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INTRODUCTION

I. The Ubiquity of EU Competition Law

'Show business competition policy' Only a few areas of law, and in particular of European Union law, garner as much press exposure as EU competition law: 'Europe fines Intel $1.45 billion in antitrust case';[1] 'European Commission blocks Ryanair's bid for Aer Lingus';[2] 'Brussels slaps record fine on glass cartel';[3] 'European banks get EU warning'.[4] In fact, major business newspapers almost daily report on competition authorities' interventions in the market. Press agencies now boast dozens of specialized competition journalists and offer competition-related briefings on a real-time basis. **1.01**

This evolution bears testimony to the steady rise of EU competition law as a critical issue throughout Europe and elsewhere. Today, the constraints imposed by EU competition law have become a major area of concern for decision-makers both in the public and private **1.02**

[1] James Kanter, 'Europe Fines Intel $1.45 Billion in Antitrust Case', *New York Times*, 13 May 2009.
[2] David Lawsky and Sabina Zawadzki, 'EU Commission blocks Ryanair's bid for Aer Lingus', *Reuters*, 27 June 2007.
[3] Sarah Arnott, 'Brussels slaps record fine on glass cartel', *The Independent*, 13 November 2008.
[4] Stephen Castle, 'European Banks Get EU Warning', *International Herald Tribune*, 23 July 2009.

sectors (see Section A). Yet, beyond the cosmetics of press releases and business reports, the significance of EU competition law can be measured by its profound and lasting effects on economic activity (see Section B).

A. Impact of EU Competition Law on Public and Private Decision-Makers

1.03 **Impact on undertakings** EU competition law has a direct, critical influence on the business strategies chosen by firms (or 'undertakings' as mentioned in the Treaty on the Functioning of the European Union (TFEU)). To take a few examples, companies of a certain size that decide to merge need to obtain prior authorization from the European Commission.[5] Although, to date, the Commission has only actually objected to a very small number of the 4,274 combinations notified between 1990 and December 2009 (the prohibition against the concentration of the aircraft manufacturers GE and Honeywell in 2001 is one well-known example),[6] it has frequently allowed these operations subject to significant conditions or 'remedies', including the divesture of entire industrial facilities, the compulsory licensing of intellectual property (IP) rights, and the adoption of long-term supply commitments.

1.04 In the same vein, undertakings that coordinate their pricing policies, limit their production, partition markets, or reduce their investments expose themselves to the ire of competition authorities. Whilst such coordinations, generally referred to as 'cartels',[7] used to be the customary organizational model adopted by European industries before the Second World War,[8] they are, today, said to be the 'cancer' of modern free market economies and

[5] EU merger control was the subject of much debate following the famous 'merger mania' of the 1990s. See 'Europe's Merger Morass', *The Economist*, 23 September 2000, at 73–4.

[6] To date, the Commission has issued 20 Decisions declaring concentrations to be 'incompatible' with the common market. See Decisions M.4439, *RyanAir/Aer Lingus*, 30 October 2006; M.3440, *ENI/EDP/GDP*, 9 December 2004; M.2416, *Tetra Laval/Sidel*, 30 October 2001; M.2187, *CVC/Lenzing*, 17 October 2001; M.2283, *Schneider/Legrand*, 10 October 2001; M.2220, *General Electric/Honeywell*, 3 July 2001; M.2097, *SCA/Metsä Tissue*, 31 January 2001; M.1741, *MCI Worldcom/Sprint*, 28 June 2000; M.1672, *Volvo/Scania*, 15 March 2000; M.1524, *Airtours/First choice*, 22 September 1999; M.1027, *Deutsche Telekom/Betaresearch*, 27 May 1998; M.993, *Bertelsmann/Kirch/Premiere*, 27 May 1998; M.890, *Blokker/Toys 'R' Us* (II), 26 June 1997; M.774, *Saint Gobain/Wacker Chemie/Nom*, 4 December 1996; M.784, *Kesko/Tuko*, 20 November 1996; M.619, *Gencor/Lonrho*, 24 April 1996; M.553, *RTL/Veronica/Endemol (HMG)*, 20 September 1995; M.490, *Nordic Satellite Distribution*, 19 July 1995; M.469, *MSG Media Service*, 9 November 1994; M.53, *Aerospatiale/Alenia/De Havilland*, 2 October 1991. Added to the above list should be those concentrations which the parties abandoned before a ban was pronounced. See eg cases M.1852, *EMI/TimeWarner* and M.1715, *Alcan/Pechiney*.

[7] Cartels date back to early wars, when those fighting concluded agreements to suspend hostilities in order to exchange prisoners. Nowadays the cartel is understood as an agreement to suspend competition (which itself is a form of economic warfare). See with regard to these points, J. Joshua and C. Harding, *Regulating Cartels in Europe—A Study of Legal Control of Corporate Delinquency* (Oxford: Oxford University Press, 2003), at xxiii.

[8] A negative perception of cartel agreements is, in Europe, relatively recent, dating back to the end of the Second World War. Prior to that, agreeing with competitors to limit the harmful effects of 'excessive' competition was viewed as a perfectly legitimate practice, a form of collective industry code preferable to 'individualism'. A legacy of nineteenth century Austrian and German schools of thought, the cartels so common in the Rhine region had the blessing of the public authorities. Realizing, after the Second World War, that the major cartels in the Ruhr had backed the German war effort and established the military supremacy of the Third Reich, the drafters of the European Steel and Coal and EC Treaties were keen to establish the basis of a lasting peace in Europe. They therefore introduced in these treaties a provision prohibiting agreements in restraint of trade. Not surprisingly, however, history and habit have been hard to break, meaning that even today undertakings in certain industries continue to enter into cartel agreements. See J. Monnet, *Mémoires* (Paris: Fayard, 1998).

are accordingly heavily sanctioned.[9] In this regard, EU competition law allows the imposition, on cartel participants, of administrative fines of up to 10 per cent of their total worldwide revenue in the preceding year.[10] Of course, the EU competition law regime is still far from the harsh tone set by US *antitrust* law, where participation in a cartel is punishable by imprisonment.[11] Nonetheless, over the last decade the Commission has been able to impose a number of stiff fines on undertakings convicted of participating in a cartel. In 2003, a €462 million fine was imposed on just one company, Roche, in the famous *Vitamins* case.[12] In February 2007, four undertakings were fined €992 million for illegally concluding a series of agreements in the mechanical elevator and escalator installation and maintenance market of four Member States (Germany, Belgium, Luxembourg, and the Netherlands).[13] Finally, in the car glass cartel, the firm Saint Gobain was fined €896 million, the highest fine ever imposed on a single undertaking in a cartel case.[14] Since such staggering financial penalties may force infringing firms out of business,[15] the enforcement of EU competition law now constitutes a legal risk that undertakings can no longer ignore. This explains the success of internal compliance programmes designed, often with great ingenuity, by competition law practitioners for their corporate clients.

[9] See Mario Monti's speech, 'Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?', 3rd Nordic Competition Policy Conference, Stockholm, 11–12 September 2000.

[10] The objective of administrative sanctions is to 'exhort people to respect the laws and regulations and to encourage them to adopt behaviours that are in accordance with the legal framework.' See J. Schwartze, 'Sanctions imposed for infringements of European competition law according to Article 23 of EC Regulation no. 1/2003 in light of the general principles of the law' (2007) 43(1) RTD 1. See Art 23(2) of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4 January 2003, at 1. National legal systems may provide criminal sanctions for infringements of national competition law. Member States which have adopted such provisions include Estonia, France, Greece, Hungary, Ireland, the Czech Republic, Romania, and the UK. The question of transposing these solutions to the EU level is the subject of fierce debate, however. A recent Court of Justice judgment, the scope of which is still argued, might perhaps provide a legal basis for introducing criminal sanctions into Community law. See CJ, C-176/03 *Commission v Council*, 13 September 2005 [2005] ECR I-7879, at 47 and 48.

[11] In the United States, a number of industry executives have been imprisoned for infringing antitrust laws. In December 2001, eg, the chairman of the board of directors of Sotheby's, Alfred Taubman, was sentenced to a year and a day's imprisonment for having been actively involved in concerted price-fixing practices with Christies. See 'Taubman Sentenced To One Year—Plus A Day', *Forbes*, 22 April 2004.

[12] See Commission Decision of 21 November 2001, COMP/E-1/37.512, *Vitamins*, OJ L 6 of 10 January 2003, at 1–89.

[13] See Commission Decision of 21 February 2007, COMP/E-1/38.823, *Elevators and escalators*, nyr.

[14] Summary of Commission Decision of 12 November 2008 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement, COMP/39.125, *Car glass*, OJ C 173 of 25 July 2009, at 13.

[15] See CJ, Cases annexed 96–102, 104, 105, 108, and 110/82 *NV IAZ International Belgium et al v Commission*, 8 November 1983 [1983] ECR 3369, at 56. According to the EU judge in that case, the Commission does not have to take account of the 'adverse financial situation' of an undertaking when it sanctions it: 'recognition of such an obligation would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market.' The undertaking's inability to pay is therefore not, in principle, a mitigating circumstance that is taken into account by the Commission in calculating an individual fine (see Commission Decision of 18 July 2001, COMP/E-1/36.490, *Graphite electrodes*, OJ L 100 of 16 April 2002, at 1, paras 184–5). The Commission has, however, encouraged a flexible interpretation of this principle, either by reducing the amount of a fine (see Commission Decision of 3 December 2003, COMP/C.38.359, *Electrical and mechanical carbon and graphite products*, at 360 where the Commission reduced the amount of the fine imposed on the undertaking SGL by taking account of (i) the serious financial problems it was then experiencing and (ii) the fines which had recently been imposed on it for its participation in two other cartels), or by agreeing to adjustments in payment terms (eg deferred payment; see Commission Decision of 7 June 2000, COMP/36.545/F3, *Amino Acids*, OJ L 152 of 7 June 2001, at 24, para 438). See COMP/C37.370, *Sorbates* (2005/493/EC), where two firms left business in the years following the discovery of the cartel.

1.05 Firms' unilateral conduct on the market has also become a concern for companies holding a powerful position on one or several markets. Microsoft, which was sanctioned and fined €497 million in March 2004 for leveraging its near monopoly position in the market for PC operating systems (OS) onto the markets for work group server operating systems and for media players, is a clear illustration of the Commission's strict enforcement of Article 102 TFEU.[16] Later in the same decade, in May 2009, the Commission fined Intel €1.06 billion on the ground that it unlawfully granted rebates that foreclosed its competitors.[17] In EU competition law, size is, in itself, 'suspect': an undertaking that occupies a dominant position would, by its very presence in the market, be deemed to alter the degree of prevailing competition.[18] The TFEU therefore subordinates dominant undertakings to a regime of 'special responsibility'[19] that allows the Commission to declare illegal and, if necessary, prohibit and sanction, commercial practices that are otherwise lawful, when practised by a non-dominant firm. Such commercial practices include, inter alia, price discrimination, exclusive supply clauses, tie-in sales, aggressive new product launch prices ('introductory pricing' in economics jargon), and even certain types of price discounts and rebates.

1.06 **Impact on public authorities** Unlike in the United States, where 'big stick' government is often decried as encroaching upon individual freedoms and entailing costly policy choices, the State—and its supporting administration—is often perceived in Europe as a legitimate, and benevolent, organization. Accordingly, European governments and other public authorities have traditionally enjoyed a large margin of manoeuvre to intervene in economic and social affairs.

1.07 EU competition law has, however, significantly limited this freedom. A first illustration of this can be found in the major liberalization programmes initiated by the Commission in the 1990s. Those reforms led to the elimination of statutory monopolies[20] and to the dismantling of restrictive regulations in a large range of economic sectors (telecommunications, energy, postal service, air, rail, and maritime transport, often referred to as network industries).[21] Whilst those reforms were not, *sensu stricto*, triggered by EU competition law, the Commission has nonetheless proactively enforced competition rules in those sectors, where the natural advantage held by incumbent operators remained in place for several years following liberalization and abuses were pervasively carried out by the former state-sponsored monopolists. EU competition law was therefore particularly instrumental in putting an end to abusive practices which risked undermining the benefits of the liberalization process.

1.08 Second, EU competition law also constrains the ability of the Member States to intervene financially in the economy. Often, States grant subsidies to support *national undertakings*

[16] See Commission Decision of 24 March 2004, COMP/C-3/37.792, *Microsoft*, OJ L 32 of 6 February 2007, at 23. See also, GC, T-201/04 *Microsoft v Commission*, 17 September 2007, ECR II-360. See regarding this case, N. Petit, 'L'arrêt Microsoft: abus de position dominante, refus de licence et vente liée—L'article 82 TCE sans code source' (2008) 145 JDE 8–12.

[17] Commission Decision of 13 May 2009, COMP/37-990, *Intel*, available at <http://ec.europa.eu/competition/sectors/ict/intel.html>.

[18] There are grounds for criticizing this eminently 'structuralist' approach. See Chapter 2.

[19] See CJ, *Michelin v Commission* [1983] ECR 3461.

[20] The terms used in EU law are 'exclusive rights' and 'special rights'.

[21] In order to achieve its chief aims of improving consumer welfare and promoting a single European market, the Commission aimed to increase competition in these European industry sectors, which necessitated the opening of the sectors to new market participants. The Commission was therefore quick to require Member States to terminate legal monopolies that had previously been granted to some undertakings.

facing strong international competition, for instance steel producers or car manufacturers. States may also seek to attract foreign direct investment (FDI) in their territory by offering financial incentives to *foreign firms* (tax and social security exemptions, direct subsidies, etc). Obviously, such measures are liable to distort competition by artificially increasing the competitiveness of certain economic operators at the expense of others. State aid that distorts, or threatens to distort, competition is therefore declared 'incompatible with the common market' in the TFEU.[22] In recent years the Commission has proactively enforced the State aid rules. The *Alstom* case, for instance, showed that Member States are not allowed to 'rescue' an undertaking that is in financial difficulties, regardless of whether such difficulties arose as a result of international competition or as a result of its own industrial strategic decisions.[23] The *Ryanair* case also demonstrated that local municipalities are not necessarily free to grant financial advantages in order to induce undertakings to settle in their territory.[24]

B. The Positive Economic Effects of EU Competition Policy

Introduction The Commission's active enforcement policy, and more fundamentally the rules of the TFEU, are based on the belief that a 'proactive' competition policy delivers beneficial macro and micro-economic effects (see Section 1).[25] Moreover, within the EU, the competition rules are deemed to bring a decisive contribution to the economic integration of national markets (see Section 2). **1.09**

(1) The beneficial macro and micro-economic effects of competition law

The effects of competition policy and its implementing Regulations can be observed at both the macro-economic level (ie, on factors such as growth, inflation, jobs, consumption, and investment) and the micro-economic level (ie, at the level of the individual economic 'agents', namely the undertaking and the consumer). **1.10**

(2) Beneficial macro-economic effects

General statements Beyond abstract, intuitive statements on the positive macro-economic effects of competition policy, there have been few attempts to evaluate accurately the effects of competition policy on the determinants of long-term growth. Even far-reaching, sophisticated macro-economic assessments, like the famous 'Sapir report' of 2003,[26] remain silent **1.11**

[22] The present treatise does not cover State aids, which are presented here simply to illustrate the wide reach of EU competition law.

[23] See Commission Decision of 7 July 2004 concerning the aid measures enforced by France in favour of Alstom, OJ L 150 of 10 June 2005, at 24.

[24] See Commission Decision of 12 February 2004 concerning the advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair when it set up at Charleroi, OJ L 137 of 30 April 2004, at 1.

[25] See Commission Notice, 'A Pro-active Competition Policy for a Competitive Europe', 20 April 2004, COM(2004) 293 final, at 2:

> Competition policy is one of a number of Community policies impacting upon the economic performance of Europe. It is a key element of a coherent and integrated policy to foster the competitiveness of Europe's industries and to attain the goals of the Lisbon strategy.

[26] See *An Agenda For A Growing Europe—Making the EU Economic System Deliver*, Report of an Independent High-Level Study Group established on the initiative of the President of the European Commission, July 2003, at 130.

on the source of their contention that EU competition policy has sustained technological innovation and contributed to the EU's macro-economic stability.[27]

1.12 **Imputation issues** The lack of concrete, 'hard fact', evidence in support of the allegation that competition policy delivers beneficial macro-economic effects is unsurprising. In addition to competition policy, many other public policies (monetary, budgetary, commercial, etc) can contribute to growth, job creation, consumption, and investment. It is hard, then, to isolate the macro-economic contribution of competition policy from these other policies.[28]

1.13 **Attempts at empirical measurement** Notwithstanding the identification problem, several economists have tried to quantify, at least indirectly, the contribution of competition policy to economic growth. While some have questioned whether the impact of active enforcement is worth its cost, these studies tend not to offer any hard cost–benefit evidence.[29] In an effort to provide such evidence, several studies have tried to evaluate the social cost of monopolies on Gross Domestic Product (GDP). For instance, studies carried out in the 1950s in the United States placed the social cost of monopoly between 0.1 and 1 point of GDP.[30] On the other hand, a French study by Professors Jenny and Weber in 1983 reached an estimate of 7.4 per cent.[31] In their famous work on industrial economics published in the 1990s, Professors Scherer and Ross estimated the social cost of monopoly to be in a range of 4 per cent to 7 per cent.[32] A 2003 study by Baker harkens back to the 1950s estimate. He found that

> [t]he total annual costs of antitrust enforcement in the United States are no more than $2 billion each year [both direct and indirect] . . . [whereas] the costs to the economy from

[27] By improving the EU's resilience to external shocks. Ibid, esp at 73–4.

[28] Certain political representatives have proposed concrete estimates of the macro-economic effects of competition law. Eg, Belgium's former Minister for the Economy, F. Moerman, mentioned annual benefits of around €250 million, representing 6,000 potential jobs, for Belgium. See F. Moerman, 'Towards a Belgian competition authority' in P. Nihoul (ed), *Decentralisation in the Application of Competition Law. A Greater Role for the Practitioner?* (Brussels: Bruylant, 2004), at 253–4.

[29] Most notably, Richard Posner fall into this camp. Richard A. Posner, 'The Social Costs of Monopoly and Regulation' (1975) 83(4) J Political Economy 807, at 818–19 ('Indeed, the costs of regulation probably exceed the costs of private monopoly'). Warren Schwartz identifies the appropriate question that should be asked: do the deterrence effects of enforcement outweigh the costs of achieving them? Warren F. Schwartz, 'An Overview of the Economics of Antitrust Enforcement' (1079–80) 68 Georgetown LJ 1075 at 1082:

> The costs involved in deterring violations by exacting a price from individual antitrust violators therefore must be traded off against the benefits from the resulting reduction in the harm caused by antitrust offenses. Decreasing the number of antitrust violations benefits society by reducing both the misallocation of resources associated with charging monopoly prices and the waste of resources involved in securing monopoly power. To maximize the social value of enforcement expenditures it is these two types of harm that must be minimized. Greater or lesser gain to the monopolist, however, does not necessarily correlate with the magnitude of the social harm caused by the proscribed conduct.

[30] A cost that is perhaps less than the cost of regulating and administering competition law. See, in particular, the study carried out by A. Haberger, 'Monopoly and Resource Allocation' (1954) 44 Am Economic Rev 77. The period under empirical examination extended from 1924 to 1928. Haberger, who was aware of the problems of measurement, decided to overestimate rather than underestimate the cost of monopoly. Of course, an approach, which overestimates the cost of monopoly, is not reliable since the empirical measurement of cost is based on a system in which antitrust law already applies. The estimate cannot therefore be a true and fair view of the monopoly cost, which is already limited by the application of antitrust law. See also K. Cowling and D. Mueller, 'The Social Costs of Monopoly Power' (1978) 88 Economic Journal 727, who, for their part, had estimated the welfare losses for the US economy as between 4 and 13 per cent of GDP.

[31] See F. Jenny and A. Weber, *Initiation into Microeconomic Theory* (Paris: Dunod, 1983).

[32] See F.M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance*, 3rd edn (Boston, MA: Houghton Mifflin, 1990), at 459–62.

> the exercise of market power could readily be at least 1 percent of national product, or in excess of $100 billion annually, not withstanding the antitrust laws.[33]

Finally, an even later empirical study on 'total factor productivity' in 22 industries of 12 OECD countries between 1995 and 2005 demonstrated a causal link between strong competition enforcement and long-term economic growth, although it offered no hard figures on GDP.[34] While the specific figures estimated vary tremendously, the consensus among these studies is that competition enforcement is justified (and perhaps should even be increased) to reduce the huge cost to society that derives from the exercise of market power.

(3) Beneficial micro-economic effects

1.14 Micro-economic theory envisages the effects of competition on the welfare of individual economic agents. In this context, the early works of neoclassical economists in the late nineteenth century cast light on the welfare-reducing effects of monopoly on economic agents (Section (b)). The findings of those economists subsequently gave rise to a new, normative, body of economic literature, which views the enforcement of competition rules as a means to eradicate 'market failures' (Section (c)). Prior to delving into those issues, however, a number of general remarks concerning micro-economic analysis are appropriate (Section (a)).

(a) General remarks

1.15 **Allocation of scarce resources** Economic theory studies how scarce resources are allocated within society. To take an example, a business manager employs scarce (ie, limited) labour and financial resources.[35] His primary, if not sole, activity is thus to decide how best to use (allocate) those resources, for example purchasing inputs, making investments, etc, in order to maximize his return (ie, his profits). By the same token, given the scarcity of resources available, any human society must decide who will perform which tasks and under what conditions in order to maximize social welfare.

1.16 **Allocation method** To allocate resources, a given human society faces several options: it can delegate allocation decisions to a central government be it, or not, democratically constituted ('central planning') or it can rely on the 'market', that is, a system where suppliers and customers exchange their resources ('the market economy'). In most cases, societies allocate their resources through both State *and* market mechanisms, although not necessarily to the same extent.

(b) Neoclassical price theory

1.17 **Presentation** Neoclassical price theory was initially developed by Alfred Marshall at the end of the nineteenth century.[36] In its normative dimension, it views the market as the best form of economic organization. The famous 'invisible hand' of the market would indeed deliver an *optimal* allocation of scarce resources within society, by channelling those resources

[33] Jonathan B. Baker, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17(4) J of Economic Perspectives 27, at 43 and 45.

[34] See Paolo Buccirossi, Lorenzo Ciari, Tomaso Duso, Giancarlo Spagnolo, and Cristiana Vitale, DP7470 Competition Policy and Productivity Growth: An Empirical Assessment, September 2009.

[35] Our example is taken from N.G. Mankiw, *Principles of Economics* (New York: The Dryden Press/Harcourt Brace, 1998).

[36] See A. Marshall, *Principles of Economics* (London/New York: Macmillan, 1890).

to the economic agents who value them the most.[37] In layman's language, one would say resources are allocated to people who like them best.

1.18 **The decisive role of 'price'** Within the resource-allocation process, the *price* plays a critical coordination role,[38] in allowing the selection of the agents who will be supplied and the conclusion of transactions between suppliers and customers. The supply of goods/services can only take place if the price (the value) at which the customer/consumer is willing to buy the product matches the price (value) at which the producer agrees to sell his product. The supplier must offer a price lower than (or equal to) the maximum price which the customer is ready to pay for the product/service (his maximum valuation of the product/service). This is known as a *reservation price*. The customer must offer a price greater than (or equal to) the price under which the supplier would stop producing (in principle, any price lower than the costs of production, since at that price the supplier would lose money on each sale made). The market allows what is called an equilibrium price to be reached through negotiation, and this, in principle, guarantees optimal allocation of the resources.

1.19 **Monopolies and competition** Neoclassical price theory indicates that the optimal operation of the market—generally referred to as 'market performance'—is contingent on the existence or absence of competition. In a market with limited competition, for instance a monopoly, the allocation of resources will be suboptimal. When a single firm owns the entire production capacities of a market, it can refuse to supply certain customers who nonetheless are willing to pay a price greater than its costs of production. In this case, the allocation of resources is suboptimal since the monopolist could improve the situation of those particular customers by selling them the product without incurring any loss (its costs would still be covered).[39] The exclusion of certain customers from consumption leads to a *deadweight loss*. Those particular customers who are not supplied are forced to shift to other products, which they value less. In addition, the customers that are supplied, because they are ready to pay a higher monopoly price, have less resources to invest into other products/services.

1.20 A similar logic applies to markets where suppliers coordinate their industrial and commercial policies (eg in the case of a cartel). Producers can refuse to supply certain customers by collectively reducing their output. The Organization of Petroleum Exporting Countries (OPEC) is a well-known example of this. By means of a formal, institutionalized agreement, oil-exporting countries collectively reduce the quantities of petrol placed on the market, thereby causing certain customers who value it at levels exceeding the costs of production to be excluded from the market.

1.21 Of course, one may wonder why a supplier would refuse to supply its products to customers that value it. Here again, neoclassical price theory offers an explanation. Economic agents are deemed to act 'rationally', and thus seek to maximize the utility which they derive from

[37] See A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776. Depending on their respective preferences, each economic agent that values a good, service, or investment, may be freely supplied on the market.

[38] See Michael L. Katz and Harvey S. Rosen, *Microeconomics*, 3rd edn (Columbus, OH: Irwin McGraw-Hill, 1998), at 10.

[39] In the sense of Vifredo Pareto's optimum, ie, 'making someone better off, without making someone worse off'. According to Pareto, an optimal allocation of resources exists when it is no longer possible to improve the situation of any individual without harming another individual. See V. Pareto, *Cours d'économie politique* (Lausanne: 1896).

their activities.[40] For a firm, utility maximization equates to profit maximization, that is, the maximization of the difference between the price charged and the cost incurred. By reducing production, a firm with a monopoly can create scarcity on the market and thereby lead prices to rise. Limiting production is therefore an obvious profit-maximizing strategy, provided, of course, that the gain arising from the price increase exceeds the loss arising from the reduction in the quantities supplied.

Debate Economic theorists do not fully agree in respect of the magnitude of the harmful effects of monopolies. On the one hand, a number of orthodox economists consider that the sole harmful effect of monopolies lies in the exclusion of potential customers whose reservation price is less than the monopolist's price but greater than its costs.[41] This *deadweight loss*, or *allocative inefficiency* of the monopoly, may be corrected by introducing price discrimination. Under perfect price discrimination, the monopolist adopts differentiated tariffs, indexed to the reservation price of each customer on the market, so that all of the quantities requested at a price greater than cost are supplied. The fact that certain customers pay a price far in excess of costs is not a problem, as long as they are ready to pay for it (their reservation price is not met). Competition economists often refer to this approach as the *total welfare* standard. **1.22**

According to other authors, the primary cost of a monopoly is the price surplus paid by customers to the monopolist even if all of the quantities requested on the market are indeed supplied (eg in the case of price discrimination). All customers, including those whose reservation price is high, should be supplied at a price level that is geared to the costs of the monopolist. There is otherwise an inappropriate transfer of income from the customer to the supplier, which may be referred to as a *distributive inefficiency*. Because it focuses on the well-being of the customer, this approach has been labelled the *consumer welfare* standard. In practice, it has led politicians to support the adoption of price control mechanisms on monopolists in times of economic inflation.[42] **1.23**

(c) The market failure theory

Introduction Building on the works of neoclassical theorists, a new economic school of thought, sometimes called *welfare economics*, emerged. As explained previously, the free operation of economic agents on the market occasionally fails to ensure an optimal allocation of resources. This may, for instance, happen because a producer holds a monopoly or because rivals coordinate their pricing policies. When such 'market failures' arise,[43] public **1.24**

[40] The premise that undertakings are absolutely rational at all times must be qualified. See eg Gary S. Becker, 'Irrational Behavior and Economic Theory' (1962) 70(1) J Political Economy 1 (discussing how some irrational (non-optimizing) firms may exist in a largely rational industry, at 11–13). More intuitively appealing in its explanation of suboptimal behaviour is the theory of 'near-rational behaviour'. Along these lines, see George A. Akerhof and Janet L. Yellen, 'A Near-Rational Model of the Business Cycle, With Wage and Price Inertia' (1985) 100 Quarterly J Economics 823 (discussing that firms may adjust prices and wages slowly and thereby fail to optimize at every point in time, even though the related losses tend to be small, at 825).

[41] See Mankiw, n 35, at 318.

[42] According to the orthodox view, combating inflation, eg, is not a suitable area for competition authority intervention. Inflation leads to a general price increase on the market, thereby affecting all producers uniformly. See K.N. Hylton, *Antitrust Law* (Cambridge: Cambridge University Press, 2003), at 151.

[43] See Mankiw, n 35, at 10. The invisible hand that guides the market does not always operate optimally. In particular, one or more of the following shortcomings may be present in a market: externalities (ie, a spillover stemming from an economic transaction which impacts third parties that are not directly involved in the transaction), public goods (goods or services which benefit all of society and which are neither exclusive nor rivalrous), asymmetries of information (situations where there is imperfect information on one side of transaction),

intervention into the marketplace is deemed necessary to eradicate the observed inefficiencies.[44] This need for public intervention is what caused competition law to develop.[45]

1.25 **Government failure** Whilst modern economic theory teaches that market imperfections justify public intervention, in addition it demonstrates that government intervention is also fraught with significant imperfections. The first of these imperfections is *informational*. As compared to firms, public authorities do not possess accurate, comprehensive, reliable information on markets (on prices, costs, output, technology, etc). Absent perfect information, government may thus be mistaken. Public intervention may in turn lead to suboptimal outcomes (ie, it may not improve social welfare). The costs of intervention may even be higher than those of the original market failure which it aimed to correct.

1.26 A second imperfection concerns the risk of *opportunism* of government representatives. Public choice theory argues that elected officials (and, even more so, civil servants) are, like entrepreneurs, driven by self-interest and profit-maximization objectives. Because public officials do not sell products/services in exchange for a price, and thus cannot make monetary profits, 'profit maximization' takes other forms, such as ensuring re-election or reappointment, expanding powers and jurisdiction, or increasing notoriety.[46] Such strategies may lead to suboptimal decisional outcomes, with public officials making self-serving choices at the expense of society. For instance, a civil servant may refuse to inflict a fine on a monopolist, in the hope that he may, in the future, obtain an influential position within this company (the so-called 'revolving door practice'). Or, at the other side of the spectrum, an agency official may push for large fines to be imposed on a high-profile company in order to fund a large budget for her group or in the hope for reappointment.

(4) The 'integrationist' effects of competition law

1.27 **Trade in Europe before 1957** Prior to 1957, a customer living in one Member State could not easily acquire goods and services produced in another Member State.[47] Indeed, a whole host of barriers to trade—tariffs (customs duties), quantitative restrictions (eg quotas), and regulations (eg specific marketing authorizations)—prevented goods and services from moving across national boundaries.[48]

1.28 **EC Treaty and common market** The adoption of the Treaty Establishing the European Community (EC Treaty or Treaty of Rome) in 1957 changed this situation. The Treaty of

transaction costs, natural monopoly (in the case of economies of scale or increasing returns), etc. All of these examples constitute scenarios of so-called market failure.

[44] Ibid. Appropriate State intervention is seen as justified for the purpose of promoting efficiency and eradicating or at least reducing market failures. In addition to the objective of promoting efficiency, a second objective of government intervention in the marketplace is the goal of fairness or equitable redistribution (eg through fiscal policies like taxes).

[45] It also led to the adoption of special regulations in certain sectors, eg in the telecommunications sector, to correct the negative effects of a market failure known as 'natural monopoly'.

[46] See J.M. Buchanan, *The Limits of Liberty* (Chicago, IL: Chicago University Press, 1975). A government subject to mandatory re-election will thus have a tendency to favour choices and decisions that are in line with the preferences of the categories of electors that are crucial to its re-election. See W.D. Nordhaus, 'The Political Business Cycle' (1975) 42 Rev of Economic Studies 169.

[47] Of course, by the mid-1950s the development of international transportation had contributed to the increase in imports/exports within the European area.

[48] The State has a predominant role in the development of a nation's wealth by adopting selective protectionist policies that include establishing tariff barriers and encouraging exports.

Rome progressively replaced several nationwide economic territories with a 'common market'[49] based on a 'customs union' (ie, the dismantling of tariff and non-tariff barriers),[50] and on the coordination of national regulations (through harmonization or mutual recognition),[51] so that factors of production (goods, services, labour, and capital) could flow freely between Member States.

Economic rationale of European integration The beneficial economic effects of European integration were well summarized in a report compiled in 1992 by Professor Cecchini.[52] First, market integration enables firms to achieve tremendous *economies of scale*. The dismantling of obstacles to trade increases the size of the market on which European firms are active, entitling them to serve new customers based in other Member States. In industries with high fixed costs, firms engaging in cross-border trade are thus able to reduce their average production cost and, consequently, their prices. Second, many domestic firms which were previously protected by tariff and non-tariff barriers suddenly faced the competitive pressure of foreign undertakings and thus had strong incentives to become more efficient.[53] **1.29**

Competition law as a safeguard to market integration The benefits arising from the elimination of public obstacles to trade could be largely undermined if firms could freely re-establish similar barriers. For instance, a supplier may contractually assign exclusive sale territories to its distributors and prevent them from serving customers outside their national territories. Such a distribution system obviously erects indirect obstacles to trade. **1.30**

Illustration: the *Volkswagen* case

The Volkswagen group was ordered by the Commission to pay a heavy fine (€102 million) for impeding the purchase of vehicles in Italy by customers not residing within that Member State.[54] Volkswagen had concluded agreements with its subsidiaries and with the Italian dealers in its distribution network aimed at prohibiting or restricting sales of Volkswagen and Audi vehicles in Italy to customers of other Member States or dealers in its network established in other Member States. The methods used by Volkswagen to restrict these 'parallel imports' from Italy included a contingent supply system for Italian dealers leading to a partitioning of the market and a bonus system that discouraged the Italian dealers from selling to non-Italian customers.

[49] See Art 2 of the former EC Treaty.

[50] In other words, a free trade area (no internal obstacles to trade) and a common customs tariff, in accordance with the definition in Art XXIV.8 of the General Agreement on Tariffs and Trade (GATT).

[51] When the EU adopted the Single European Act in 1986, it set the goal of creating an 'internal market' in Europe by 1992. See Art 7A. The concept of an 'internal market', which is closely related to the concept of a 'common market', expresses the desire for greater harmonization of national policies.

[52] See P. Cecchini, *The European Challenge, 1992: The Benefits of a Single Market* (Aldershot: Gower, 1988).

[53] Since the protection offered by customs duties has disappeared, prices, production, and innovation are directly stimulated by the dismantling of the obstacles to economic trade among Member States.

[54] See Commission Decision IV/35.733, *VW*, OJ L 124, at 60. See GC, T-62/98 *Volkswagen AG v Commission*, 6 July 2000 [2000] ECR II-2707; CJ, C-338/00 P *Volkswagen AG v Commission*, 18 September 2003 [2003] ECR I-9189.

1.31 To alleviate this risk, and ensure the *effet utile* of the other Treaty provisions in particular Articles 34, 49, and 56 TFEU, which aim at eliminating public barriers to intra-Community trade, the competition rules of the TFEU have been used to combat private obstacles to trade.[55] This particular feature of EU competition law finds formal expression in the provisions of the EU Treaty, which declares anticompetitive conduct 'incompatible with the common market' rather than unlawful.[56]

II. The History of EU Competition Law

1.32 Because it was first formally enacted in 1957, EU competition law is generally perceived as a relatively recent legal discipline (Section B). Its real, substantive, origins are however much older, and can be traced back to the history of ancient civilizations (Section A).

A. Origins of Competition Laws

1.33 **Antiquity** Anticompetitive practices are probably as old as the history of trade. In ancient Egypt and Greece (more than 3,000 years BC), historians report the existence of monopolistic and collusive practices.[57] In this context, the famous Greek astronomer, Thales, for instance, holds a somewhat surprising place in the history of competition law. Following erudite astronomic observations, Thales managed to forecast a particularly hot and sunny period.[58] Anticipating an abundant olive harvest, Thales immediately rented all of the oil presses available in the neighbourhoods of Miłet and Chios. When the harvest came around, Thales enjoyed a regional monopoly in olive pressing equipment. He made a fortune in renting olive pressing capacity.

1.34 The first regulations prohibiting anticompetitive conduct were adopted a few centuries BC, in India and Rome. Surprisingly, the substantive scope of those regulations was quite similar to modern competition rules: they forbade certain agreements between undertakings, boycotts, output-limiting conduct, and activities of private and public monopolies.[59]

[55] See in particular J. Stuyck, 'Libre circulation et concurrence: Les deux piliers du Marché commun', *Mélanges en hommage à Michel Waelbroeck*, vol II (Brussels: Bruylant, 1999), at 1477. See also C.-D. Ehlermann, 'The Contribution of EC Competition Rules to the Single Market' (1992) 29 Common Market L Rev 257, which emphasizes competition law's crucial role in the construction of the large European internal market.

[56] The concept of incompatibility with the common market is complementary to the goal of promoting economic efficiency. Namely, eliminating private barriers to trade and allowing for the completion of an integrated market achieves both goals. Note that the EU judiciary saw the incompatibility concept as separate from economic efficiency and especially important for obtaining an integrated market. See CJ, 6/72 *Europemballage and Continental Can v Commission*, 21 February 1973 [1973] ECR 215.

[57] See K.P. Ewing, *Competition Rules for the 21st Century: Principles from America's Experience* (The Hague: Kluwer Law International, 2003), at 75–6.

[58] The Greek philosopher Aristotle provides this example in his discussion of monopolies in Book IV of his *Politics* collection.

[59] See Ewing, n 57, at 76. The *Lex Julia de Annona*—adopted under Caesar during the Roman Republic around 50 BC—provided for sanctions against arrangements intended to raise the price of wheat. Around AD 301, the emperor Diocletian issued an edict aimed at fighting the increase in the cost of living which sanctioned, in particular, practices aimed at artificially creating situations of shortage in staples. Finally, Zeno's constitution of AD 483, which pursued similar goals, prohibited not only monopolies and private agreements but also eliminated 'public' or 'State' monopolies previously granted by the Emperor.

However, those regulations lacked effectiveness. They were periodically dismantled by kings, emperors, and governments wanting to extract rents from public monopolies as well as reward political support through the granting of private monopolies.[60]

Development of competition laws (tenth to eighteenth century) Until the tenth century, trade in Europe was limited and concerns for restrictions of competition were rare. The development of commercial exchanges in Europe, however, induced a number of countries to adopt competition-inspired legislation. In Great Britain, legislation was passed to establish price control mechanisms and to forbid specific infringements. English law prohibits, for instance, *forestalling* practices under which operators artificially create shortages by buying goods before they reach the market. Elsewhere in continental Europe, similar laws emerged between the thirteenth and sixteenth centuries.[61] **1.35**

Again, however, this second round of commitment of European nations to competition laws was fragile. Most economic activities were subject to State monopolies. In Great Britain, for instance, the government sold exclusive rights (labelled 'licences') over certain markets to collective organizations of entrepreneurs.[62] In continental Europe, with the reign of Louis XIV, the influence of Colbertism led nations to create national industrial monopolies and to support the export activities of domestic firms through the allocation of significant subsidies. **1.36**

Progress in the eighteenth century The development of common law paved the way for the development of an embryonic competition culture. Common law sanctions *restraints of trade*, that is, restrictions that two parties to a contract impose on each other's freedom to operate without restriction on the market (eg non-compete clauses in the sale of a business). In the same vein, in 1758 in *The King v Norris*, an English judge condemned several salt producers that had engaged in price fixing.[63] The ruling is particularly interesting because it considers the price level—allegedly low—as irrelevant. The infringement hinged on the very act of collusion. A per se prohibition of cartels began to take shape. **1.37**

At around the same time in France, 'corporations'—groups of individuals enjoying monopolies in entire economic sectors—fell into disgrace. In 1791, the *Décret d'Allarde* and the *Loi le Chapelier* elevated *freedom of trade and industry* as a mandatory rule of law and accordingly outlawed 'corporations'.[64] That said, in practice, monopolies, State funding, and protectionism still remained pervasive.[65] **1.38**

[60] The Emperor Justinian, eg, decided to reintroduce the status of State monopolies. See R.O. Wilberforce, A. Campbell, and N.P.M. Elles, *The Law of Restrictive Trade Practices and Monopolies* (London: Sweet & Maxwell, 1957).

[61] The King of Bohemia Wenceslas II introduced the *constitutiones juris metallici* between 1283 and 1305, which prohibited ore traders from making agreements among themselves to increase prices. The municipal statutes of Florence of 1322 and 1325 eliminated public monopolies.

[62] In 1561, a system of licences of industrial monopolies was introduced.

[63] See 2 Keny 300, 96 Eng Rep 1189 (KB 1758).

[64] See Allarde decree, 2–17 March 1791: 'Any person shall be free to choose the trade, profession, art or occupation he wants'. See le Chapelier Law of 14 and 17 June 1791.

[65] See M. Glais and P. Laurent, *Traité d'économie et de droit de la concurrence* (Paris: PUF, 1983), at 21–2.

B. Appearance of Modern Competition Laws

1.39 The first bodies of modern competition rules appeared in North America (Canada and then the United States) at the end of the nineteenth century (Section 1).[66] These two nations' rules had a significant influence on the design and content of the EU competition rules (Section 2).

(1) The adoption of competition law in North America

1.40 **From the industrial revolution to 'trusts'** The second industrial revolution, which started in the second half of the nineteenth century led to a surge in the degree of competition on many product/services markets in the United States. The development of modern transport (railway and internal combustion engine) and telecommunications (telegraph and telephone) induced US firms—which primarily traded their goods and services at the local, State level—to operate across several regions of the US territory, so as take advantage of economies of scale.

1.41 To insulate themselves from what was perceived as profit-killing price competition, market players formed *trusts*, that is, legal organizations in which several independent firms of the same sector cooperate to determine their commercial policies.[67] In the same vein, major mergers and acquisitions were implemented—under the impetus of financial tycoons such as JP Morgan—to reduce overcapacities in a number of industries (eg the steel industry) and undermine the 'ruinous' competitive process.

1.42 **Adoption of the Sherman Act** US farmers and small undertakings were harmed by the trusts' pricing policies, from which they sourced their inputs. In addition, the monopolization of the petrol industry by John Rockefeller's Standard Oil became a cause of concerns for the US decision-makers.[68] Petrol is a critical input in many goods and services, then and today. Its pricing has a significant effect on the overall US economy (and particularly, impacts inflation). Moreover, Rockefeller's monopoly threatened the democratic process. Policy makers feared that Rockefeller would seek to steer his strong economic power to influence decision making in a number of unrelated policy areas. Those concerns led to the adoption of the Sherman Act in 1890. Section I of the Sherman Act enshrines a prohibition of inter-firm contracts, combinations, and conspiracies (trusts and other forms of agreements), which restrain trade between US States. Section II of the Sherman Act outlaws the monopolization, or attempts to monopolize, of any part of the trade or commerce.

[66] Contrary to the popular view, Canada adopted a competition legislation one year before the United States. On 2 May 1889, Canada adopted the Act for the Prevention and Suppression of Combinations in Restraint of Trade, Statutes of Canada, 1889, 52 Vic, c 41.

[67] See M. Motta, *Competition Policy—Theory and Practice* (Cambridge: Cambridge University Press, 2004), at 1.

[68] This fear became the cause of the legislature's intervention with the adoption of the Sherman Act. In *Standard Oil Co of New Jersey v United States*, 221 US 1 (1911) [1], the US Supreme Court found Standard Oil guilty of illegally monopolizing the US oil industry through a series of anticompetitive actions. Standard Oil was severely sanctioned and dismantled into several competing companies.

(2) The emergence of competition regimes in Europe

1.43 It took 50 more years for competition rules to be adopted in Europe. Drawing on both the North American experience and on the insights of the so-called 'ordo-liberal' theories of the Fribourg School (Section (a)), the founding fathers of the EU enacted European-wide competition rules with the 1951 Treaty of Paris establishing the European Coal and Steel Community (ECSC). A few years later, the 1957 Treaty of Rome establishing the European Community (EC) recognized that a system of *undistorted* competition shall prevail in Europe, and provided to this end a sophisticated competition law regime covering anticompetitive agreements between competitors, abuses of dominance, and rules governing State aid (Section (b)).

(a) The ordo-liberal school

1.44 **The ultra-liberalism of the twentieth century** In the early twentieth century, an ideology that can be described as ultraliberal prevailed in Germany. The Prussian legislation in force in the German empire considered—as was subsequently theorized by Ludwig Von Mises and Friedrich Hayek[69]—that government should never interfere with freely established, contractual relationships between private economic agents. Accordingly, cartels were viewed as entirely lawful. Naturally, they became a pervasive market practice. Historians report that 4,000 cartels were active in Germany[70] at the end of the Weimar Republic in 1933.[71] Then the advent of the Nazi regime further increased the number of cartels in the German industry.

1.45 **The emergence of ordo-liberalism** Against this background, a number of German scholars from the University of Fribourg (amongst others, Walter Eucken) considered, in the 1930s, that because market competition does not arise spontaneously, State intervention is required in order to establish, organize, promote, and protect it. Left to themselves, firms will collude rather than compete.[72] And even when firms do not collude, they try to eliminate competition by acquiring harmful dominant positions.[73]

1.46 To promote healthy market competition, according to this view, later named ordo-liberalism, heavy-handed public intervention is thus required. However, because executive authorities' intervention intrinsically embodies a risk of discretionary abuse, the competition system must be based on a detailed, prescriptive, and high-ranking regulation. The Fribourg scholars thus advocated the adoption of an economic *constitution* ('*Wirtschaftsverfassung*'),[74] which, in practice dictated to firms occupying a dominant position to behave *as if* they were active in a competitive market.[75] To this end, competition statutes were explicitly and

[69] See Ludwig von Mises, *A Critique of Interventionism* (1929); Ludwig von Mises, *Interventionism: An Economic Analysis* (1941); Friedrich Hayek, *The Constitution of Liberty* (Chicago, IL: University of Chicago Press, 1960).

[70] See D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Oxford University Press, 1998), at 148.

[71] See K.-U. Kuhn, 'Germany' in D.J. Graham and E.M. Richardson (eds), *Global Competition Policy* (Washington DC: Institute for International Economics, 1997). Germany did, however, have an administrative system for controlling cartels, established by legislation in 1923.

[72] See Gerber, n 70, at 250.

[73] Ibid.

[74] Ibid, at 245.

[75] Ibid, at 252.

exhaustively to provide for a list of practices deemed to restrict competition (eg predatory pricing, boycotts, and the granting of loyalty rebates). As will be seen later, the very idea that dominant firms should be forced, because of their market position, to behave in a particular fashion has heavily influenced the case law of the European courts and is the foundation for the 'special responsibilities' provision in force today.[76] Similarly, the pervasive regulation of vertical agreements that has long prevailed under EU competition law is a clear practical repercussion of ordo-liberal ideas.

1.47 From a public policy perspective, the end of the Second World War provided a fertile ground for the transposition of ordo-liberal theories in Germany. Indeed, the postwar economic reforms of the West German Minister of Economics, Ludwig Erhard, significantly drew upon ordo-liberal theories.

1.48 **Marshall Plan** In the postwar era, the nations administering the German territory adopted laws designed to eliminate cartels and structurally to dismantle a number of industries in Germany.[77] The purpose of these rules was primarily to dissolve the giant industrial cartels (in the Ruhr region, in particular) and the groups which had helped Germany to reach a position of military supremacy under Hitler.

(b) Treaty establishing the European Economic Community

1.49 **Treaty of Paris** Aware of, and possibly enlightened by, the US experience and the work of the ordo-liberal school, the governments of Belgium, France, Germany, Italy, Luxemburg, and the Netherlands considered in 1951 that competition and market integration were necessary conditions for collective prosperity. European-wide competition rules should (i) ensure undistorted competition and (ii) eliminate private obstacles to trade amongst European countries. This rationale prompted the drafter of the 1951 ECSC Treaty to lay down competition provisions (Arts 65 and 66) prohibiting both cartels and abuses of economic power (including concentrations) in the steel and coal sectors.[78] The implementation of those provisions was then entrusted to a supranational executive body of the ECSC, the 'High Authority.'

1.50 **Treaty of Rome** In 1957, the six founding Member States of the ECSC considered that full economic integration, not limited to coal and steel, was necessary. Amongst other things they expanded, in the Treaty of Rome, the competition provisions of the ECSC Treaty to all economic sectors. Importantly, those rules were perceived as complements of other Treaty provisions which sought to eradicate public barriers to trade between Member States (ie, public regulations forbidding foreign firms from operating on domestic territory). There was indeed a real risk that, through market partitioning agreements for instance, firms reinstate private obstacles to trade, thereby undermining the dynamics of economic integration which the Treaty purports to achieve.[79] Moreover, the EC competition provisions embodied a ban on State aids that distort competition, in selectively advantaging certain companies over others.

[76] Ibid, at 253.

[77] Ibid, at 268–9.

[78] These provisions bear traces of sections 1 and 2 of the Sherman Act. The founding fathers were advised by several American experts (R. Bowie, Professor at Harvard, and G. Ball, an American attorney with an office in Paris). The provisions were 'corrected' by an eminent French legal expert (M. Lagrange, Councillor of State). See Gerber, n 70, at 338–9.

[79] Ibid, at 343; and D. Goyder, *Competition Law*, 4th edn (Oxford: Oxford University Press, 2003), at 23–4.

Compromise The competition rules of the EC Treaty are the result of a political compromise. On the one hand, the German ordo-liberal view that the rules of competition should be enshrined in a constitutional instrument is clearly reflected within the EC Treaty. Its preamble provides, at Article 3(f), that the *activities* of the Community shall include a system of *undistorted* competition.[80] Similarly, the rules on cartels and abuse of dominance form an integral part of the Treaty (Arts 85 and 86 EC, now Arts 101 and 102 TFEU). No regulatory instrument can thus supersede those provisions. **1.51**

On the other hand, the fact that the EC Treaty did not provide for a specific European competition enforcement structure (ie, institutions and procedures), was clearly a concession to the French government, which was reluctant to forfeit its freedom to intervene discretionarily in market-related issues, by being placed under the permanent supervision of a supranational authority.[81] This explains why Article 84 EC (now Art 104 TFEU) delegated the enforcement of the competition rules to the Member States. Article 84 EC provided nonetheless that the Council of Ministers ('the Council'), that is, the EU's main legislative arm, could adopt specific Regulations governing the enforcement of Articles 81 and 82 EC (now Arts 101 and 102 TFEU), pursuant to the procedure set out under Article 83 EC (now Art 103 TFEU). **1.52**

Institutional negotiations Competition enforcement issues gave rise to lengthy negotiations between France and Germany in the years following the adoption of the EC Treaty. Whilst the German government supported the adoption, pursuant to a Council Regulation, of an *authorization/notification* system, whereby the European Commission would *ex ante* review all business transactions involving a potential violation of the then Article 81 EC, the French—who had finally agreed to entrust the Commission with some powers—argued in favour of a *legal exception* system, whereby the Commission would pursue infringements of the EC competition rules *ex post*. **1.53**

Regulation 17/62 Those negotiations finally came to fruition in 1962, with the adoption of Council Regulation 17/62. In line with the German position, Regulation 17/62 established a centralized enforcement system,[82] where the European Commission (and more particularly the Directorate General for Competition, (DG COMP)) was entrusted with significant enforcement powers and in particular, the power to scrutinize *ex ante* agreements between firms. While national authorities and courts remained competent to enforce the prohibition laid out in the then Article 81(1) EC, Article 9(1) of the Regulation additionally bestowed upon the Commission exclusive jurisdiction over the enforcement of Article 81(3) EC. This provision salvages anticompetitive agreements from the prohibition of Article 81(1) EC, provided the said agreement generates economic benefits. In practice, all firms likely to conclude a potentially restrictive agreement are thus incentivized to 'notify' it to the Commission. **1.54**

Limits of Regulation 17/62 This *mandatory notification* procedure, which had the undeniable direct merit of helping the Commission to build significant market expertise quickly was, however, fraught with very significant shortcomings. Only a few years after the adoption of Regulation 17/62, the Commission had received a massive number of notifications, and **1.55**

[80] See Art 3(f) EEC Treaty, later Art 3(1)(g) EC.
[81] See Gerber, n 70, at 347.
[82] See Council Regulation 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty, OJ L, 21 February 1962, at 204.

was no longer capable of enforcing the competition rules in a swift, timely manner. The Commission thus developed a number of administrative practices to speed up case processing: adoption of block exemption regulations and guidelines, *comfort letters*,[83] negative clearance decisions,[84] *de minimis* notices, etc.

C. Modernization of EU Competition Law

1.56 **The modernization process** In 1999, 40 years after the inception of Regulation 17/62, the Commission undertook a review of the EC competition enforcement framework. The Commission's effort ushered in a 'White Paper on the modernisation of the regulations implementing Articles 85 and 86 of the EC Treaty', which painted a grim picture of its own enforcement activities:[85] the Commission's monopoly over the notification and exemption of agreements had led EC and non-EC firms to notify a huge number of agreements which, for the most part, did not pose a real threat to competition. As a result, the Commission had spent a considerable amount of time reviewing benign agreements, whilst more serious agreements, those that are difficult to uncover, had hardly been investigated for lack of available resources.[86] In addition, this notification procedure imposed significant costs and red tape on companies.

1.57 **Regulation 1/2003** The White Paper's main findings did not give rise to strong opposition within the competition law community.[87] The Commission thus subsequently submitted to the Council a proposed Regulation reforming the competition enforcement system. The Council followed the Commission's proposal and adopted Regulation 1/2003 ('the Regulation'), which now replaces Regulation 17/62. This Regulation came into force on 1 May 2004.[88]

1.58 The Regulation's primary innovation is to 'decentralize' the enforcement of EU competition rules. First, it abolishes the Commission's monopoly as regards Article 101(3) TFEU. Second, it replaces the *ex ante* authorization with an *ex post* legal exception system. Firms and their counsel can no longer request the Commission to review proposed agreements. Undertakings are now required to *self-assess* their business practices through the lens of Article 101(1) and (3) TFEU.

1.59 **Entry into force of the Lisbon Treaty** The TFEU, which followed the ratification of the Lisbon Treaty in 2009, replaces the EC Treaty. Under the new Treaty, the EU competition rules can now be found in Articles 101, 102, and 107 to 109, which replace Articles 81, 82,

[83] Administrative letters in which DG COMP informs the parties that it considers that competition law did not apply to the agreements notified or that it did not consider it necessary to pursue the procedure to the stage of making a decision.

[84] Formal decisions finding that the behaviour examined did not constitute either an anticompetitive agreement as defined in Art 81 EC (now Art 101 TFEU) or an abuse of a dominant position as defined in Art 82 EC (now Art 102 TFEU).

[85] See White Paper on the modernisation of the regulations implementing Articles 85 and 86, COM(1999) 101 final of 28 April 1999, OJ C 132 of 12 May 1999.

[86] See ibid.

[87] With the notable exception of D. Waelbroeck, 'La modernisation des règles de concurrence' (2001) 1–2 Cahiers de droit européen 204. This author considers that the number of notifications was not excessive.

[88] See Regulation 1/2003, n 10, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4 January 2003, at 1–25.

and 87 to 89 EC. As was the case under the previous Treaty, those rules cover agreements between undertakings, abuses of dominance, and anticompetitive State aids respectively.[89] Similarly, the substantive wording of Articles 101, 102, and 107 to 109 TFEU is almost identical to the wording of the competition rules of the EC Treaty. Overall, with the exception of State aid provisions, the competition rules of the Lisbon Treaty thus remain remarkably stable. The only noticeable change relates to the reference to the *common market* which, under the new Treaty, is replaced by a reference to the 'internal market'.

Current trends in European competition law In addition to the above institutional and procedural changes, in recent years EU competition law has undergone drastic, substantive evolution. Since the late 1990s, the Commission has endorsed a so-called 'more economic approach',[90] which turns EU competition law into a technical, sophisticated discipline, where economists often supplant legal experts.[91] In brief, the Commission will no longer focus on the formal features of a given practice to establish an infringement of the competition rules (the so-called 'forms-based approach'), but instead will seek to verify concretely whether the practice has given—or is likely to give—rise to competitive harm (the so-called 'effects-based approach'). This evolution, which this book seeks fully to embrace, has its advantages, insofar as it diminishes the risks of false convictions (type I errors). Yet, the benefits provided by economic analysis in the decision-making process must be put into perspective with the costs, namely those resulting from the *loss of legal certainty*. **1.60**

III. The Goals of EU Competition Law

A. Economic Goals

Doctrinal debate There has been, in recent years, endless doctrinal discussions on the economic objective(s) underpinning EU competition law.[92] The theoretical literature ascribes four possible objectives to the EU competition rules.[93] **1.61**

[89] Title VII, Chapter 1 TFEU replaces former Title VI, Chapter 1 EC Treaty.

[90] In the late 1990s, the Commission began a wave of reforms targeting the fundamental rules of EU competition law—regulations on vertical restrictions, horizontal agreements, technology transfer agreements, concentrations between undertakings. The text adopted under the reforms aimed to increase the efficiency of competition policy in Europe. See Commission Exemption Regulation 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements, OJ L 304 of 5 December 2000, at 3–6; Commission Exemption Regulation 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, OJ L 304 of 5 December 2000, at 7–12; Commission Regulation 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336 of 29 December 1999, at 21–5; Commission Notice—Guidelines on Vertical Restraints, OJ C 291 of 13 October 2000, at 1–44; Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3 of 6 January 2001, at 2–30; Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24 of 29 January 2004, at 1–22; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31 of 5 February 2004, at 5–18.

[91] See regarding this, D. Geradin and N. Petit, 'Droit de la concurrence et recours en annulation à l'ère post-modernisation', RTD Eur, 4, October–December 2006, 795.

[92] See eg L. Parret, 'Do We (Still) Know What We are Protecting?', Tilburg Law and Economics Center (TILEC) Discussion Paper No 2009-010, 1 April 2009.

[93] See R.J. van den Bergh and P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Antwerp/Oxford: Intersentia/Hart Publishing, 2001), at 1–2. Others would like to see competition

1.62 **Fairness** A first strand of authors consider that the primary economic goal of EU competition law is to protect *fairness in competition*. This interpretation is based on the wording of the Preamble to the Treaty of Rome itself.[94] It endorses the ordo-liberal view that the rules of the competitive 'game' should be the same for all undertakings. In other words, competition law enforcement should seek to level the playing field, offering a guarantee of genuine equality of opportunity to market players,[95] absent which firms would be dissuaded from participating in the market. In practice, this interpretation is well illustrated by Commission decisions ordering firms occupying a dominant position to share their IP rights or to increase their prices so as to assist the entry of their competitors. Quite ironically, a US Department of Justice official labelled this approach 'Gentlemen's competition'.[96] Similarly, the view that the EU competition rules seek to promote 'fairness' may have led the Commission to sanction, in recent years, practices whereby dominant firms manipulate official administrative procedures (eg marketing authorization procedures for pharmaceutical products)[97] or *ambush* their competitors (in the context of standard-setting organizations, eg, by failing to disclose that they own essential IP rights).[98]

1.63 **Economic freedom, plurality, and consumer choice** Articles 119 and 120 TFEU refer to 'the principle of an open market economy with free competition'.[99] Albeit inserted in the Treaty's general provisions on the EU's economic and monetary policy, certain scholars consider that those provisions arguably apply to the EU competition rules. In a nutshell, this view maintains that market players—in particular small ones—must be free to operate on the market, and should therefore be protected from any obstacle arising from the behaviour of other agents, whether public or private. This view, in turn, hinges on the belief that plurality in the market enhances social welfare.[100] The theoretical foundations of this can be traced back to the works of the so-called 'Harvard School' in the 1950s which held that the less concentrated a market, the better its performance in terms of price and choice for the consumer.[101]

policy given industrial objectives. See in particular, J. Oudin, *Europe et mondialisation—L'espoir industriel*, Information report 462 (97–98)—Delegation of the Senate for the European Union.

[94] See Preamble to the EC Treaty, which states, eg '*Recognising* that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition.'

[95] This is the concept of fairness that was espoused by the ordo-liberal doctrine already referred to. See Gerber, n 70, at 37–8.

[96] See 'Section 2 and Article 82: Cowboys and Gentlemen', Remarks by J. Bruce McDonald, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, presented to the College of Europe, Global Competition Law Centre, The Modernisation of Article 82, Second Annual Conference, Brussels, 16–17 June 2005.

[97] Commission Decision 2006/857/EC of 15 June 2005 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, COMP/A.37.507/F3, *AstraZeneca*, OJ L 332 of 30 November 2006, at 24–5.

[98] 'Commission accepts commitments from Rambus lowering memory chip royalty rates', IP/09/1897, 9 December 2009.

[99] See Arts 4 and 98 EC.

[100] See D. Encaoua and R. Guesnerie, *Politiques de la concurrence (CAE no. 60)* (Paris: La Documentation française, 2006), at 37. By extension, economic concentration may allow some dominant undertakings to influence the play of democracy. See G. Amato, *Antitrust and the Bounds of Power—The Dilemma of Liberal Democracy in the History of the Market* (Oxford: Hart Publishing, 1997), at 2.

[101] See, generally, Monti, n 9, at 87. In the United States, Professor Robert Lande is one of the few authors who espouses, in keeping with ordo-liberal ideology, that the main objective of the Sherman Act is the maintenance of a *choice for the consumer*. See R. Lande, 'Consumer Choice as the Ultimate Goal of Antitrust' (2001) 62 U Pittsburg L Rev 503:

> The role of antitrust can best be understood in terms of a fundamental standard—the standard of consumer choice. The antitrust laws are intended to ensure that the marketplace remains