concept of "effect on trade" between the Member States to a point where few major business transactions fell outside the reach of the Treaty's competition law provisions.<sup>188</sup> Ironically, at about this time calls for decentralizing responsibility for competition law enforcement began to increase.<sup>189</sup> These calls have become part of a broader move toward decentralization associated with the Maastricht negotiations.<sup>190</sup>

Decentralization creates a dilemma. To the extent that it is effective, it reduces the strain on Commission resources, limits or reverses the concentration of political power, and improves compliance. Yet it also reduces the capacity of Community institutions to influence the development of competition law and to use the system in pursuit of their own objectives. Decentralization also amplifies the risk of inconsistencies within the system. As a result, Community institutions have moved slowly and cautiously in this area.

In the competition law context, decentralization has two main components. The first relates to the role of national courts in applying

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187. For discussion of related issues, compare Pierre Pescatore, *Public and Private Aspects of European Community Competition Law*, 10 *FORDHAM INT'L L.J.* 373, 373-82 (1987) with Giuliano Marengo, *Competition Between National Economies and Competition Between Businesses—A Response to Judge Pescatore*, 10 *FORDHAM INT'L L.J.* 420, 424-28 (1987).

188. See, e.g., Joined Cases 48, 49, 51-57/69, *Imperial Chem. Indus. Ltd. v. Commission*, 1972 E.C.R. 619 (*Dyestuffs case*) and Case 8/72, *Vereeniging van Cementhandelaren v. Commission*, 1972 E.C.R. 977 (*Cement Handler's case*).

189. See, e.g., Ehlermann, *Contribution*, *supra* note 171, at 280-81; John Meade, *Decentralisation in the Implementation of EEC Competition Law—A Challenge for the Lawyers*, 37 *N. IR. LEGAL Q.* 101 (1986).

190. For discussion of the principle of "subsidiarity" and the drive for decentralization associated with it, see A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 *COMMON MKT. L. REV.* 1079 (1992).

Community law. Recently, the Commission has encouraged complainants to file actions in national courts rather than rely on DG IV to secure compliance with competition law norms.<sup>191</sup> The dramatic increase in the use of group exemptions facilitates such a development, because national courts can rule on whether conduct meets the standards of group exemptions.<sup>192</sup> Despite this development and the judicial establishment of the direct effect of the competition law provisions, the Commission's pleas for the use of national courts have largely gone unheeded.<sup>193</sup>

The second set of decentralization issues relates to the role of national competition authorities within the system. During the foundational period, Member States typically had either no competition law or one that was unimportant. Today, all Member States have competition law regimes, and these have increased in power and significance. Furthermore, they have come to resemble more closely the Community competition law system, as confidence in the future of the Community has encouraged Member States to enact competition law regimes or modify existing regimes to correspond more closely to Community law. Spain and Italy, for example, have recently introduced competition law systems for the first time,<sup>194</sup> and France significantly reformed its loose set of competition-related norms and institutions in 1986, shaping a system akin to that of the Community.<sup>195</sup>

This evolution reduces the need, perceived since the construction of the competition law system, to centralize competition law authority in the Commission. If national competition law authorities are enforcing similar substantive rules in similar ways, there is less reason to place primary responsibility on an already under-staffed Community institution. Resistance to such centralization also draws support from the growing group of competent and influential national competition law officials, who often believe that they can protect competition as well

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191. See, e.g., Claus-Dieter Ehlermann, *The Second Wilberforce Lecture: The European Community, Its Law and Lawyers*, 29 COMMON MKT. L. REV. 213, 225 (1992) (advocating a "grass roots approach" to decentralized enforcement) [hereinafter Ehlermann, *Second Wilberforce Lecture*].

192. See Verstrynge, *supra* note 2, at 684-85. Recall that national courts are not normally entitled to rule on requests for exemption under article 85(3).

193. In supporting their pleas, Commission officials have emphasized the importance of educating lawyers to pursue such remedies in the national courts. See, e.g., Ehlermann, *Second Wilberforce Lecture*, *supra* note 191, at 224-27.

194. For Spain, see Law 16/1989 of July 17, 1989: Deference of Competition, *discussed in* FERNANDO POMBO, *DOING BUSINESS IN SPAIN* § 10.03[1] & [2] (1993). For Italy, see Law No. 287 of Oct. 10, 1990: Law concerning the norms on the protection of competition and the market, *GAZZETTA UFFICIALE DELLA REPUBBLICA ITALIANA* 240 (Oct. 13, 1990), *reprinted in* 30 I.L.M. 824 (1991).

195. For discussion of the French reform, see, e.g., Frederic Jenny, *French Competition Policy in Perspective*, 1987 *FORDHAM CORP. L. INST.* 301 (1988).

or better than the authorities in Brussels and who generally are disinclined to reduce their power.

The Community's competition law system thus has undergone major changes since the mid-1980s. The goals, methods, and roles of its institutions look very different today than they did less than a decade ago. Although many of these changes began to emerge before the mid-1980s, the new political and economic circumstances brought about by the Single European Act enhanced the scope and impact of these changes and made them "visible."

## V. TRANSFORMATION AND THE SEARCH FOR IDENTITY

Has Community competition law been transformed? It has not in the sense that doctrines or institutions themselves have radically changed. It is the system that has mutated—both its goals and its processes. The image of a self-confident Commission enforcing an increasingly clear set of well-accepted legal principles under the forward-looking and bold guidance of a court confident of its objectives and methods is not persuasive. The system is more convincingly portrayed as featuring an under-staffed and somewhat uncertain Commission facing new problems, pressures, and demands with diminishing guidance from the Court and increasingly tentative support for its mission. The competition law system thus faces what can aptly be described as an "identity crisis."

### A. *The Changing Roles of Competition Law*

Driven and defined throughout its history by the goal of creating a single market for Europe, the competition law system increasingly must operate without its lodestar. Competition law conceived as a means of achieving economic integration loses its way where such integration already has been achieved. A system constructed and maintained to achieve one primary goal now faces fundamental questions about what it is doing and why. Shorn of its special role in achieving economic integration, the competition law system must redefine its mission, and this process is likely to further destabilize the conceptual framework that has informed competition law.

The resulting uncertainty is exacerbated by increasing demands for accommodation between competition law goals and other goals of the Community. Trade policy, social concerns, and environmental claims, *inter alia*, must be reconciled with the objectives of competition law. Moreover, these demands have grown more insistent with the approach of the single market and the concomitant elimination of competition



law's special status as a "motor of integration." Consequently, just as the keystone of the existing goal structure is being removed (and in part because of the imminence of that removal), lateral pressure from other values and policies is increasing, generating even further uncertainty about the roles of competition law.

One response to this situation would be to turn toward more "generic" competition law goals—i.e., generic benefits associated with protecting the process of competition. Such goals have lived in the shadow of the integration imperative since the foundational period, but they rarely have been explored in their own right, primarily because integrationist and generic goals have been intermingled, and there has been little reason to distinguish between them. This has led to the assumption that "unbundling" these goals will change little and to a lack of concern about the potential impact of eliminating integrationist goals. The assumption, however, remains unexamined, shielded from examination by the natural resistance to changing one's conceptual framework and the political risks of doing so.

Yet removal of the integration imperative necessarily alters competition law goal structures and the associated discourse. Without it, there will be increased pressure on DG IV's decision-makers to articulate other goals with far more care than in the past. Should market efficiency be the sole goal? If not, which other values should be served and how should such other goals relate to each other, i.e., what should be the new goal structure? These questions are likely to take on increasing urgency as the integration imperative fades.

This process of redefining the system's goals will also require a new language to relate specific decisions to the redefined structure. This will give new contours to some competition law issues and focus attention on other issues that have thus far played little or no role in competition law thinking. For example, the Court may need to define more carefully the concept of competition it employs. The Court generally has been able to skirt this issue, because its primary concern was to reduce barriers to the flow of goods across national borders. This relatively straightforward and "physical" criterion often did not invite deeper analysis. However, a goal structure consisting of generic competition law objectives demands a different concept of "competition" that is likely to be more difficult to define. National competition law systems have wrestled with these issues for decades, but the dominance of integrationist goals has obscured such concerns within Community competition law.

Changes in goals and discourse have also begun to redirect policy initiatives and enforcement energies. The predominant concern with vertical agreements that has been associated with the integration imperative has diminished, for example, as concerns associated with the

generic benefits of competition turn attention toward horizontal restraints.<sup>196</sup>

A second possible response to the uncertainties facing European competition law is to avoid them and turn to a different set of problems. This may help to explain the “public turn” of competition law. By turning away from the traditional private areas of competition law and focusing attention on the anticompetitive impact of governments, Community decision-makers avoid, at least temporarily, some of the difficulties involved in changing goals and concepts and “retooling” the system to achieve a new set of objectives. Moreover, by casting the activities of governments as the primary threat to competition, the Court and the Commission can use this relatively “clean slate” to maintain the symbolic momentum critical to the goal of political integration.

Removal of economic integration as the central goal of the competition law system does not mean that issues associated with economic integration will not arise in the future. They will, because the *de jure* integration of the Community’s market does not automatically create *de facto* integration. Moreover, the existence of national cultures and governments will continue to create incentives for firms and groups of firms to evade the full implications of economic integration. The critical point is that the creation of a unified market removes such issues from their dominant, identity-defining position within the system.

### *B. Methods: Less Law, More Politics*

Another process of erosion is also undermining the system’s identity. Not only are the system’s goals changing, but the means used to achieve those goals also have been quietly mutating. The “juridical component” that has been the core of the system since its earliest days has been losing influence relative to its political components. At least in some respects, the competition law system is becoming less juridical and more political.

At one level, this politicizing is a natural concomitant of change and uncertainty as to goals. As goals change and become less well-defined, concepts and practices developed to achieve such goals may appear less appropriate and reliable.<sup>197</sup> The resulting lack of confidence in gener-

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196. See *supra* text accompanying notes 184–186.

197. Some observers have noticed discrete elements of this mutation, but its sweep and implications have generally escaped notice. See, e.g., Thomas E. Kauper, *Article 86, Excessive Prices, and Refusals to Deal*, 59 ANTITRUST L.J. 441, 455 (1991) (noting that competitive forces may take the place of regulation in combatting monopoly power). It is in uncovering these interdependencies that a systemic perspective has particular promise.

alized principles may militate, therefore, in favor of increasingly ad hoc, political decision-making.

A more fundamental and pervasive factor relates to changes in the roles played by the Court and the Commission. As the Commission's role becomes more central and the Court's role becomes less dominant, the relative importance of the methods associated with these institutions changes accordingly.

The Court's dominant position in the system assured the centrality of juridical processes. As long as the Court was supplying intellectual leadership for the system, structuring its thought and guiding its development, the dominant discourse of the system was juridical. The principal decisions within the system were viewed as the result of applying juridical methodology to authoritative texts. Until very recently, the political situation within the Community assigned a high value to such "neutral" discourse.

In contrast, the Commission is an explicitly political institution. The more central its role in the system, the more influential political elements are likely to become. Its decisions reflect a variety of pressures resulting from the perceived interests of Member States, interest groups, and other Community institutions. As the Commission becomes less dependent on the Court for intellectual leadership and political "protection," its methods and discourse are likely to become more influential, and the influence of juridical discourse is likely to wane.

The reemergence of the conflict between the juridical model of competition law and an industrial policy model reflects this changed dynamic.<sup>198</sup> That conflict was critically important during the early years of the system,<sup>199</sup> and it was resolved in favor of the juridical model only when the Court stepped forward during the mid-1960s and assumed a bold leadership role within the competition law system. It is perhaps more than coincidence that this conflict has reemerged with new and sharper contours just as the Court has begun to pull back from such a role.

### C. A "Transformation" Perspective

The image of Community competition law presented here contrasts sharply with conventional descriptions because it is created by using different lenses and asking different questions.<sup>200</sup> A perspective that

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198. See text accompanying *supra* notes 25–33.

199. See text accompanying *supra* notes 25–33.

200. Those accustomed to other perspectives may find some of the conclusions reached here disturbing—trying on new lenses can be uncomfortable. I hope, however, that the perspective yields sufficient insights and suggestions to compensate for any such discomfort. Moreover, any

focuses on systemic relationships among decision-makers and on the interactions of those decision-makers with sources of decisional authority detects forces that remain undetected from more traditional perspectives, and it is these forces that are driving change.

Viewed from this perspective, the competition law system appears far less stable than many observers assume. The integration of the Community's market has undermined its goal structures as institutional changes have weakened support for its methods, and together these forces are transforming the system. Recognizing these forces thus becomes a matter of some urgency, because the sooner they are recognized, the better will be the opportunities for timely analysis of their implications and for effective responses to them.

Competition law has been central to the economic and political successes that have created a "new" Europe. As the Community moves toward further integration, much may depend on how the competition law system adapts to the political and economic dynamics of a single market. That system has long symbolized the constructive, "community-building" role of law in Europe, and if Community decision-makers adequately appreciate the dimensions and the impact of that system, it may continue to be able to play such a role in the future.

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discomfort should be lessened by the recognition that the perspective developed here is intended only to supplement rather than to replace conventional perspectives.

