

# *Fordham International Law Journal*

---

*Volume 37, Issue 5*

2014

*Article 1*

---

## Searching for a Modernized Voice: Economics, Institutions, and Predictability in European Competition Law

David J. Gerber\*

\*The American Society of Comparative Law

Copyright ©2014 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

ARTICLE

SEARCHING FOR A MODERNIZED VOICE:  
ECONOMICS, INSTITUTIONS, AND  
PREDICTABILITY IN EUROPEAN COMPETITION  
LAW

*David J. Gerber\**

INTRODUCTION.....	1422
I. THE SEARCH FOR PREDICTABILITY IN EUROPEAN COMPETITION LAW .....	1424
II. INSTITUTIONAL MODERNIZATION AND THE CLOUDED ROLES OF INSTITUTIONS.....	1426
A. Institutional Modernization, Predictability, and the Search for a Single Voice.....	1427
B. The Institutional Reshaping of Uncertainty .....	1428
1. Formalist Bias .....	1429
2. Who Decides .....	1429
3. Institutional Divergences.....	1431
4. Institutional Relationships.....	1432
III. SUBSTANTIVE MODERNIZATION: THE LIGHT AND SHADOWS OF ECONOMICS.....	1433
A. Content and Contours of Substantive Modernization—The More Economic Approach....	1434
1. The Commission’s Role .....	1435

---

\* Distinguished Professor of Law and Co-Director of the Program in International and Comparative Law. Professor Gerber works in the areas of antitrust law, international competition law, comparative law and international law. He holds a Bachelor’s degree from Trinity College, a Master’s degree from Yale University and a law degree from the University of Chicago. He also holds an honorary Doctor of Laws degree from the University of Zurich in Switzerland. Professor Gerber has taught law at the University of Pennsylvania, Northwestern University, and Washington University in the United States, as well as at the University of Stockholm in Sweden and at the Universities of Freiburg and Munich in Germany. He is currently Vice-President of the American Society of Comparative Law, and he is a titular member of the International Academy of Comparative Law. His most recent book is entitled *Global Competition: Law, Markets and Globalization*.

2. Reception by Other Institutions.....	1436
B. The More Economic Approach and the Transformation and Relocation of Uncertainty.....	1437
1. Language, Methods, and Outcomes: Unraveling the Relationships.....	1438
2. The Diverse Roles of Economics.....	1439
3. Diverse Institutional Dynamics.....	1441
4. Diverse Procedures .....	1441
5. Relationships among Institutions .....	1442
6. External Factors .....	1442
C. Identifying Uncertainty Issues .....	1443
IV. IMPROVING THE LENSES: DYNAMICS AND DECISIONS IN THE EUROPEAN COMPETITION LAW SYSTEM.....	1443
A. Embedded Decisions as the Basis for Analysis.....	1444
B. Localizing Decisions.....	1445
C. Decisional Influences.....	1445
D. Decisional Analysis as an Analytical Framework.....	1449
CONCLUDING COMMENTS.....	1449

### *INTRODUCTION*

Uncertainty has been an increasingly central theme in discussions of competition law in Europe since the beginning of “modernization” efforts in the 1990s.<sup>1</sup> This may seem paradoxical, because the modernization programs—both institutional and substantive—were intended to reduce the range of variation in competition law rules and thereby increase uniformity and predictability of results throughout the expanding European Union, and they were justified by claims that they would achieve these benefits. Does the chorus of concerns about the lack of predictability in European competition law mean that the modernization processes were misguided or that they have failed? In my view, the answer is “no.” They have, however, transformed and relocated uncertainty in ways that are seldom adequately recognized and

---

1. See, e.g., Imelda Maher & Oana Stefan, *Competition Law in Europe: The Challenge of a Network Constitution*, in *THE REGULATORY STATE: CONSTITUTIONAL IMPLICATIONS* 178, 189 (Dawn Oliver et al. eds., 2010).

rarely addressed. Insufficient recognition of these transformations and their implications has wide-ranging and potentially serious implications for competition law in Europe and even for global competition law development.<sup>2</sup> How then are we to reconcile the aims of modernization with its consequences?

A basic theme of this Article is that although the two forms of modernization have in some ways reduced uncertainty in EU competition law, they have also generated new forms of uncertainty that have sometimes concealed and at other times transformed it. The Article analyzes the impacts of “modernization” on competition law decision-making in the European Union and thus on the substance of the law itself. It identifies the areas and forms of uncertainty that have resulted from these modernizations. While some commentators have noted elements of the relationship between modernization and uncertainty,<sup>3</sup> that relationship may be more fundamental to understanding European competition law than is generally recognized.

The Article also examines the conceptual tools typically used in thinking about European competition law and demonstrates how these can be inadequate for the legal situation in the wake of modernization. Often they no longer provide adequate analysis of the complex processes of decision-making in Europe today. I then go on to suggest ways in which these tools can themselves be “modernized” to account for these changing complexities. In order to deal effectively with European competition law, it is necessary to use a perspective that is specifically designed to identify the factors that shape competition law decisions.

The Article thus has two central objectives. One is to explore the transformations of uncertainty in European competition law that impede recognition of the “modernized” contours of competition law and to identify some of their

---

2. See generally DAVID J. GERBER, *GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION* 187–204 (2010).

3. See, e.g., Damien M.B. Gerard, *The Effects-Based Approach Under Article 101 TEFU and its Paradoxes: Modernisation at War with Itself?*, in *TEN YEARS OF EFFECTS-BASED APPROACH IN EU COMPETITION LAW: STATE OF PLAY AND PERSPECTIVES* 18, 18 (Jaques Bourgeois & Denis Waelbroeck eds., 2012).

potential consequences. A second objective is to suggest some modified tools that can be of value in more effectively and precisely analyzing and understanding competition law in Europe.

### I. *THE SEARCH FOR PREDICTABILITY IN EUROPEAN COMPETITION LAW*

Access to the content of laws is a fundamental concern of law, at least in developed legal systems. This “knowability” of law is a central factor in its roles, its functions, and its value to those involved with it or affected by it. Only to the extent that law provides knowable content can it serve most of the social purposes that it purports to serve. This means that it can serve these objectives only where authority-based decisions about the content of the law can be predicted with reasonable confidence. In the context of the European Union, the role of predictability (often referred to as “legal certainty”) takes on additional functions and dimensions. Law *is* the basic tool for the European integration process, and thus the predictability and stability of its content are central to that process and to the confidence of EU stakeholders and citizens in the operation of EU institutions and governance structures. Moreover, EU citizens demand that law be knowable and reasonably predictable, so that they can assess their own rights and obligations within the European Union as well as the obligations of others. This has been true since the founding of the European integration institutions, but it has become a particularly sensitive issue in recent years, as membership in the European Union has dramatically expanded and EU-level regulation has penetrated economic and social domains previously reserved for national institutions. Recent controversies about the future of European integration exacerbate concerns about the knowability and predictability of EU laws.<sup>4</sup>

Predictability takes on a particularly salient role in competition law. This area of European law has long played a

---

4. See, e.g., Paul Taylor, *Europe's Zigzag Course Toward Integration*, REUTERS (Dec. 24, 2013), available at <http://www.nytimes.com/2013/12/25/business/international/europes-zigzag-course-toward-integration.html>.

central role in the process of European integration, not least because of the centrality of economic development and the role of the market in that process.<sup>5</sup> In addition, competition law has often been a center of attention in the process of European integration, not least because it directly affects powerful economic and sometimes also political interests. It is often a front-page issue and an immediate concern for business and economic decision-makers as well as the general public. These factors further enhance the value of the capacity to “know” the content of competition law and thus be in a position to predict competition law decisions.

These concerns have played an important role in efforts to “modernize” European competition law, which have focused on the need to reduce the range of variation of norms of economic conduct within the European Union. I distinguish here between two forms of modernization.<sup>6</sup> One is what I call “institutional modernization” as represented by the “modernization package” implemented in 2004.<sup>7</sup> This set of reforms included institutional and procedural changes aimed at greater efficiency and certainty in European competition law. The second form of modernization seeks to reduce variations in substantive norms by using economics to standardize the basis for competition law decisions. I use the term “substantive modernization” to refer to this project. It is commonly referred to as a process of introducing a “more economic approach” (“MEA”) into European competition law.<sup>8</sup> The relationship between these two related processes is central to issues of predictability and uncertainty. The Article first looks at these two forms of

---

5. See generally DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 334–46 (1998).

6. I examine these two forms of modernization and their interrelationships in David J. Gerber, *Two Forms of Modernization in European Competition Law*, 31 FORDHAM INT'L L.J. 1235 (2007).

7. Council Regulation 1/2003/EC on the implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. L 1/1.

8. For discussion, see for example Lars-Hendrik Röller, *Economic Analysis and Competition Policy Enforcement in Europe*, in MODELLING EUROPEAN MERGERS: THEORY, COMPETITION POLICY AND CASE STUDIES 13 (Peter A.G. van Bergeijk & Erik Kloosterhuis eds., 2005); Arndt Christiansen, *The “More Economic Approach” in EU Merger Control—A Critical Assessment* (Deutsche Bank Working Paper Series, Research Notes 21, 2005), available at [http://www.dbresearch.com/PROD/DBR\\_INTERNET\\_EN-PROD/PROD000000000196093/The+%22more+economic+approach%22+in+EU+merger+control+-+A+critical+assessment.PDF](http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD000000000196093/The+%22more+economic+approach%22+in+EU+merger+control+-+A+critical+assessment.PDF).

modernization separately and then reviews some of the relationships that are particularly relevant for the transformations of uncertainty.

## II. *INSTITUTIONAL MODERNIZATION AND THE CLOUDED ROLES OF INSTITUTIONS*

Institutional modernization and its consequences have played a central role in thinking about EU competition law since the mid-1990s. Initial plans began evolving in the competition directorate of the EU Commission (the “Commission”) in the mid-1990s. As the plans for institutional change took shape around 2000, it became an important issue at the Member State level as well. Enactment of the reforms required formal changes that had to be approved by the Member States, and thus the process was discussed over a period of years with representatives of these governments as well as both European and US competition experts. The “modernization package” was enacted in 2003, and since then it has been at center stage for all involved with competition law in Europe. It has been the subject of volumes of commentary, and its implications continue to be a major focus of analysis, and a major reference point for understanding the competition law situation in Europe today.

This institutional modernization process centered on two objectives—efficiency and uniformity. Both were seen as necessary to respond to the increasing size and membership of the European Union. Membership increased to fifteen in 1995, and the collapse of the Soviet Union seemed very likely to lead to further increases. Commission leaders recognized that expansion made the existing competition law procedures increasingly cumbersome and inefficient. They also realized that the globalization wave unleashed in the 1990s together with US economic dynamism during that period created new economic challenges that called for a more efficient institutional mechanism. Among the key changes here was elimination of notification requirements for potentially anticompetitive agreements as well as elimination of the Commission’s monopoly on granting exemptions to the prohibition on agreements restricting competition.

A. *Institutional Modernization, Predictability, and the Search for a Single Voice*

A second major objective of these institutional reforms was to create greater uniformity and predictability in the rules of competition law in Europe by requiring that EU competition law be applied to most conduct that might be considered anticompetitive.<sup>9</sup> Prior to 2004 there was no single voice for competition law in Europe.<sup>10</sup> The EU applied its rules according to its understanding of its jurisdictional prerogatives, and each Member State applied its own competition laws on the basis of its own conceptions of its jurisdictional reach. European Union competition law had priority in some situations over Member State law, but the systems were largely independent. The result was that very different rules and procedures might potentially apply to transactions or other conduct in Europe. There were many potential voices and many jurisdictional considerations.

In the 1990s, as European integration moved into a new phase of expansion and increased economic integration, many called for greater predictability regarding permissible conduct within Europe. They argued that there should be only one voice of competition law in Europe and thus that all institutions should apply the same law, namely, European Union law. For some decision-makers, this was particularly important in light of the major expansion of membership in the European Union that would take place at the same time that modernization was expected to go into effect. Their concern was that new Member States have little experience with competition law or with competitive markets in many cases, and thus without a single voice—i.e., without certainty regarding contents—these Member States may have even more radically different forms of competition law and creates an even greater level of uncertainty within the expanded EU.

---

9. “In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community.” Recital 1 of Council Regulation (EC) 1/2003 of 16 December 2002, 2003 O.J. L 1/1.

10. See David J. Gerber, *The Evolution of a European Competition Law Network*, in EUROPEAN COMPETITION LAW ANNUAL 2002: CONSTRUCTING THE EU NETWORK OF COMPETITION 43 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2005).



B. *The Institutional Reshaping of Uncertainty*

The modernization package did reduce uncertainty and increase predictability in an important sense. By requiring that EU competition law be applied in almost all cases involving competition law in Europe, it greatly reduced divergences among the formal rules of competition law. Although each Member State can and usually does have its own competition law, there are now only minor divergences from the substantive provisions of EU competition law, because EU law must also be applied if the potential effects of the conduct extend beyond the borders of a single state, and thus states have little or no incentive to have a competition law that diverges from EU law. This part of the story has often been told.<sup>11</sup>

Often overlooked, however, is the impact of these changes on uncertainty. Reducing the number of independent voices reduces potential variation in the formal *substantive* rules of competition law. This eliminates many of the causes of uncertainty that inhered in the previous non-integrated competition law regime in Europe. Yet procedures and institutional structures within the Member States have not been standardized. Each Member State still has its own procedures and institutional structures.

Recognizing the potential for divergences in the interpretation and application of laws in this new context, the Commission has established and supported a European Competition Network (“ECN”), whose role is to coordinate decisions among the various institutions and decision makers within the European Union.<sup>12</sup> This mechanism has served the purpose for which it was intended. It provides a mechanism for coordination among the competition law systems applying EU competition law rules, and the mechanism is regularly used and with noteworthy accomplishments. It also may, however, conceal some of the remaining discrepancies and uncertainties. The

---

11. See, e.g., Gerber, *supra* note 2, at 187–202.

12. See generally THE INTERNATIONAL COMPETITION NETWORK AT TEN: ORIGINS, ACCOMPLISHMENTS AND ASPIRATIONS (Paul Lugard ed., 2011). For a recent discussion, see, for example, Firat Cengiz, *The European Competition Network: Structure, Management, and Initial Experiences of Policy Enforcement* (European University Institute Working Papers Max Weber Programme 2009/05, 2009), available at <http://cadmus.eui.eu/handle/1814/11067>.

system that has been created is complex, and it is important to recognize the sources of uncertainty within it.

### 1. Formalist Bias

One factor that tends to conceal the uncertainties in the institutional system is what we can call a formalist bias in thinking about EU competition law. The process of institutional modernization has often diverted attention from the complex of factors that influence actual decision-making. Since the beginning of the modernization process, the focus of discussion has been formal factors and relationships, and the political rhetoric that has justified modernization has often further emphasized these formal issues. Formal factors include the language of statutes, the formal content of reports filed by the Member States and the procedures for submitting them, and so on. This was given further weight at various points in the process. For example, during the process of approving membership for the ten Member States that joined in 2004, the main issues relating to competition law were formal. EU officials who were charged with reviewing an applicant state's competition law had to rely on formal criteria for evaluating the state's readiness for admission to the European Union. They focused on issues such as the language of the statute, the number of cases opened by the authority, its budget, and so on. All these things are important, and it is natural and appropriate to focus on them. One consequence of this focus has been, however, to draw attention away from other factors that may create divergences within the system and from analysis of how the system works in practice.

### 2. Who Decides

Public Enforcement and the Network–Institutional modernization reduced uncertainty for businesses operating in Europe by establishing that one set of substantive competition law principles would generally be applicable to business conduct wherever it occurred within EU territory. It also created a formal procedure for allocating cases that might be handled by more

than one national jurisdiction.<sup>13</sup> In this procedure, there are formal principles for deciding which competition authority may handle a case. In most cases, this allocates cases among Member States based on the contacts between the conduct and the State. Some types of cases are the prerogative of the Commission, and the Commission may also decide that it wishes to handle a particular case that would otherwise be handled by a Member State. The ECN is the main forum for the application of these rules and for the negotiations that surround them. Prior to modernization, each agency applied its own substantive rules according to its own jurisdictional principles.<sup>14</sup> The institutional changes thus represent a significant increase in predictability. Issues of who can apply which rules has become a less frequent and generally less complicated concern of business decision-makers.

The issue of “who decides” remains important, however, because of the interplay of three factors. First, modernization has made the issue of who decides a matter of regulation and negotiation, and both regulation and negotiation involve uncertainties relating to negotiating power, access to information, and numerous other factors. Second, these procedures serve to reduce conflict and uncertainty *after* the conduct has occurred, but the business decision-maker must make decisions at a point in time where the outcome of the negotiations is unknowable. And third, there remain very significant divergences among competition authorities regarding the procedures to be applied and the institutional contexts and capacities of their application (see below). Taken together, these factors may create potentially significant uncertainty for business decision makers.

**Private enforcement and the limits of the Network**—When the potential for private enforcement of competition laws is added to this mix, uncertainties increase further. National courts in Europe are not part of the ECN, and they are far less

---

13. For analysis, see David J. Gerber & Paolo Cassinis, *The “Modernisation” of European Community Competition Law: Achieving Consistency in Enforcement—Part I*, 27 *EUR. COMP. L. REV.* 10 (2006); David J. Gerber & Paolo Cassinis, *The “Modernisation” of European Community Competition Law: Achieving Consistency in Enforcement—Part II*, 27 *EUR. COMP. L. REV.* 51, 51 (2006).

14. See Gerber, *supra* note 10.

susceptible to Commission control and influence than are national competition authorities. Here, there is no formal mechanism in place to coordinate jurisdictional claims. Private litigants can choose courts as they wish based on factors such as procedural advantages and disadvantages of one court procedure over another, varying interpretations of European law among the courts, etc. This means that institutional divergences may play an important role in their choices and thus that there is less uniformity in the application of the formal rules than might appear from the formal structures themselves. Private litigation in Europe is still relatively new and relatively infrequent, but in some countries the number of private competition lawsuits has increased significantly in recent years. The European Commission has fostered this expansion of private litigation, but the success of these efforts may often counteract or undermine the predictability and uniformity goals that the Commission has pursued in its procedural and substantive modernization efforts.<sup>15</sup>

### 3. Institutional Divergences

The issue of “who decides” increases in importance to the extent that the procedural and institutional factors that influence decision-making diverge. If all procedures and institutional factors were standardized, the uncertainty would be of little concern, but the greater the divergences, the more salient are the uncertainties associated with applying the competition law. Although some in the Commission realized even at the beginning of the process that procedural disparities could undermine the effects of modernization, political opposition at the Member State level prevented procedural standardization from being part of the package.<sup>16</sup>

---

15. For a valuable set of articles on these and related enforcement issues, see *THE ENFORCEMENT OF COMPETITION LAW IN EUROPE* (Thomas M. J. Möllers & Andreas Heinemann eds., 2008).

16. See generally Mario Monti, *Effective Private Enforcement of EC Antitrust Law*, in *EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 3* (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2003). See also Hannah L. Buxbaum, *German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Enforcement*, 23 *BERKELEY J. INT'L L.* 101, 101 (2005); Damien M.B. Gerard, *Regulation 1/2003 (and Beyond): Balancing Effective Enforcement and Due Process in Cross-Border Antitrust Investigations*, in *INTERNATIONAL*

As a result, there are major institutional and procedural divergences among the institutions applying competition law in Europe. Institutional divergences involved issues such as, for example, the amount of resources devoted to competition law, the political support for competition law, the independence of the institutions from external interference, hiring practices, and the economic, linguistic capacities of decision-makers. Each of these factors can play a significant role in how competition law is understood and in particular how specific cases are handled.

Similarly, each institution has its own procedures. These determine factors such as, for example, the extent of data available for analysis, the control of the data and of its presentation to relevant decision-makers, the roles assigned to economists and the procedural context within which they can present their work, how decision making is organized, who is allowed to be heard and under what circumstances and so on.<sup>17</sup> These factors play important roles in influencing the actual outcomes of the application of competition law in the numerous institutions that apply that law.

#### 4. Institutional Relationships

Relationships among European institutions are important not only from the standpoint of who decides, but from the standpoint of what institutions may exert influence over decisions and what mechanisms are available to them for exerting influence. Prior to modernization, Europe's competition law institutions generally had minimal contact with each other, and there were few incentives to seek collaboration or to follow advice or practices of other institutions. That all changed in the wake of modernization. The creation of the ECN greatly increased the intensity and importance of relationships both between the Commission and national competition authorities and among the national competition authorities themselves. These relationships became part of the negotiating process for decisions within the ECN. This has created strong

---

ANTITRUST LITIGATION: CONFLICT OF LAWS AND COORDINATION 437 (Jurgen Basedow et al. eds., 2012).

17. For an example, see Andrea M. Klees, *Breaking the Habits: The German Competition Law after the 7th Amendment to the Act against Restraints of Competition (GWB)*, 7 *GERMAN L.J.* 399 (2006).

incentives for Member State authorities and individual decision makers within those authorities to seek connections and influence with others in the network. As a result, institutional relationships are now a major factor influencing decisions, and these types of influences are seldom open for public scrutiny and thus can create an additional level of complexity and uncertainty.

This brief review of some of the elements and impacts of institutional modernization reveals that it has reduced a key set of factors creating uncertainty about the norms of competition in Europe. In the process, however, it has introduced new forms of uncertainty and reshaped the overall contours of uncertainty. In order to make predictions about competition law's content, therefore, it becomes necessary to look in the right places—to seek predictability where it exists, and this will often be in places other than those generally assumed to be relevant.

### III. SUBSTANTIVE MODERNIZATION: THE LIGHT AND SHADOWS OF ECONOMICS

The substantive component of modernization has also been seen as a means of reducing uncertainty, and it has reduced one form of uncertainty. It has provided a central conceptual base for thinking about competition law in Europe and thereby reduced the uncertainties resulting from an unstructured variety of ways of approaching competition law. This has been of much value, but it has not eliminated uncertainty in this area. It has relocated it and altered its contours. As with its institutional counterpart, the “more economic approach” (MEA) has played a central role in thought and discussions of competition law since the mid-1990s. It has been at the core of most discussions of what competition law in Europe is and what its objectives are and should be.<sup>18</sup> As we shall see, these two forms of modernization have major implications not only for competition law, but for the future of European integration.

Although the two forms of modernization are interrelated and have had similar impacts, they represent two very distinct forms of legal change. Institutional modernization occurred

---

18. See, e.g., Anne C. Witt, *From Airtours to Ryanair: Is the More Economic Approach to EU Merger Law Really About More Economics?*, 49 COMMON MKT. L. REV. 217 (2012).

through a formal process of changing the procedural regulations of the EU. The proposed changes were clearly articulated, and representatives of the Member States were informed of the Commission's plans and had to give their formal assent in order for the reforms to be instituted. In contrast, substantive modernization has evolved as a change in thinking about competition policy within the European Commission, and this change in thinking has spread from the Commission to other institutions in varying ways and with various levels of penetration. Most involved with competition law in the European Union recognize the basic idea behind the change, but many remain uncertain about its details. This has led to major issues involving the degree to which other EU and Member State institutions accept the Commission's views in this area.

*A. Content and Contours of Substantive Modernization—The More Economic Approach*

The central idea behind substantive modernization and the MEA is that economics should play a greater role in the development and application of European competition law. What that greater role should be remains a subject of controversy. "How much more?" "More than what?" Views differ on these questions. Moreover, the term "MEA" and the idea behind it have tended to polarize opinion. For some, it has become a shibboleth; for others, it functions as a semi-sacred talisman.<sup>19</sup> The debate has become freighted with emotional baggage, which has further exacerbated the uncertainty. We need, therefore, to briefly review the basics of that evolution.

---

19. For discussion and comparison, see, for example, Ioannis Lianos, *Categorical Thinking in Competition Law and the "Effects-Based" Approach in Article 82 EC*, in *ARTICLE 82 EC: REFLECTIONS ON ITS RECENT EVOLUTION* 19, 19 (Ariel Ezrachi ed., 2009); Christian Ahlborn & Jorge Padilla, *From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law*, in *EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC* 55, 55 (Claus-Dieter Ehlermann & Mel Marquis eds., 2008). For a valuable collection of articles on the issue, see *ECONOMIC THEORY AND COMPETITION LAW* (Josef Drexel et al. eds, 2009).

### 1. The Commission's Role

During the 1990s EU competition officials began to call for changes in European competition law that would introduce greater use of economics into European competition law. These efforts were related to major changes in US antitrust law that began in the 1970s and radically changed its substantive content.<sup>20</sup> That development moved economics to a central normative role in US antitrust law. The basic criterion of the law was whether conduct could be clearly identified as having specific economic effects. Economists and legal scholars in the United States created a powerful literature that demonstrated how form-based rules—i.e., rules based on the characteristics of the conduct itself—could lead to competition law decisions that harmed rather than protected competition. The basic insight was that the effects on competition of conduct by a firm with market power differ from the effects produced by the same conduct engaged by a firm without market power. Competition law rules based on the form of the conduct itself could therefore lead to market interventions that discouraged competitive conduct—the opposite of protecting competition. The claim was that competition law should intervene in the economic process only where specific conduct under specific circumstances could be clearly shown through the tools of economic science to harm the competitive process. From this perspective, conduct that had been considered a violation of European competition law on the basis of previously existing form-based rules appeared inappropriate and potentially harmful to the European economy.

Commission officials began to take these arguments seriously as institutional modernization was moving forward and in the context of impending major expansion of the European Union.<sup>21</sup> They revised regulations to include a greater normative role for economics and more scrutiny of the effects of conduct and less concern with their form. Initially the new approach focused on vertical restraints, but the changes soon also altered

---

20. For comparative discussion, see David J. Gerber, *Comparative Antitrust Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1193 (Mathias Reimann & Reinhard Zimmermann eds., 2006); David J. Gerber, *Competition*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 510 (Peter Cane & Mark Tushnet eds., 2003).

21. See, e.g., Gerber, *supra* note 2, at 187–204.



assessment of mergers and of horizontal agreements. Although Commission leaders have also introduced more economics-based analysis into the assessment of dominance, the impact of the changes has been less clear in this area of competition law.

From the outset of this process, one of the main justifications for these changes has been the potential of an MEA to unify, standardize, and give greater predictability to competition law.<sup>22</sup> An economics-based competition law was cast as a single, conceptual and normative framework for competition law throughout the European Union. This also symbolized a higher level of European integration and at the same time sought to assure that the new Member States did not develop their own conceptions of competition law. There was concern among Commission officials and others that if many new competition authorities were now included in the European Union, this could increase uncertainty and lead to major divergences between and among competition laws of the Member States. The normative use of economics was seen as a means of avoiding or at least significantly reducing this potential for diversity and uncertainty. Economics, it was claimed, was a clear conceptual framework for competition law. If, therefore, every Member State followed the economic approach, there would be little basis for divergence and its resulting uncertainties.

## 2. Reception by Other Institutions

The Commission initiated this form of modernization, and it has remained the driving force behind the drive for more economics. This central role is a key to understanding the dynamics of competition law in Europe today, because other institutions responsible for interpreting and applying EU competition law have moved at varying paces in seeking to understand the Commission's views on the role of economics and to absorb this set of ideas in their own decisional practices. Many competition law decision-makers and scholars are unsure of how to use economics and how much to use economics.

---

22. See, e.g., Götz Drauz, *A View from Inside the Merger Task Force: Comments on "Reforming European Merger Review: Targeting Problem Areas in Policy Outcomes"*, 2 J. INDUS., COMPETITION & TRADE 391, 391-99 (2002).

Others have not been convinced that this approach is appropriate for the European Union, at least in its present form. This has led to lively debate for more than a decade about what the more economic approach is and what its consequences are likely to be.<sup>23</sup>

All European institutions appear to have accepted the basic idea that effects should be considered in applying EU competition law, at least most of the time, but their acceptance of a normative role for economics is far from even. The two EU courts have used some of the concepts of the MEA at times, but not always consistently or clearly.<sup>24</sup> The decisions and positions of Member State competition authorities (“NCAs”) also vary widely. Some accept and apply the more economic approach principles on more or less the same basis as does the Commission, while the decisions of other NCAs are far less consistent with this view. National courts often remain resistant to extensive use of economics in evaluating competition law cases.

#### B. *The More Economic Approach and the Transformation and Relocation of Uncertainty*

The Commission has achieved many of the goals that it had associated with increased use of economics in European competition law. Use of economics as a point of reference has in itself reduced the uncertainties that arise whenever numerous institutions with differing goals, agendas, and backgrounds apply law in a particular area. It has also created an important conceptual anchor for competition law that has generated stability in the context of EU expansion. To this extent, therefore, the MEA has successfully reduced uncertainty.

It has, however, also transformed uncertainty and relocated it, and this aspect of the use of economics is often overlooked. Failure to recognize this aspect of substantive modernization can

---

23. See, e.g., Röller, *supra* note 8, at 13. See also the collections of articles in RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW (Einer R. Elhauge ed., 2012) and in COMPETITION POLICY AND THE ECONOMIC APPROACH (Josef Drexler et al. eds., 2011).

24. For an example, see Kelyn Bacon, *European Court of Justice Upholds Judgment of the European Court of First Instance in the British Airways/Virgin Saga*, 3 COMPETITION POL'Y INT'L 227, 227 (2007).

lead to misconceptions and misunderstandings that can have significant impacts on competition law in the European Union. We look briefly, therefore, at this aspect of modernization, the obstacles to understanding it, and the potential consequences of failure to grasp it more effectively.

### 1. Language, Methods, and Outcomes: Unraveling the Relationships

A valuable starting point for analyzing this transformation is a focus on the uncertainties within economics itself. As a science, economics offers a language and a set of methods that can be used in evaluating and predicting economic phenomena. On its face, therefore, “more economics” means no more than increased use of this language and methodology. This basic observation brings into higher relief a central source of misunderstanding about the MEA and about the discrepancies between promises and expectations relating to it, on the one hand, and the outcomes it has produced, on the other.

Use of economic language and methodology can provide a framework for thinking about competition law.<sup>25</sup> To the extent that economics is used for particular functions, it structures discussion and limits the range of perspectives that can be brought to bear on the performance of that function. The standardizing impact of economics operates, therefore, at the conceptual and linguistic level. This means that its potential value for standardizing outcomes depends on the objectives for which it is being used, the persons and institutions that use it, and the conditions of its use. “More economics” may not necessarily, therefore, limit the range of potential outcomes in competition law. It has the potential to play that role, but whether it does so depends on how and by whom it is used.

---

25. For discussion and examples, see Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 *ANTITRUST L. J.* 471 (2012); Ioannis Lianos, *‘Judging’ Economists: Economic Expertise in Competition Law Litigation—A European view*, in *THE REFORM OF EC COMPETITION LAW: NEW CHALLENGES* 185 (Ioannis Lianos & Ioannis Kokkoris eds., 2010); see also MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 17–31 (2004).

## 2. The Diverse Roles of Economics

A key to analyzing the transformation of uncertainty through the MEA is to perceive, identify, and untangle the differing roles that economics can play in competition law.<sup>26</sup> I here identify three main functions that economics performs in competition law systems and examine some of the factors that are likely to influence their potential for supporting standardization.

One is the role of economics in describing—i.e., assembling and interpreting data and identifying and quantifying relationships among economic variables. Economists are trained to structure data for purposes of more precise analysis and to identify the actual and potential effects of conduct on other economic variables. Their training prepares them to perform these tasks effectively and thoroughly. Their role is thus primarily descriptive. This function is valuable for competition law decision-makers, and thus they have incentives to employ economists to provide this kind of information.

This descriptive function does not necessarily limit the range of outcomes from the application of competition law and lead toward standardization of the substantive norms of competition law. The use of economics to describe facts can serve any competition law or regulatory goals. It merely increases the amount and quality of information available for use by the decision-makers. It does not itself dictate the purposes for which the information is used. Moreover, many other factors influence how the tools of economics are employed. The use of economics to gather and interpret factual data is costly. How much description can be performed by economists depends on the resources available to the competition law system using them. In addition, these costs are born by different actors in the system, and these actors have varying incentives. This means that there will virtually always be major differences in the amount and quality of description among competition law systems.

---

26. For analysis of the embeddedness of economics in procedural and institutional frameworks, see David J. Gerber, *Competition Law and the Institutional Embeddedness of Economics*, in *ECONOMIC THEORY AND COMPETITION LAW*, *supra* note 19, at 20.

A second role for economics is normative. Here economics provides the basic norms of competition law. For our purposes, identifying this as a separate function is critically important, because failure to distinguish it from other functions of economics can render analysis confusing, at best, and misleading, at worst. I use the term “normative role” to refer to the role of economics as a source of competition law norms. In this role, economics determines to a greater or lesser extent the substantive content of competition law—“Does conduct violate the law or not?” In US antitrust law, economics plays this role to a very significant extent. If economics determines, for example, that conduct has increased a price above a competitive price, the conduct will generally be considered to have violated the law. If it does not, this generally precludes a finding of antitrust violation. Economics is, of course, filtered through and applied by legal institutions, but the basic proposition is that conduct violates competition law if and only if it causes or can be expected to have specified economic effects.

A third potential role for economics is seldom identified clearly, but there is much analytical value in doing so—methodological discipline. This use provides support for standardization while maintaining avenues for disciplined differences among competition law regimes. In this use, economic methodology provides a channeling mechanism that can reduce the range of variation in the norms of competition law systems while at the same time enabling and identifying variations within that range.

Economic methods can narrow the range of decisions related to a specific legal function precisely because the use of such methods requires that certain kinds of questions be asked and particular kinds of analyses be used. Methods impose requirements on decision-making, and they impose obligations on decision-makers. These requirements and obligations constrain the discretion of decision-makers either directly or indirectly (by exposing deviations from the methods).

Identifying these related, but quite distinct, roles for economics in competition law helps to clarify the potential for differences in competition law outcomes resulting from the objectives for which economics is used and the functions for which it is employed.

### 3. Diverse Institutional Dynamics

Each function that economics performs is influenced by the institutional dynamics of the institution performing the function.<sup>27</sup> As noted above, the actual impact of economics on competition law decisions depends on who is using it, for what purposes, and subject to which conditions and influences. Each institution—whether the European Commission, an NCA, or a court—has its own agenda, its own configuration of resources and capacities, and a specific set of factors that shape the preferences of decision makers—e.g., incentives for promotion. Individual decision-makers within the institution also have varying degrees of knowledge and capacity relating to the use of economics in the competition law content, and they have differing individual and collective experiences in using it. These shape expectations regarding the MEA and, in turn, this shapes incentives to use it—or not—in particular ways.

### 4. Diverse Procedures

Procedural mechanisms differ significantly along numerous criteria that affect the way economics is used.<sup>28</sup> For example, there are significant differences in the degree to which data is available to decision-makers who wish to apply economic methodology. The value of economic methodology often depends on how much data is available for the economist to use, how much control the economist has over the investigation and procurement, and so on. Economists also play varying roles in institution. In some, they may be given significant roles in the decision-making process and/or significant opportunities to influence decision-makers. In other enforcement institutions, economists may have limited roles and limited status within the

---

27. For comparative analysis of procedural functions, see David J. Gerber, *Comparing Procedural Systems: Toward an Analytical Framework*, in *LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN* 665 (James A.R. Nafziger & Symeon C. Symeonides eds, 2002).

28. For discussion, see, for example, Andrew I. Gavil, *The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System: Lessons from the American Experience*, 4 *J. COMPETITION L. & ECON.* 177 (2008); Oles Andriychuk, *Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process*, 6 *EUR. COMPETITION J.* 575 (2010).

institution. In courts, they seldom have direct access to decision-makers at all.

### 5. Relationships among Institutions

Relationships among institutions may also influence the way economics is used. Procedural modernization created a network of relationships among Member State as well as between the European Commission and Member State competition authorities. These relationships may influence the degree to which economists have access to data from other jurisdictions, the extent to which they can coordinate their efforts with the efforts of those controlling and/or interpreting data in other jurisdictions, and so on. There are also less formal networks of economists within Europe and internationally that have varying degrees of status and influence relating to these institutional relationships. Moreover, national courts have varying relationships to the national competition authorities as well as varying views of their obligations to follow Commission decisions and guidance regarding the use of economics in competition law cases.

### 6. External Factors

The application of economics methodology in competition law institutions is also influenced by a variety of factors that are external to the institutions themselves, but that nonetheless can have a significant impact on decision-making within it.<sup>29</sup> The structure and characteristics of the economics profession in the jurisdiction and its relationship to the competition law institutions can, for example, have important effects on the use of economics in those institutions. Economics as a profession is international in some senses, but European jurisdictions vary significantly in the extent to which economists as a profession are organized in ways that support and promote the use of economics in competition law institutions. Even the term “economist” (and its cognates) is defined in differing ways. Sometimes it refers only to holders of PhD degrees, while in

---

29. See, e.g., David J. Gerber, *Convergence in the Treatment of Dominant Firm Conduct: The United States, the European Union, and the Institutional Embeddedness of Economics*, 76 *ANTITRUST L.J.* 951 (2010).

others it includes those who have the equivalent of masters level (or even less) training in economics. Often these differences in institutional influences and incentives are overlooked in analyzing the role of economics in competition law in Europe.

### *C. Identifying Uncertainty Issues*

Substantive modernization succeeded in reducing one form of uncertainty—the uncertainty that resulted from having divergent conceptual bases for competition law in Europe. By providing a defined and unified conceptual reference point for competition, it has been of much value. As we have seen, however, it did not eliminate other types of uncertainty, and it introduced a new set of uncertainties.

The brief review here of some of these sources of uncertainty should not detract from the value of economics as a decisional framework, but it does elucidate some of the factors that influence its actual operations and create divergences and uncertainties within Europe. It reveals the need for a more nuanced view of the role of economics and economists in European competition law.

The combined effect of these two forms of modernization has been, therefore, to restructure and relocate uncertainty about competition law in Europe, and understanding EU competition law is today in large part about understanding what has changed and where and how these new uncertainty factors operate and how they influence decisional outcomes. Traditional lenses based on the operation of law in a single country often miss and/or distort these factors, and thus the new situation calls for modifications of these lenses.

## *IV. IMPROVING THE LENSES: DYNAMICS AND DECISIONS IN THE EUROPEAN COMPETITION LAW SYSTEM*

In this Part, I outline a basic framework that addresses these potential distortions and inadequacies in the lenses used to view European competition law in the wake of procedural and substantive modernization.<sup>30</sup> It alters the focus and tools of

---

30. This analysis is outlined in David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?*, 46 AM. J. COMP. L. 719 (1998).



analysis in ways that correspond to the changes brought about by these two forms of modernization. This necessarily entails altering some of the questions asked and organizing knowledge in ways that respond to these questions.

*A. Embedded Decisions as the Basis for Analysis*

The starting point for enhancing the effectiveness of analysis is fundamental to the rest of the analysis. If the analysis starts from more traditional ways of viewing the material, such as focusing on what potentially relevant texts say, the results are likely to be suboptimal. As we have seen, in a context in which decisions are made by diverse and often quite different institutions and players, texts may be viewed, used, and applied in varying ways throughout the European system. As a result, the starting point may obscure questions that need to be asked in order to be in a position to predict decisions about what the law is.

When we change the starting point for the analysis and begin with the decisions themselves, the picture changes. This move reveals relevant questions that more traditional forms of analysis tend to marginalize. Starting with texts suggests that there is a single voice—"the law." Yet, there is no single voice in European competition law today. There are numerous institutions making claims about what the law is and/or using varying reference points in applying the provisions of law. The focus of analysis should, therefore, be the decisions that represent what law is in potentially relevant contexts. This is what those interested in European competition law—whether practicing legal professionals, business advisors, or others—need to know. Thinking about competition law after modernization requires foregrounding the diversity of influences on decisions among the institutions applying the law.

The focus on decisions naturally leads to questions about the factors that influence those decisions. These kinds of questions tend to be treated unsystematically in traditional thinking about law. Often they are little more than anecdotal considerations. They may be mentioned, but they are seldom studied in ways that reveal patterns that can be useful in predicting decisions. The assumption is often that they are

secondary issues that are not susceptible to organization and effective analysis.

They can, however, be studied in ways that provide a basis for predicting future decisions and thus ascertaining “the law in operation.” I have suggested elsewhere one way of generating structure into the data that allows it to be systematically studied.<sup>31</sup> It can reveal information that does assist in knowing and advising about what the law is. I refer to this form of analysis as “system dynamics.” It gives structure to the data and thereby enhances the users’ capacity to perceive relationships among decisional factors and thus more effectively predict outcomes. It groups decisional influences into four main categories. They are related to each other at the point of individual decisions. Some examples are below.

#### B. *Localizing Decisions*

Applying this analysis in the EU competition law context emphasizes the need to localize decisions that may be relevant to particular forms of conduct in particular situations. Who is deciding? Given the variety of institutional voices in the modernized competition law system, it is necessary to know where to look in thinking about what will happen in a specific situation. Outcomes may vary significantly, depending, for example, on whether the relevant decision-maker is the European Commission or a court in a specific Member State.

#### C. *Decisional Influences*

This allows us to identify and isolate the influences on those decisions. These influences are interrelated in actual decision-making, but they can be identified separately, and patterns of interaction among them can also be identified.

**Authoritative Texts**—One set of decisional influences consists of the texts that are considered authoritative by the institutions involved—e.g., statutes, regulations, and judicial opinions. They express the authority that is central to the application of law.<sup>32</sup> To the extent they are considered

---

31. *Id.*

32. “Text” here refers to a set of linguistic meaning units (usually “words”) that is basically fixed. In modern systems texts are typically written, but a text may also refer to

authoritative by a set of decision-makers they constrain decision-making within that group and relate the decisions of each to those of the others. Each institution within the European Union has its own configuration of authoritative texts, and recognizing their distinctive roles yields insights into the decision-making process. One consists of texts that are authoritative for all Member States' institutions—i.e., texts produced by the European Union itself. These foster standardization among the Member States, but each Member State also relies on another set of texts which is considered authoritative only for its own institutions, and they often diverge extensively from each other.

EU texts provide the basis for claims about what the law is in Europe. They represent a framework that is expected to relate decisions throughout European institutions to each other, and thus it is the strongest tie among the institutions and the most influential constraint on the decisions that are likely to be made. In the European Union the relevant treaties provide the overall framework for reference in competition law, but they are quite general and abstract, with the result that more specific texts become primary reference points. These include regulations and directives that vary significantly in their level of specificity and thus of guidance to decision-makers.

Each Member State has its own set of potentially relevant texts, however, and these are not a common reference point for all, but a factor of variation. Some of these may relate to fact patterns that may be covered by EU texts, but may be inconsistent with them. Although the competition law statutes of the Member States now align closely with EU level provisions, some differences remain.<sup>33</sup> There may also be other regulatory or constitutional factors that overlap with competition law provisions. For example, domestic intellectual property provisions sometimes relate to conduct that is also covered by

---

maintained by oral or other forms of tradition. For further discussion, see David J. Gerber, *Authority Heuristics and Legal Knowledge*, in *ORDINARY LANGUAGE AND LEGAL LANGUAGE* (Barbara Pozza ed., 2005), *reprinted and revised in* David J. Gerber, *Authority Heuristics and Legal Knowledge*, 79 *CHI-KENT L. REV.* 959 (2004).

33. For examples related to Art. 102 (abuse of dominance), see *EUROPEAN COMPETITION LAW: THE IMPACT OF THE COMMISSION'S GUIDANCE ON ARTICLE 102* (Lorenzo F. Pace ed., 2011).

competition law.<sup>34</sup> Finally, as noted above, there are institutional and procedural regimes in each state that may affect the way the texts of EU law are interpreted and applied.

**Institutions**—Institutions create their own set of influences on legal decisions. They subject decision-makers to pressures and incentives. Each is part of a structure of authority, and each contains its own internal structure of authority. These varying structures influence who is heard by decision-makers and the kinds of influence individuals can have on decisions within the institution. For example, they create authority relationships which determine whose views are to be given weight within the institution or can be considered to represent the institution. In addition, each institution has its own decision-making procedures, hiring and career advancement structures, and its own set of relationships with other institutions, both public and private.

As we have seen, institutions that apply competition law in the EU context differ significantly in each of these ways. At the EU level itself, there are two very different sets of institutions that make authoritative decisions about competition law—the EU Commission and the EU courts. They differ along many axes. For example, the responsibilities of the institutions, the training and backgrounds of the decision-makers, their personal and shared agendas, and their incentives diverge significantly.

The two EU courts play authoritative roles in European competition law, but they have not always been consistent with each other, and to some extent these differences may reflect differences in their respective roles and agendas as well as other factors such as differences in appointment procedures and priorities.<sup>35</sup>

The Commission has its own structures, responsibilities, influences, and incentives, which are quite different from those of the courts. Moreover, its competition decisions are influenced

---

34. See, e.g., Josef Drexl, *AstraZeneca and the EU Sector Inquiry: When Do Patent Filings Violate Competition Law?* (Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 12-02, 2012), available at <http://ssrn.com/abstract=2009276>.

35. See generally THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW (Allan Rosas et al. eds., 2013).

by the structures and institutions within the Commission. The European Commission is the bureaucracy of the European Union and has responsibility for all EU policies and objectives. It must approve major decisions in the competition law area, and it must consider the effects of these major decisions on other areas of European law. The Commissioner for competition is primarily responsible for competition policy, and s/he must consider both the intra-European as well as extra-European consequences of decisions. The Directorate-General for Competition must interpret existing EU law, develop competition policy, interact with other parts of the EU bureaucracy, and apply the law. Finally, the Legal Service of the European Commission has responsibility for aligning the Commission's decisions with EU law, and in many cases it must approve decisions taken by the competition directorate.

The institutions of the Member States—the courts and the competition authorities—differ in similar ways both in relation to the EU institutions and in relation to each other. Each Member State institution has its own dynamics and is subject to its own configuration of influences. They are influenced by the political and economic context of the country, its size, its history, its educational system, and the like. The ECN has opened avenues of greater understanding and coordination among these institutions, but divergences in institutional dynamics remain highly significant.

**Communities**—A third type of influence on legal decision-making is found in patterns of “community” within legal systems. I use the term “community” to refer to regularized patterns of relationship—here, among actors that affect competition law decisions. Who talks with whom? Who has status, etc.? This concept of community includes not only officials within the institutions, but also others who talk with competition law decision-makers and have status in the eyes of those decision-makers. For example, professors of law and of economics, as well as academic and private economists, often talk on a regular basis with competition officials, and competition officials often respect their views. Each of these factors can significantly impact decisions. Decisional analysis can investigate these patterns of status and communication among those who make or influence competition law decisions.

**Patterns of thought**—A fourth category of influence includes patterns of thought and discourse within legal communities. These may include, for example, established orthodoxies about how to analyze competition law issues. For example, resistance to substantive modernization is often associated with existing patterns of thought that focus on the primacy of textual analysis in applying law. Such patterns condition how decision-makers identify and evaluate relevant data, their perception of particular kinds of evidence, their expectations regarding the roles of courts and administrators and so on. Patterns of thought can be identified and analyzed by examining the language and decisions of relevant actors, both in writing and in oral communications.

#### *D. Decisional Analysis as an Analytical Framework*

This brief look at factors that influence decisions in the modernized European competition law is revealing. Each of the factors plays a role, and they are all interrelated. This emphasizes the potential value of an analysis structured around decisions and influences on those decisions. This form of analysis structures the data necessary for predicting decisions and reducing uncertainty. It reflects the multi-voice character of the European competition law system, and it emphasizes the need to place decisions in the context of the complex legal relationships that constitute the system of competition law in Europe.

#### *CONCLUDING COMMENTS*

This analysis of the transformations of uncertainty in European competition law since the late 1990s reveals the extent of the changes that have occurred and the need for more effective ways of analyzing and understanding competition law in Europe. The modernizations were intended to reduce certain kinds of uncertainties and to increase predictability and uniformity of law within the European Union. They have done that, but they have also reshaped, transformed, and relocated uncertainty, creating new forms of uncertainty in the process of eliminating or reducing others. Moreover, the modernizations and the search for greater certainty they represent have

sometimes also obscured the consequences of these changes, making uncertainty less visible and thus more difficult to penetrate.

It is critically important, therefore, to develop ways of thinking about European competition law that identify and comprehend these uncertainties. As we have seen, the use of lenses that are not designed for this post-modernization context tend to obscure the causes of uncertainty and its many political and other implications. If one views modernized European competition law with lenses that were developed for national systems or for European competition law as it operated prior to the modernizations, the lenses may distort the realities that those modernizations have created. The two forms of modernization of European competition law were a response to changes in the European Union and in the world surrounding it. Those changes are likely to continue, and thus recognizing the new dimensions of uncertainty and developing analytical approaches to deal with it represent an urgent challenge.