

# Antitrust and Institutions: Design and Change

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## I. INTRODUCTION

This paper is about comparative institutional design of competition law and policy systems, and the relationship of design to context.<sup>1</sup> It is also about design and change.

Jurisdictions need sound and thoughtful institutional design that will best help to advance their competition law and policy, and do so with transparency, fairness, and due process. Many designs may achieve these ends.<sup>2</sup> This paper is not about available choices or global models. Rather, albeit selectively and anecdotally, it concerns the design choices that nations make.<sup>3</sup>

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1. "Institutional design" is used in this paper to include organizational design. In the antitrust context, it is used to denote the systems, structures, processes, and procedures of antitrust law enforcement and application and competition policy advocacy. Thus, the usage herein differs from the definition by Douglass North in his seminal work, *Institutions, Institutional Change and Economic Performance*: "Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction." DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 3 (1991). "Institutions include any form of constraint that human beings devise to shape human interaction." *Id.* at 4.

2. For example, jurisdictions may choose between: the administrative agency versus the executive enforcer model; the agency versus the court as first level adjudicator; the specialist versus the generalist court; the inquisitorial versus the adversary system; the multi-function versus the single function agency; the more bureaucratic versus the more adjudicative system; authorization of a minister to trump decisions for public interest reasons versus adjudication as the last word; the linked-in antitrust system—e.g., to trade and regulation, and to the presidential cabinet—versus the isolated antitrust system; the one-stop shop versus multi-sourced enforcement; and criminal versus civil enforcement. Jurisdictions may and will choose various designs and various permutations. See Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions*, 25 *WORLD COMPETITION* 361 (2002); Kenneth Davidson, *Creating Effective Competition Institutions: Ideas for Transitional Economies*, 6 *ASIAN-PAC. L. & POL'Y J.* 71, 102–19 (2005).

3. A systematic study of antitrust institutions, so defined, is being undertaken by New York University School of Law under the aegis of the Global Administrative Law Project. This study will examine comparative institutional design and consider consistency of design with global

The paper has two parts. Part II refers principally to the initial choice of design. It reflects how design choices are driven by context. Part III is about changes in design: how change does or does not happen; and what forces triggered change in the past, both radical and instrumental, and thus may be likely to do so in the future. Both parts observe that choices are driven not only by logic but also by politics and political and economic context. Part III observes also that, when initial designs reveal flaws or their logic or fit is outgrown, systems with wise leadership tend to adapt the system to the demands of the time. Systems (through good leaders) may rise to the occasion. They are especially likely to do so in the global and Internet economy, in which sunlight is abundant, flaws are often transparent, international watchdogs constantly evaluate comparative performance, and the individuals who lead the competition authorities have incentives not only to be among the “best” but also to be so perceived.<sup>4</sup>

This is not to argue for an efficient market of institutional design and change—a hypothesis that has been powerfully refuted by Douglass North.<sup>5</sup> But it is to hypothesize that transparency and forces of cross-fertilization in the world today, when aligned with the personal internal motivations of good leaders, tend to produce effective and productive change.

## II. CONTEXT INFORMS DESIGN

A jurisdiction’s first design is its most important design. The first design puts the basic foundation in place. The foundation may be virtually immovable without radical reconstruction, and radical reconstruction is hard to accomplish. Less foundational choices, such as adding a private right of action or applying remedies against individuals as well as enterprises, may be made incrementally without moving the foundation.

Contemplating the first design is daunting because so much important information is yet unknown. Jurisdictions begin with their own problems, priorities, and possibilities. When the European Community

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norms (of, for example, due process and transparency). *See* Global Administrative Law Project Homepage, <http://www.iilj.org/GAL> (last visited Mar. 8, 2010).

4. “Best” requires definition. It entails or may entail pursuing “the right” investigations, making decisions with thoughtfulness and expertise while according rights of defense, and promulgating sound and reasoned decisions. These adjectives (what is best or right) may be a function of soft international norms and standards at the time. Of course, individuals may also be guided by other incentives, such as to please the higher leaders of their government, or to take an easier path such as one that replicates what they know or what they usually do.

5. *See* NORTH, *supra* note 1, at 8–9, 92–104.

was launched in 1957, its big challenge was to integrate Europe for peace. When the South African competition law was drafted in the late-1990s, the big challenge was to give equity and mobility to the black majority. When many poor developing countries adopted their competition laws in the last two decades, they did so in the context of pervasive corruption and privilege, lack of infrastructure, and absence of effective markets.

All such needs, constraints, and background facts informed design. When Europeans drafted the Treaty of Rome establishing the Economic Community, they created a Commission, which is an executive body with administrative and quasi-judicial functions. The competences of the Commission span all of the subject areas of the Community, which interact to accomplish common goals.<sup>6</sup> The original six Member States were all civil law countries. Not surprisingly, when the structure was conceived, the procedures fit the inquisitorial model, and a regulatory one.

When South Africa adopted its post-apartheid competition law, it needed to counter the toothless competition regime preceding it, which had reinforced the white oligarchy. It had to include room for the public interest, especially the interest in empowering the black majority who had been designedly excluded from the economic system. It was logical for the scheme of the new competition system to seal itself off from discretionary control of a minister. The public interest element of the competition law was entrusted to the Tribunal and courts; not to a minister.<sup>7</sup>

When Tanzania adopted its competition law in 2003, principal problems included undue government and regulatory measures that restrained trade and competition. Anticipating the importance of competition advocacy and persuasion, the drafters included in the functions of the commission the charges to: “(g) investigate impediments to competition including entry into and exit from markets, . . . and publicise the results . . . ; [and] (i) participate in deliberations and proceedings of government, government commissions, regulatory authorities and other bodies in relation to competition and consumer welfare . . . .”<sup>8</sup>

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6. GEORGE A. BERMAN, ROGER J. GOEBEL, WILLIAM J. DAVEY & ELEANOR M. FOX, *CASES AND MATERIALS ON EUROPEAN UNION LAW* 104–05, 781–83 (2d ed. 2002).

7. See David Lewis, *The Political Economy of Antitrust*, in 2001 *FORDHAM CORP. L. INST.* 617 (Barry E. Hawk ed., 2002); Eleanor M. Fox & Dennis Davis, *Industrial Policy and Competition—Developing Countries As Victims and Users*, in 2006 *FORDHAM CORP. L. INST.* 151, 163–69 (Barry E. Hawk ed., 2007).

8. Fair Competition Act, 2003, § 65(2) (2003) (Tanz.).

When China adopted its anti-monopoly law in 2008, three bodies were contending for control as the competition authority: the Ministry of Commerce (MOFCOM), which vetted foreign investment and mergers; the National Development and Reform Commission (NDRC), which attended to pricing issues under the Price Law; and the State Administration of Industry and Commerce (SAIC), which policed unfair trade practices.<sup>9</sup> Ultimately, China empowered three competition bodies: MOFCOM would be in charge of mergers generally; NDRC would deal with matters relating to price; and SAIC would handle abuse of dominance and restrictive agreements, including cartels, except to the extent that they involve price fixing, which are handled by NDRC. A coordinating committee is chaired by MOFCOM. The tripartite structure was a child of turf battles, with no priority given to one single strong voice of competition.

A second design choice by China is also unique. Provincial restraints that barricade borders and stop the flow of goods from neighboring provinces plague China. China's constitution has no commerce clause, and enforcement against cross-border restraints needed a home. The new Anti-Monopoly Law prohibits such protective restraints, under the aegis of abuse of "administrative monopoly."<sup>10</sup> But, as a result of political compromise, the law assigns jurisdiction over such restraints to the higher political authority, thus putting the problem of parochial provincial restraints beyond the practical reach of the competition enforcers.<sup>11</sup>

Some designs have served well and continue to do so. As to others, we may ask whether a different design might have been superior. Might Europe have been better served by a standalone competition authority? Might the U.S. have been better served by a single federal competition authority? Might China have been better served by one competition enforcement body? Might Japan have been better served by a standalone private right of action? Might many jurisdictions have been better served by an adversarial rather than an inquisitorial system? Whatever the answers, we might observe that many choices were made

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9. See Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75 ANTITRUST L.J. 133, 144-45 (2008).

10. Eleanor M. Fox, *An Anti-Monopoly Law for China—Scaling the Walls of Government Restraints*, 75 ANTITRUST L.J. 173, 175-76 (2008) [hereinafter Fox, *An Anti-Monopoly Law for China*]. It has been suggested that China's design choices may have been the best attainable, given the political and social context. See Yong Huang, *Pursuing Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 ANTITRUST L.J. 117 (2008).

11. Fox, *An Anti-Monopoly Law for China*, *supra* note 10, at 177.

either because they best fit the context or because they were the best that thoughtful policymakers could obtain in the context, and at the time.

### III. CHANGE: HOW DESIGN CHANGE HAPPENS OR NOT; DISCOURSE ON CHANGE AND ITS OUTCOMES

In this Part, I draw my examples largely from Europe, with a short reflection on one example from the United States. I will consider the sources that trigger change, radical and incremental, and consider when change happens and when it does not.

#### A. Europe

The European system of competition law enforcement exemplifies the process of institutional change. This Part will describe the institutional change in Europe.

##### 1. Winds of Change

In Europe there were winds of change in the mid-1990s. Globalization and technological progress had rapidly increased. Cross-border activity had expanded exponentially. The procedural regulations that underlay the institutional design of the European competition enforcement system had been adopted when there were six Member States, and the number had already increased to fifteen (a decade later it would increase to twenty-seven). Agreements that could distort competition were subject to filing by the parties and exemption by the Commission. There were long regulatory delays. The notification/exemption system was absorbing the resources of the Competition Directorate, leaving few resources for attacking cartels. Efficient management of the system, with room for proactive enforcement, was a looming challenge. Alexander Schaub, the Director General for Competition, and successive Competition Commissioners, Karel van Miert and Mario Monti, recognized all of these challenges.<sup>12</sup>

Even while flaws were observed from within, there was criticism from without. The business community complained that the rules were formalistic and were handicapping the freedom of businesses to engage in productive transactions. It also complained that the antitrust process was, by the nature of its design, too political.<sup>13</sup> Some members of the

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12. Schaub gave an early and important presentation in 1996 at Fordham. See Alexander Schaub, *European Competition Policy in a Changing Economic Environment*, in 1996 FORDHAM CORP. L. INST. 71 (Barry E. Hawk ed., 1997).

13. See, e.g., Alberto Pera & Mario Todino, *Enforcement of EC Competition Rules: Need for*

business/legal community complained that the structure of the system submerged rights of defense.<sup>14</sup> Members of the American legal community questioned Europe's priorities, arguing (often in a context critical of abuse of dominance proceedings) that cartel enforcement was the most urgent task and yet had been left by default to a skeletal team.<sup>15</sup>

Recognition of the system's limits led to a project called "modernisation," which resulted in, among other things, a new design involving devolution of powers of enforcement to the Member States, discussed directly below. Dieter Wolf, President of the German Bundeskartellamt, proposed yet a different design change: that the competition directorate should be spun off as an independent agency. This even more radical change—which did not occur—is discussed following modernisation. A third set of issues involved procedural due process, and this change did occur. While it may be considered a part of modernisation, it is separately treated.

## 2. Devolution of Authority and Reform of the Notification/Exemption System

The Treaty of Rome sets forth a two-stage process for the assessment of possible anticompetitive agreements. Article 81(1) (now Article 101(1) of the Treaty on the Functioning of the European Union) catches agreements that prevent, restrict, or distort competition. Article 81(2) declares such agreements void. Article 81(3) states that Article 81(1) may be declared inapplicable (later translated as "an exemption may be given") if four conditions are met. The conditions may be summarized and condensed as follows: the agreements on balance must be procompetitive, efficient, or technologically progressive; competition must be restrained no more than necessary to fulfill these objectives; consumers must get a fair share of the benefits; and the restraint must not enable the firms to eliminate competition in a substantial part of the market.<sup>16</sup> Article 81 needed legislative implementation. It was

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*A Reform*, in 1996 FORDHAM CORP. L. INST. 125, 129, 142–47 (Barry E. Hawk ed., 1997).

14. See *id.* at 144–47; *Roundtable on Reform of EC Competition Law*, in 1996 FORDHAM CORP. L. INST. 175, 204–05 (Barry E. Hawk ed., 1997) [hereinafter *Roundtable on Reform of EC Competition Law*] (remarks of Amadeo Petibò Juan); *id.* at 201–02 (remarks of Alberto Pera).

15. See, e.g., James S. Venit, *Future Competition Law*, in 1997 EUROPEAN COMPETITION LAW ANNUAL: OBJECTIVES OF COMPETITION POLICY 567, 567–68 (Claus Dieter Ehlermann & Laraine L. Laudati eds., 1998) (noting, prior to modernisation, that defects in the European competition system caused "a serious misallocation of the Commission's scarce enforcement resources").

16. Treaty Establishing the European Economic Community art. 81, Mar. 25, 1957, 298 U.N.T.S. 11, *as amended*, Consolidated Version art. 81, 2002 O.J. (C 325) 33, *last amended by*

implemented in 1962 by Regulation 17, which declared that the Commission (alone) could give exemptions; furthermore, it set the structure for clearing and exempting agreements.<sup>17</sup> Under this structure, if parties provided notification of the agreement to the Commission, the provision declaring the agreement void was stayed until the Commission ruled on the entitlement to the exemption.

The notification/exemption system required a huge amount of paperwork and analysis, but this process was important for the young European Community. The Competition Directorate had to get acquainted with the types of restraints business imposed, and develop policies and rules based on the facts. By the 1990s, however, the balance had shifted. The paperwork and the time and effort it took to analyze the thousands of filed agreements were extraordinary, and the workload would increase exponentially with the admission of the new accession states.<sup>18</sup> Delays were long. The bureaucratic and reactive work drained resources, to the marginalization of major proactive work. Moreover, the structure of the system—which included group (block) exemptions for transactions of a common sort—had resulted in highly rigid regulatory rules that were out of step with increasingly well accepted modes of economic analysis.

Proposals were made to reform the system: to abolish the notification and exemption procedure, and to devolve power to Member States—along with the Commission—to declare Article 81 inapplicable where the criteria of Article 81(3) were met. Thus, Member States' competition authorities and courts would gain the power to “grant exemptions.”

Adoption of this proposal would change the design from an ex ante to an ex post system. Advance clearance would not be necessary (or available). Nor would the Commission any longer have a monopoly on the power to decide that an agreement was lawful. The change began with abolishing the notification system for vertical agreements in 1999, in view of the growing recognition that most vertical agreements are not anticompetitive.<sup>19</sup> The new design took effect in its entirety—for

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the Treaty of Lisbon, 2007 O.J. (C 306) (effective Dec. 1, 2009).

17. Council Regulation No. 17/62, 1962 O.J. (P 13) 204, replaced by Council Regulation No. 1/2003, 2003 O.J. (L 1) 1.

18. See Schaub, *supra* note 12, at 75.

19. See generally David Deacon, *Vertical Restraints Under EU Competition Law: New Directions*, in 1995 FORDHAM CORP. L. INST. 307 (Barry E. Hawk ed., 1996) (a seminal paper plumbing the depths of the controversy surrounding the rigidity of the vertical restraints law and describing the Commission's reaction); Barry E. Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 COMMON MKT. L. REV. 973 (1995) (likewise, a seminal paper, instrumental in triggering vertical restraint reform).

horizontal as well as vertical agreements—in 2004.

How did this very significant design change, which required the Commission and DG Competition to give up its monopoly on exemptions, muster the support necessary for adoption? Discussion was launched within DG Competition. Support was built from a small nucleus. The ideas were debated in internal dialog. Conferences, notably including the annual Fordham conference directed by Barry Hawk, and the annual workshop of the European University Institute directed by Claus Dieter Ehlermann and Giuliano Amato, were key intellectual and brainstorming events.<sup>20</sup> Support grew within the Competition Directorate, as key actors gradually came to appreciate that the filing and exemption process was now a counterproductive burden.

Competitive benchmarking in the conference halls of global camaraderie also may have spurred consensus. The Competition Commissioner and Competition Directorate surely wanted to be (or remain) a world-class competition authority with appropriate concern for the most harmful anticompetitive restraints. Criticism from the outside (rigidity, formalism, neglect of cartels) mirrored essentially the same concerns from within. In addition, Commission officials began to construct a longer range vision to adjust the Directorate to the changing European environment. In Europe, there was a growing movement to devolve to the Member States the functions that they could do well, and the Member States were enlisted to pull their oars for the good of the enterprise. The Member States were generally happy to receive the extra competition powers, or else they had limited interest in the matter.<sup>21</sup> And the Competition Directorate was happy to enlist the states to work for the good of the whole, thus freeing up time for the now world-recognized fight against cartels. The Competition Directorate no longer needed stashes of notifications to understand the dimensions of the European competition problems and to make policy. Moreover, as part of the new design, the states and the center would gain a vehicle for better coordination. As a result, the cutting-edge European Competition Network was created. In sum, the incentives for the new system were strong and were largely aligned.

Who were the detractors? A number of commentators thought the current system worked relatively well, that the problems were

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20. See generally 1996 FORDHAM CORP. L. INST., *supra* note 12, at 71–218; ROBERT SCHUMAN CENTRE ANNUAL ON EUROPEAN COMPETITION LAW 1996 (Claus Dieter Ehlermann & Laraine L. Laudati eds., 1997) [hereinafter SCHUMAN CENTRE ANNUAL] (working papers and panel discussion on the centralization and decentralization of enforcement of Community law).

21. See David J. Gerber, *Two Forms of Modernization in European Competition Law*, 31 FORDHAM INT'L L.J. 1235, 1243–45 (2008).

exaggerated, that the proposals for devolution would dangerously give powers to antitrust-ignorant courts, and that devolution would destroy the coherence of the law.<sup>22</sup> Germany, which had the best developed national competition law system in Europe, feared a loss of influence as a result of terms of the project that submerged Member State law.<sup>23</sup> Many detractors were lawyers for businesses and their clients, who enjoyed the business certainty inherent in the notification and clearance-or-exemption system. They viewed the new world of self-assessment with some trepidation and complained that they (for their clients) would have to estimate the risks and advise on probable legality, creating uncertainty. The answer that risk assessment is what lawyers do every day seemed to fall short of their concern. In any event, given the overwhelmingly good reasons for the change, the lesser merit of the objections, and the alignment of public (European Community and Member State) incentives,<sup>24</sup> the change happened.

### 3. The Directorate/Commission Model, in Contrast with an Independent Competition Agency

The Competition Directorate is one of eighteen directorate generals of the European Commission. Other directorates include internal market, energy, research, agriculture, economic affairs, employment, health and consumers, the environment, information society and media, and justice and security. There is at present one Commissioner from each Member State, and each Commissioner has one or more portfolios. One Commissioner has the competition portfolio, which includes antitrust (agreements and abuse of dominance), merger control, and state aids.

The Competition Directorate is one of the few directorates that houses a process for administrative proceedings. An investigation may be opened, a proceeding may be brought, and then submissions may be filed. Thereafter, if requested, a hearing will be held before a hearing officer who resolves process issues, including rights of defense, and writes a report. The case team within the Competition Directorate writes the first draft of the proposed Commission decision. This draft is vetted within the directorate, by the competition team in Legal Service—which functions as lawyers' lawyers for each directorate—and

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22. See SCHUMAN CENTRE ANNUAL, *supra* note 20, ch. 5 (panel discussion on the role of national competition law in the European Community system).

23. Hannah L. Buxbaum, *German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement*, 23 BERKELEY J. INT'L L. 474, 489–91 (2005); Gerber, *supra* note 21, at 1245.

24. Germany was the only Member State to oppose the change.

also by a committee of Member State experts. After all proposed changes and critiques are taken into account, and when the Director General is satisfied, the Director General presents the proposed decision to the Commissioner for Competition.<sup>25</sup>

Next, the Commissioner for Competition and her cabinet may have additional comments and points for discussion, and after she is satisfied, she sends the proposed decision to the cabinet of all other Commissioners. In the usual course, the proposed decision is accepted by all other Commissioners, most of whom do not have competition law expertise and rely on the expertise of the Competition Commissioner and her directorate. Of course, the other Commissioners are free to dispute or disagree with the decision, and if they raise issues there is further communication among the Commissioners or members of their cabinets to work out differences.

There is no hearing or argument before the Commission as a deliberative body, such as one finds in the U.S. Federal Trade Commission (FTC). But there are meetings of the relevant members of the cabinets, with a presentation by the Competition cabinet to the other cabinets, and if there are unresolved issues, these are discussed at the meeting of the College of Commissioners that adopts the decision. Meanwhile, parties may visit any Commissioner they choose and put forward their case before that Commissioner (as they may in the FTC). Decisions are adopted by majority vote. They can then be appealed to the European Court of First Instance (CFI) and then to the European Court of Justice (ECJ). The CFI not only decides points of law but also scrutinizes Commission decisions for manifest errors of assessment of facts, and in doing so reviews all facts brought before them. The ECJ is restricted to points of law.

In the mid-1990s, during the time of lively conversations on reform, Dieter Wolf, President of the Bundeskartellamt, made a proposal. He proposed that the competition function be removed from its place in a directorate and be reconstituted as an independent competition agency. He argued that this change would remove competition from an essentially non-judicial and political context to a judicial context, and that both due process and legal certainty would increase.<sup>26</sup>

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25. See Wouter P.J. Wils, *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, 33 *WORLD COMPETITION* (forthcoming Mar. 2010) (manuscript at 6–7), available at <http://ssrn.com/abstract=1492736>.

26. Panel Discussion, *Decision Making at the Centre*, in ROBERT SCHUMAN CENTRE ANNUAL ON EUROPEAN COMPETITION LAW 1996, at 8–11 (Claus Dieter Ehlermann & Laraine L. Laudati eds., 1997) [hereinafter *Decision Making at the Centre*] (remarks of Dieter Wolf); *Roundtable on Reform of EC Competition Law*, *supra* note 14, at 198–200.

Dieter Wolf's main point was that competition law is law enforcement, and that competition law decision-making, at least at the first level, should be made in a purely judicial environment. At the annual Fordham international competition program in 1996, he said:

Only by law enforcement can you avoid preferential treatment in favour of major companies. Otherwise, the bias always exists that larger enterprises, stronger ones, have easier access to political bodies. Only the law guarantees equal treatment, and therefore one must not regard Articles [81] and [82] . . . as a sort of political orientation but as juridical prescription. It is law enforcement.

So let us have a look at the actual decision making in Brussels. It started, if I am well informed, with some six Commissioners at the very beginning. We now have fifteen Member States and twenty Commissioners, with the tendency toward growth. Only one of those Commissioners is responsible for competition, so it is rather easy to imagine how such cases develop. If the Competition Commissioner wants to bring a competition case through, he has to get ten colleagues on his side to get the majority. That will be difficult enough, if not impossible, in quite a lot of cases.

But I am supposing that he is successful. Then, exactly those ten colleagues who assisted him will await and expect in the next round that he will be in favour of their interests too, to compensate.

I am not blaming anybody for that. That is just the normal political deal in a political situation, and politics lives from the principle of balance of interests. But it has nothing to do with the application of law. Application of law is different. It is not a question of majority and it is not a question of balance of interest.<sup>27</sup>

Alexander Schaub, Director General of the Competition Directorate, disputed President Wolf's view of the facts and process and argued against the proposal for an independent competition agency. First, he said, "the main criticism that the Commission is easily susceptible to political influence is not borne out by the facts. . . . Second, one must question whether an independent authority would be better placed to resist pressures which inevitably will arise." He argued that the EU institutions as structured helped the Commission maintain its independence. Third, competition culture in Europe was still lacking and the current structure, he argued, helps the Commission "maintain strong leadership in defending competition principles and in working towards more general acceptance of the competition principle within the Member States."<sup>28</sup>

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27. *Roundtable on Reform of EC Competition Law*, *supra* note 14, at 198–99 (remarks of Dieter Wolf).

28. *Decision Making at the Centre*, *supra* note 26, at 11–12 (remarks of Alexander Schaub).

Schaub turned to the question of separation of powers:

[O]n the question of separation of functions within DG [Competition], this does not appear to be a key point. The present practice has been approved by the Court of First Instance and, also by the way, the House of Lords in the UK after a very convincing presentation by Claus Dieter Ehlermann, who testified as Director General of DG [Competition] at their hearings.<sup>29</sup>

Schaub and his predecessor, Director General Claus Dieter Ehlermann, later elaborated on this last point by arguing that much would be lost by severing competition from its position as a directorate. They stressed the importance of linking competition into the broader system, which includes, for example, telecommunications, energy, media, and the internal market. Further, they raised the problem that, with the spin off of the competition function to a separate agency, the Community would lose the synergies between the state aids and the antitrust and merger functions<sup>30</sup>—a point that the financial crisis later validated.<sup>31</sup>

Finally, in his remarks in 1996, Schaub acknowledged weaknesses in the system, such as long duration of procedures and long delays in outcomes, and expressed that some of the problems could be cured by more decentralization and by reducing notifications (as ultimately

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29. *Id.* at 12–13 (remarks of Alexander Schaub); REP. OF THE H. OF LORDS SELECT COMM. ON THE EUR COMMUNITIES, 1993 H.L. Paper 7-1, at ¶¶ 17, 30 & 35 (remarks of Claus Dieter Ehlermann); *see also* Case T-11/89, *Shell Int'l Chem. Co. v. Comm'n*, 1992 E.C.R. II-757 ¶¶ 39–41 (holding that procedural guarantees do not require the Commission to preclude one official from acting as both investigator and rapporteur in the same case). *But see* *Dubus S.A. v. France*, App. No. 5242/04, Eur. Ct. H.R. (June 11, 2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Dubus S.A.”) (holding that proceedings of French Banking Commission violated the defendant’s right to a fair hearing; not only was the commission prosecutor, investigator and judge, but there was no clear distinction between the functions and there was no appeal to a judicial body with full jurisdiction; applicant’s doubts about the commission’s independence and impartiality were objectively justified); Press Release, Eur. Court of Human Rights, Chamber Judgment *Dubus S.A. v. France* (June 11, 2009), available at <http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=73921&skin=hudoc-pr-en&attachment=true>. Complaints by Intel, and separately by Saint-Gobain Glass, against the European Commission alleging prejudgment of the case and infringement of right to an independent and impartial tribunal are pending. *See* Case T-56/09, *Saint-Gobain Glass v. Comm'n*, 2009 O.J. (C 90) 49; Case T-457/08, *Intel v. Comm'n*, 2008 O.J. (C 301) 60; Case T-286/09, *Intel v. Comm'n*, 2009 O.J. (C 220) 86.

30. *Decision Making at the Centre*, *supra* note 26, at 12–13 (remarks of Alexander Schaub); *see also Roundtable on Reform of EC Competition Law*, *supra* note 14, at 202–03, 206, 218 (remarks of Jonathan Faull).

31. *See* Neelie Kroes, European Comm’r for Competition Pol’y, Address at Fordham University, 36th Annual Conference on International Antitrust Law and Policy, Antitrust and State Aid Control—The Lessons Learned (Sept. 24, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/408&format=PDF&aged=0&language=EN&guiLanguage=en>.

occurred).

Dieter Wolf's proposed change never happened. Why? Surely on some criteria an independent agency has merit. In some measure it could better satisfy notions of independence, accountability, expertise, transparency, due regard for confidentiality, efficiency, due process, and predictability.<sup>32</sup> But Competition as a directorate has a unique fit with the multi-functional larger design of the European Union. Moreover, the incentives of the stakeholders were not aligned to produce this change. Neither the Center nor the Member States could see net benefits from reconstituting "competition" as an independent agency. Finally, as we will see in the next point, faced with the criticism for which an independent agency was proposed as a solution, the Competition Directorate made incremental changes to correct at least some of the shortcomings.<sup>33</sup>

#### 4. Responding Incrementally to Calls for Change

Changes in environment, new learning or appreciation, and recurrent flaws and insufficiencies may call for significant change. But in many cases they can be substantially satisfied by incremental change.

Europe has made a number of such changes by responding to critiques coming from within and without. Each of these changes has bolstered adherence to values that, we may agree, institutions should be designed to serve.<sup>34</sup> Here are four points of adaptation.

First, before 1982, in competition proceedings, the hearing was conducted by the case handler. This presented issues of conflict of interest or insufficient separation of functions, since the case handler was both a prosecutor and a judge. Beginning in 1982, a new post was created: the Hearing Officer. The Hearing Officer is independent from the Competition Directorate and reports directly to the Commissioner. She is charged with protecting the rights of defense and all other procedural rights and process.<sup>35</sup>

Second, before 2001, the Competition Directorate's case handlers sometimes lacked a sufficient regard for the development of a thorough

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32. These are some of the values identified by Michael Trebilcock and Edward Iacobucci in their conference paper. *See* Trebilcock & Iacobucci, *supra* note 2, at 362–68.

33. Certain issues remain unresolved. For example, is there an inherent and undue conflict of interest in the procedure whereby the head of the case team drafts the proposed decision?

34. *See supra* note 32 and accompanying text.

35. The European Union has a developed law on rights of defense; rights are taken seriously throughout the process and their denial is grounds for annulment. *See* Case T-342/99, *Airtours P.L.C. v. Comm'n*, 2002 E.C.R. II-2585; Case T-310/01, *Schneider Elec. S.A. v. Comm'n*, 2002 E.C.R. II-4071.

factual record and a sufficient base for factual inferences, and they sometimes paid insufficient attention to due process rights, perhaps lulled by a sense that there were no strict controls from above. In the summer and fall of 2002, the Court of First Instance overturned three Commission merger decisions, both because of insufficient grounds for critical inferences (such as whether the market was competitive) and because of denial of rights of defense: *Airtours*,<sup>36</sup> *Tetra Laval*,<sup>37</sup> and *Schneider*.<sup>38</sup> In the aftermath of these annulments and of other judgments giving serious scrutiny to Commission decisions for manifest errors of fact or violation of rights of defense,<sup>39</sup> the output of the Directorate demonstrates a higher level of care and attention to detail and to rights.

Third, before 2003, economic analysis in the work of the Competition Directorate was uneven and often thin or insufficiently up to date. In 2003, the Competition Directorate created the post of Chief Economist. The Chief Economist and his team—who collaborate and interact often with economist teams in the United States and elsewhere—are involved in virtually all cases and issues; their opinions matter. In addition, to strengthen decision-making, an economics advisory board of outside experts meets periodically at DG Competition to provide reactions and offer guidance.

Finally, to assure the soundness of decision-making, the Director General convenes “devil’s advocate” panels, which test the foundations of both the facts and the law regarding theories of a case and proposed decisions.<sup>40</sup>

In the global, transparent “market” of competition authorities, there are incentives for competition authorities to rise to the challenge, incrementally if not dramatically. DG Competition rose to the challenge.

### B. *The United States*

I limit my comments regarding U.S. design to one issue. Famously, the United States has two federal competition authorities: the Antitrust

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36. *Airtours*, 2002 E.C.R. II-2585.

37. Case T-5/02, *Tetra Laval B.V. v. Comm’n*, 2002 E.C.R. II-4381.

38. *Schneider*, 2002 E.C.R. II-4071; *see also* Case C-440/07 P, *Comm’n v. Schneider Elec. S.A.*, 2009 O.J. (C 220) 6, 2009 E.C.R. I-IV (July, 16 2009) (Court of Justice judgment approving and denying elements of damage for Commission’s breach of rights of defense).

39. *E.g.*, Case T-210/01, *Gen. Elec. v. Comm’n*, 2005 E.C.R. II-5575.

40. Philip Marsden, *Checks and Balances: European Competition Law and the Rule of Law 2* (Apr. 17, 2009) (draft paper prepared for the Third Annual Antitrust Marathon), *available at* [http://www.luc.edu/law/academics/special/center/antitrust/marathon/marsden\\_paper.pdf](http://www.luc.edu/law/academics/special/center/antitrust/marathon/marsden_paper.pdf).

Division of the Department of Justice (DOJ) and the Federal Trade Commission. Perennially, the wisdom of this design choice is questioned. New administrations virtually always ask: why should we pay the costs of two overlapping agencies?

Most experts agree that wise designers would not design such a two-headed system from scratch.<sup>41</sup> Recently, the issue was pondered by a presidential commission of twelve distinguished experts, the Antitrust Modernization Commission, which issued a report on a multitude of issues in 2007. The Antitrust Modernization Commission recommended no change in dual enforcement; however, it made recommendations to ease the conflict over which authority vets what merger and to harmonize injunction standards. The Modernization Commission based its recommendation in part on the practical and political difficulties of reallocating authority and the fact that the coexistence of the two authorities has not produced significant negative consequences.<sup>42</sup> More affirmatively, one might argue that (1) the system works to produce sound results and to do so efficiently,<sup>43</sup> and (2) the sword of Damocles over the head of the FTC (for the threat is usually to the FTC) seems to inspire the FTC to new heights. Duplication is minimal and productive competition is maximal. The FTC, not the DOJ, is responsible for most of the progressive initiatives in the past decade. The continued proud existence of the FTC is another indication of the fact that design and its changes are contextual, and that sunlight on weaknesses in design, and even deviations from Platonic ideals, may catalyze change that meets and even beats the “ideal” design consensus.

#### IV. CONCLUSION

Good institutional design is a critical component of good competition policy and competition law enforcement. The design of the institutions is like the design of a house: it must facilitate life within the house. Good institutional design takes account of the family’s values and empowers life within its walls. Designs cannot be conjured in the abstract; they must fit the family that lives in the house, its aspirations, possibilities, and practical limits. Therefore, the good architect lives with the family before conceptualizing the design.

Still, there are some traditional universals of good design, and some

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41. See ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 144 nn.7–8 (2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/toc.htm](http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm).

42. See *id.* at 129–32.

43. See *id.* at 144 n.8.

emerging universals. As to the first, all litigants must be accorded due process.<sup>44</sup> As to the second, in the globalizing, integrating, and networking world, all houses should have windows that open and a front and a back porch.

Even good houses do not last forever. Environments and conditions change, needs change, and flaws appear at the seams of the plaster. This is the second level of the architect's work. Again, the solution is contextual. Building a new house with all modern equipment might be prescribed by outside advice-givers; but the family might be better satisfied with wise and fitting renovations to the house they have lived in for years.

The study of antitrust institutional design is in early stages, with much ground helpfully broken by scholars such as Bill Kovacic.<sup>45</sup> The American Bar Association Section of Antitrust Law, under the leadership of Ilene Gotts, has launched a project on analysis of comparative design, as reflected in this volume. By this short essay, I contribute to the project one observation and one hypothesis. The observation is well accepted: context is a major determinant of institutional design. The hypothesis is: fora and initiatives in this globalized world, including active bench-marking, peer review, multiple and continuing cross-country personal interactions, and transparency tend to produce positive institutional change.

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44. This is, of course, a concept in need of development: What does justice require? See *supra* note 29 and accompanying text.

45. See, e.g., William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265 (2001).