

Introduction

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From a legal perspective, competition law has been at the centre of EU law and of European integration for the past fifty years. Together with the fundamental freedoms, it has formed the core of the common-market project as the most successful part of European integration. EU competition law and its enforcement are also often seen as excellent examples of supranational law and governance. Articles 85 and 86 EEC (now Articles 101 and 102 TFEU) were among the first provisions of the Treaty of Rome to be held to have direct effect in the member states. In 1962, Regulation 17 provided the European Commission with direct enforcement powers, and with the exclusive competence to grant exemptions under Article 85(3) EEC (now Article 101(3) TFEU). As specified in Regulation 17 (superseded four decades later by Regulation 1/2003), the Commission had the power to issue decisions directly binding upon undertakings. Furthermore, within the framework of Article 90(3) EEC (now Article 106(3) TFEU), the Commission was empowered to adopt decisions directly binding upon member states.

Based on these features, it is often argued, competition law has fundamentally shaped the path of European integration: it has helped to open up national markets and, during the 1980s and 1990s, to liberalize large sectors of the economy. This structural force of competition rules—in part due to the specific institutional characteristics of EU competition law enforcement and the doctrine of supremacy of Union law vis-à-vis national laws—distinguishes EU competition law from competition policies in other parts of the world, including the United States. Finally, a competition law ‘theory’ or ‘philosophy’ evolved which was widely accepted for a long time, despite deep differences in national legal traditions. According to this theory, competition law was to be seen in close connection with a fundamental decision in favour of a free market economy. It was to provide a legal framework for the operation of such a system, namely in the form of clear rules of conduct for market actors. Such a system was also expected to be in the best interest of consumers and to serve as a source of

prosperity and wealth. Finally, it was thought to provide legitimacy to the European project, as it was based on the protection of economic freedoms and the rule of law. Against this backdrop, it is often seen as the core of a genuinely Western European competition law tradition, distinct from US antitrust law; a true ‘European model’ of competition law.

This account of the normative foundations of EU competition law has repeatedly been the subject of intense discussion, and it has recently become so again. Over the years, the ‘prioritization’ of the protection of undistorted competition over selective interventions to promote various policy goals has been an issue—in particular where public measures related to state monopolies. The Treaty authors included specific provisions tailored for such scenarios; namely, Article 37 EEC (now Article 37 TFEU) and the above-mentioned Article 90 EEC. In recent years, the seemingly established normative foundations of EU competition law have been called into question by a welfare theoretical approach (the so-called ‘more economic approach’). According to this interpretation, welfare maximization should be accepted as the only (or superior) goal of competition policy. Interventions into the competitive process should be regarded as justified where they can be shown to maximize welfare overall. Both lines of debate stand for visions of European integration that fundamentally differ from the model to which many competition lawyers have traditionally been committed: a model of integration by law is replaced by a model of integration driven by political agendas or by an overall welfare goal.

Among lawyers, these debates surrounding the normative foundations of competition law have raised an acute interest in the history of competition law. Has the European ‘philosophy’ as sketched above indeed been so widely recognized from the start? To what extent has this been due to ‘Ordoliberal’ influence?¹ Should Europe stick to its original model? And as between US antitrust and EU competition law, is there a superior model?

Competition law is an established field of legal research in European Union law. Together with internal market law, it has been at the core of substantive EU law for a long time, whilst other EU lawyers have focused on the institutional side of EU law. Over time, and with the growth of integration, EU law has diversified. Simultaneously, competition law has turned into a highly specialized area of EU law.²

Historians, in contrast, have been quite reluctant to deal with the developments leading to today’s EU competition law. Until recently, this backbone of the

¹ For a reliable characterization of Ordoliberalism by an outsider, see Michel Foucault, *Die Geburt der Biopolitik, Geschichte der Gouvernementalität* 2, (Frankfurt am Main: Suhrkamp Verlag, 2004).

² See, eg, Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 4 (Munich: Beck, 2012), 609–29.

Common Market has had next to no impact on their accounts of European integration. Between lawyers and historians, there seems to be a divide in the account of the early phase of European integration, similar to the gap that Joseph Weiler has identified between lawyers and political scientists: Whereas lawyers have characterized the foundational period of Community law as an ‘heroic epoch of constitution-building in Europe’,³ with competition law at the core of a dynamic and forceful supranationalism,⁴ historians have focused on the politics of integration. Their work has mainly concentrated on the tough and protracted bargaining processes between the member states and European institutions, and many of them have stressed that these processes did not lead to the creation of a supranational order, but to that of a hybrid, *sui generis* political entity.⁵ Such views are quite similar to those of political scientists, who tend to interpret the period as an ‘era of crumbling supranationalism’.⁶

In addition, beyond competition, law has remained almost invisible in most accounts of European integration by historians, at least until recently. This can partly be explained by a lack of access to archival sources—as a defining ingredient of the work of EU historians. The ECJ is notorious for not having an official archive, and for turning it into a ‘virtue’ insofar as it has facilitated discreet internal discussions and significant anonymity.⁷ Many other materials—for instance, those of the Directorate General (DG) IV, in charge of competition at the European Commission—have also become accessible only recently, since most European countries, as well as the EU institutions, have a thirty-year rule by which internal documents cannot during that period be accessed. For this reason, EU history in general is ‘young’ in comparison to EU law research.⁸ Another explanation for the benign neglect of competition issues is the training many EU historians have received, which is strongly

³ Quote in Joseph H. H. Weiler, *The Constitution of Europe: ‘Do the New Clothes have an Emperor?’ and other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), 38.

⁴ Christian Joerges, ‘The Law in the Process of Constitutionalizing Europe’, EUI Working Paper Law No. 2002/4, 6–10.

⁵ See, eg, N. Piers Ludlow, *The European Community and the Crises of the 1960s: Negotiating the Gaullist Challenge* (London: Routledge, 2006).

⁶ Quote in Weiler, *The Constitution of Europe*, 38; for the work of political scientists, see, eg, Hubert Buch-Hansen and Angela Wigger, *The Politics of European Competition Regulation: A Critical Political Economy Perspective* (London: Routledge, 2011); Michelle Cini and Lee McGowan, *Competition Policy in the European Union*, 2nd edn (Basingstoke: Palgrave, 2009); Lee McGowan, ‘Theorising European Integration: Revisiting Neofunctionalism and Testing its Suitability for Explaining the Development of EC Competition Policy?’, in *European Integration Online Papers* 11 (2007).

⁷ As a summary of the *mentalité* driving this approach, see Peter L. Lindseth, ‘The Critical Promise of the New History of European Law’, in *Contemporary European History* 21 (2012), 468–70.

⁸ As overviews on the historiography, see, eg, Wolfram Kaiser and Antonio Varsori (eds), *European Union History: Themes and Debates* (Basingstoke: Palgrave, 2010); Kiran Klaus Patel, ‘Europäische Integrationsgeschichte auf dem Weg zur doppelten Neuorientierung: Ein Forschungsbericht’, in *Archiv für Sozialgeschichte* 50 (2010), 595–642.

influenced by diplomatic history and hence has little proclivity for legal concerns. Instead, the top level of politicians and their decisions have been the primary focus of research for a long time. The concrete content of integration was often treated rather superficially, thus replicating the position of political elites who saw economic integration and legal instruments primarily as means for political ends. While this trend is most obvious in historians' textbooks and surveys of European integration history, it has also affected the more specialized literature.⁹

This picture has only changed over the past five years, during which law has become one of the most versatile and exciting fields of European history research. Many of the most recent studies embark on an interdisciplinary dialogue and test the assumptions and models of lawyers, political scientists, and others against the evidence of primary archival sources which have finally become available. Some studies confirm existing interpretations, while others challenge conventional wisdoms; for instance, by viewing the 'constitutional' interpretation of Weiler, Eric Stein, and others¹⁰ not as an adequate interpretation of a historical fact but rather as a legitimizing strategy promoted by the ECJ and other European institutions. In a similar vein, some scholars have challenged ideas about the autonomy and self-executing quality of law and stress the bargaining processes with which jurists have managed to empower themselves.¹¹

It would go too far to call this more than a convergence of sorts. Still, dialogue between the disciplines of law and history has now become an exciting prospect and this is exactly what this book is about. Its basic idea is to study the evolution of EU competition law and policy, both in legal and historical perspective. At the crossroads of the two disciplines' vantage points, we raise the following questions: How can a review of the early political battles, negotiations, and decisions enrich the understanding of modern EU competition law, and how can a legal focus on court decisions impact on historical accounts of European competition policy? Moreover, how can both disciplines profit from a structured dialogue, and how can this change our interpretation of European integration beyond the confines of a highly specialized literature or discipline?

⁹ See as surveys, eg, Elisabeth Du Réau, *L'idée d'Europe au XXe siècle: Des mythes aux réalités* (Paris: Editions complexe, 2008); Gabriele Clemens, Alexander Reinfeldt and Gerhard Wille, *Geschichte der europäischen Integration. Ein Lehrbuch* (Paderborn: Schöningh, 2008), or, for instance, Alan S. Milward, *The European Rescue of the Nation State*, 2nd edn (London: Routledge, 2000).

¹⁰ See Weiler, *The Constitution of Europe*; Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', in *American Journal of International Law* 75 (1981), 1–27.

¹¹ See, as a recent summary, the special issues introduced by Bill Davies and Morten Rasmussen, 'Towards a New History of European Law', in *Contemporary European History* 21 (2012), 305–18; and by Laurent Warloutzet, 'Introduction', in *Histoire, Economie & Société* 27 (2008), 3–6.

Chronology

We mainly focus on the period from the 1950s to the mid-1980s. This period of investigation comprises both the ‘foundational phase’ from the 1950s through the early 1970s—the period that is often seen as representing the ‘constitutionalization’ of competition law—and the years from the 1970s to the 1980s, a period of consolidation and increased application of competition rules to state monopolies. For the earlier part of this phase, the 1957 Treaty of Rome stands out, since it laid the formal basis for today’s EU competition policy. It is therefore the logical starting-point of our analysis. But the dynamics unleashed in the EEC framework cannot be studied without taking into account the negotiations leading up to the signature of the Treaty, as well as the formative experience with competition law in the European Community of Coal and Steel (ECSC) since 1952. Already the ECSC included a rather wide range of antitrust provisions. Its stipulations were a novelty for an international organization in Western Europe, and while the ECSC remained largely a paper tiger for lack of a strong policy implementing these provisions,¹² the Coal and Steel experience became a central point of reference during the Treaty of Rome negotiations. The same holds true for the experience with national competition policies—particularly those of the EEC member states themselves during the post-war years, but also the lessons drawn from the interwar years and sometimes even from antitrust policies of the late 19th century. Furthermore, the development of EEC competition law also drew from experiences beyond the confines of the member states. Particularly the United States, with its Sherman Act of 1890, served as an important point of reference and delimitation. Taking all these considerations together, the starting point of our analysis clearly lies in the 1950s with the Treaty of Rome, but we do not stick to it too rigidly.

In analysing this ‘foundational’ phase in the history of Community competition law and policy, a number of more specific questions will be raised. What were the debates that led up to what has been identified as a particularly European approach to competition law? What was the role of the ECJ, and what did the Commission and other actors contribute to this development? Were these various actors united by a joint idea, or what kind of conflicts

¹² See, eg, Tobias Witschke, *Gefahr für den Wettbewerb? Die Fusionskontrolle der Europäischen Gemeinschaft für Kohle und Stahl und die ‘Rekonzentration’ der Ruhrstahlindustrie, 1950–1963* (Berlin: Akademie-Verlag, 2009); Raymond Poidevin and Dirk Spierenburg, *The History of the High Authority of the European Coal and Steel Community: Supranationality in Operation* (London: Weidenfeld & Nicolson, 1993).

shaped the evolution of European competition law? Was there indeed an ‘Ordoliberal’ influence, or what were the driving forces behind the evolution of the competition law and policy of the Community?

The period that we study ends in the mid-1980s. At the time, the older consensus on what the eminent political scientist John Ruggie has called an ‘embedded liberalism’ slowly ended.¹³ The new doctrine focused more on the promotion of free trade, free-market principles, and the privatization of public enterprises.¹⁴ Simultaneously, a more utilitarian approach towards competition law began to gain traction, which seemed to fit well with the Commission’s increasing growth and competitiveness rhetorics. This perspective also favoured an increasing turn towards welfare economics in the field of competition law—a shift promoted and welcomed by American lawyers in reaction to the global relevance that competition law in Europe had meanwhile gained, accompanied by increasing friction between Community competition law and US antitrust law.

Our project does not explicitly deal with this shift towards a ‘more economic approach’. It is exactly the end of our period under study that marks the start of the debates leading up to that shift. The reasons for this choice are manifold. First of all, sticking to the period until the mid-1980s keeps our project manageable—and it keeps historians on board; most of whom are reluctant to speak about the most recent past, for which they lack appropriate sources. The time frame we have adopted also allows us to treat the foundational and consolidation period of Community competition law in its own right, and not only against the backdrop of the more recent debates. At the same time, our analysis does provide a useful background to think about the ‘more economic approach’ in context: some of the reasons referred to by the Commission in order to justify the shift in the enforcement regime are touched upon in the contributions to this volume, namely the backlog created by the notification regime. At the same time, an overall well-functioning framework of competition law doctrine had evolved when the debates about a ‘more economic approach’ started. While it was certainly in need of clarification, refinement and reform in some respects, the urgency of the call for a European ‘antitrust revolution’ arguably had other reasons: it was partly due to the specificity of the European enforcement regime

¹³ John Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’, in *International Organization* 47 (1982), 379–416; on this period more broadly, see Tony Judt, *Postwar: A History of Europe since 1945* (New York: Penguin, 2005), 535–58.

¹⁴ See, eg, John L. Campbell and Ove K. Pedersen, *The Rise of Neoliberalism and Institutional Analysis* (Princeton: Princeton University Press, 2001); Marion Fourcade-Gourinchas and Sarah L. Babb, ‘The Rebirth of the Liberal Creed: Paths to Neoliberalism in Four Countries’, in *American Journal of Sociology* 108 (2002), 533–79; François Denord, ‘Néo-libéralisme et ‘économie sociale de marché’: les origines intellectuelles de la politique européenne de la concurrence (1930–1950)’, in *Histoire, Économie & Société* 27 (2008), 23–33.

(and the backlog it entailed), and partly due to an ideological shift in DG Competition and to changes in the wider political landscape.¹⁵

State of the Art

There is already a substantial body of literature on the foundational and the consolidation period of Community competition law. However, our ambition is to provide a comprehensive account of the historical foundations of this regime from the 1950s to the 1980s. Until now, no initiative of this kind has been undertaken.

Any discussion of the state of the art probably has to start with David J. Gerber's seminal book *Law and Competition in Twentieth Century Europe*, published in 1998. Gerber places particular emphasis on the early intellectual roots of the EU competition rules and the Ordoliberal influences. Obviously, Gerber's book does not reflect the more recent research, and it downplays the more specific forces and actors that drove the development of European competition law in the early years. Given that Gerber's account of the issues covered in this book amounts only to some fifty pages, this does not come as a surprise.¹⁶ Some studies have added nuances to his argument while substantiating his claim on Ordoliberalism,¹⁷ but this interpretation has also attracted criticism. For instance, Hubert Buch-Hansen and Angela Wigger, among others, have stressed the limits of Ordoliberalism's historical role in this context. Some member states, such as France, as well as transnational business elites, they argue, resisted this approach to competition. According to their account, the 'content, form and scope of the European competition regime' was also shaped by a 'national mercantilist' discourse on regulation.¹⁸

¹⁵ For some views on these issues, see, eg. Buch Hansen and Wigger, *The Politics of European Competition Regulation*; Laurent Warlouzet, 'The Rise of a European Competition Policy, 1950–1991: A Cross-Disciplinary Survey of a Contested Policy Sphere', in *EUI Working Papers*, RSCAS 2010/80; Bastiaan van Apeldoorn, *Transnational Capitalism and the Struggle over European Integration* (London: Routledge, 2002); Ernst-Joachim Mestmäcker, 'The EC Commission's Modernization of Competition Policy: A Challenge to the Community's Constitution', in *European Business Organization Law Review* 1 (2000), 401–44; Heike Schweitzer, 'The Role of Consumer Welfare in EU Competition Law', in Josef Drexler and Reto M. Hilty (eds), *Technology and Competition: Contributions in Honour of Hanns Ullrich* (Brussels: Larcier, 2009), 511–39.

¹⁶ David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Clarendon Press, 1998).

¹⁷ See, eg. Lee McGowan, *The Antitrust Revolution: Exploring the European Commission's Cartel Policy* (Cheltenham, Edward Elgar, 2010); Sybille Hambloch, *Europäische Integration und Wettbewerbspolitik. Die Frühphase der EWG* (Baden-Baden: Nomos, 2009).

¹⁸ Buch-Hansen and Wigger, *The Politics of European Competition Regulation*, 8; also see Hubert Buch-Hansen and Angela Wigger, 'Revisiting 50 Years of Decision-Making: The Neoliberal Transformation of European Competition Policy', in *Review of International Political Economy* 17 (2009), 20–44.

Lawyers would in general not follow this claim as far as the substance of Article 85 and Article 86 EEC are concerned, although different aspects were clearly relevant in the state aid field. Rather, lawyers would typically emphasize the traditionally close interaction between competition and internal market goals established during the early phase of European competition law.¹⁹ They would also agree that, in the case law of the ECJ, this approach has been maintained ever since,²⁰ while hotly debating the merits of this orientation.²¹ Recent claims that competition law has, from the start, mainly pursued an efficiency goal,²² has remained an outsider's position.

Other disciplines have focused on different aspects, including in particular the varied voices and forces that shaped the discourse during the early years. The new interest of historians can mainly be attributed to the opening of archives as well as to a broadening of the methodological basis and the research questions in integration historiography. While several book-length studies have concentrated on the inter-governmental and supranational negotiations leading to the competition policy of the ECSC and the EEC,²³ others have studied the role of transnational experts, networks, and companies in the formulation of this policy, both before and after the Rome Treaty.²⁴ Furthermore, there are

¹⁹ Wolf Sauter has gone so far as to claim that competition was a secondary goal vis-à-vis market integration—Wolf Sauter, *Competition Law and Industrial Policy in the EU* (Oxford: Oxford University Press, 1997). See also, eg, Pinar Akman and Hussein Kassim, 'Myths and Myth Making in the Institutionalization and Interpretation of EU Action: The Case of EU Competition Policy', in *Journal of Common Market Studies* 48 (2010), 111–32; Pinar Akman, 'Searching for the Long-Lost Soul of Article 82 EC', in *Oxford Journal of Legal Studies* 29 (2009), 267–303.

²⁰ See, eg, Case C-468/06 bis C-478/06, *Sot. Lélos kai Sia* [2008] ECR I-7139, para. 65; and Cases C-403/08 and C-429/08, *Murphy*, judgment of the ECJ of 4 October 2011, not yet reported, para. 139.

²¹ For a theoretical ground of the linkage between competition law and the internal market, see Ernst-Joachim Mestmäcker, 'Offene Märkte im System unverfälschten Wettbewerbs in der Europäischen Wirtschaftsgemeinschaft', in Helmut Coing, Heinrich Kronstein and Ernst-Joachim Mestmäcker (eds), *Wirtschaftsordnung und Rechtsordnung—Festschrift zum 70. Geburtstag von Franz Böhm am 16. Februar 1965* (Karlsruhe: C. F. Müller, 1965), 345–91.

²² Akman, 'Searching for the Long-Lost Soul of Article 82 EC'.

²³ See, eg, Hambloch, *Europäische Integration und Wettbewerbspolitik*; Frank Pitzer, *Interessen im Wettbewerb. Grundlagen und frühe Entwicklung der europäischen Wettbewerbspolitik 1955–1966* (Stuttgart: Steiner Verlag, 2009); Tobias Witschke, *Gefahr für den Wettbewerb?*

²⁴ See, eg, Brigitte Leucht, 'Transatlantic Policy Networks and the Creation of the first European Anti-trust Law: Mediating between American Anti-trust and German Ordo-liberalism', in Wolfram Kaiser, Brigitte Leucht, and Morten Rasmussen (eds), *The History of European Union: Origins of a Trans- and Supranational Polity, 1950–1972* (London: Routledge, 2009), 56–73; or, as a political scientist's study deeply informed by history, Antoine Vauchez, *L'en-droit de l'Europe. Champ juridique européen et institution d'un ordre politique transnational*, unpublished habilitation thesis, Paris 2010; Sigfrido Ramirez, 'Anti-Trust or Anti-US? L'industrie automobile et les origines de la politique de la concurrence de la CEE', in Eric Bussière, Michel Dumoulin, and Sylvain Schirmann (eds), *Europe organisée, Europe du libre échange? Fin XIX siècle—Années 1960* (Brussels: Peter Lang, 2006), 203–28.

some first prosopographical studies on the personnel in charge of European competition policy at the EEC level.²⁵

The small but powerful literature of political scientists is mainly interested in the dynamics of negotiations that have shaped EU competition policy and it has added many new insights by applying a wide range of theories from the toolbox at its disposal to study European integration.²⁶ A couple of economists have also dealt with the subject, often contextualizing or even comparing EU practices with those of other jurisdictions.²⁷

Taken together, the multidisciplinary research on EU competition law and policy has emerged quite impressively over the past years and decades. However, the existing literature has an important drawback: There is no consensus on the formative influences that drove the emergence of the European competition regime or on its outcome. So far, the different pieces of the jigsaw have not been pieced together. Our book is an attempt to do just this.

Argument

At the core of our work, we address four issues that are situated both at an empirical and a methodological level. Firstly, the book revisits the contested influence of German Ordoliberalism in the history of EU competition law. Some of the practitioners involved in European integration as well as many scholars have stressed the role of this ideological source of European competition law, as well as the networks feeding it.²⁸ In particular, Gerber's *Law and Competition in the Twentieth Century* has to be mentioned again in this respect, but so must the studies that have challenged its interpretation. We claim that

²⁵ See, eg, Katja Seidel, *The Process of Politics in Europe: The Rise of European Elites and Supranational Institutions* (London: Tauris, 2010); Eric Bussière, 'Competition', in Michel Dumoulin (ed.), *The European Commission 1952–1972: History and Memories* (Office for the Official Publications of the European Communities, 2007), 303–16.

²⁶ Next to Buch-Hansen and Wigger, *The Politics of European Competition Regulation*, see, eg, Tim Büthe, 'The Politics of Competition and Institutional Change in European Union: The First Fifty Years', in Sophie Meunier and Kathleen R. McNamara (eds), *Making History: European Experience and Institutional Change at Fifty* (Oxford: Oxford University Press, 2007), 175–94; Lee McGowan, 'Theorising European Integration'; Stephen Wilks and Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies', in *West European Politics* 25 (2002), 148–72; Simon Bulmer, 'Institutions and Policy Change in the European Communities: the Case of Merger Control', in *Public Administration* 72 (1994), 423–44.

²⁷ See, eg, Roger Clarke and Eleanor J. Morgan (eds), *New Developments in UK and EU Competition Policy* (Cheltenham: Edward Elgar, 2006); Saul Estrin and Peter Holmes (eds), *Competition and Economic Integration in Europe* (Cheltenham: Edward Elgar, 1998).

²⁸ As a practitioner with highly influential views, see, eg, Hans von der Groeben, 'Policy on Competition in the EEC', *EEC Bulletin (Supplement)*, 7/8 (July/August 1961); Hans von der Groeben, *Aufbaujahre der Europäischen Gemeinschaft: Das Ringen um den Gemeinsamen Markt und die Politische Union (1958–1966)* (Baden-Baden: Nomos, 1982).

through our interdisciplinary setup, we manage to come up with an assessment that sorts out some of the juxtapositions and contradictions of the existing literature, thus lifting the argument to a higher level.

In a nutshell, we argue that Ordoliberal ideas have indeed influenced the evolution of EU competition law, with particular thrust during the ‘foundational period’ following the entry into force of the Treaties of Rome. Still, there was no simple transposition of Ordoliberalism from the German setting to the Community. Rather, important European actors felt that only specific features of Ordoliberal thinking, like the focus on individual rights and the rule of law, provided a good fit with the structure and strengths of European law and institutions.²⁹ As the rule of law tended to translate into power for the Commission, these structural features were also recognized by those actors who were not committed to Ordoliberal thinking. To be sure, positions within DG IV varied from the start, and remained so over time, with shifting balances of power and influence. The ECJ ensured the stability of doctrine over time—a doctrine that shared some important starting points with Ordoliberal thinking, but simultaneously emphasized the goals specific to EU law—including, most strikingly, the commitment to a common market.

Secondly, the book addresses the autonomy of law vis-à-vis other forces shaping European integration. Lawyers and historians tend to have different views on this, as mentioned before, and each can therefore serve as a good corrective for the other. In fact, we argue that despite all the twists in its trajectory, European competition law remained very stable across our period of study. Early on, the ECJ established its primacy over national laws. Moreover, despite the generality of their wording, Articles 85 and 86 EEC were interpreted to be directly applicable law, and not just policy guidelines to be considered in the design of Community policies. Competition law could thus emerge as a particularly ‘supranational’ policy—more supranational than, for example, the Common Agricultural Policy, another Community policy with its roots in the Treaties of Rome whose history emerged from the 1960s onwards. Due to its commitment to the rule of law, European competition law was never simply functionally driven, but contributed to the ‘constitutional’ character of the European legal order. In fact, claiming such a ‘constitutional quality’ was a conscious strategy by the ECJ, which was then negotiated in a wider realm.³⁰ The great success of the European regime is in part explained by the

²⁹ Christian Joerges, ‘The Law in the Process of Constitutionalizing Europe’, *EUI Working Paper Law No. 2002/4*, 10.

³⁰ For this argument specifically, see Morten Rasmussen, ‘Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65’, in *Contemporary European History* 21 (2012), 375–97; Lindseth, ‘The Critical Promise of the New History of European Law’.

fact that the ECJ and others from among the legal elite managed to institutionalize their ideas.³¹ That said, DG IV as well as the wider community of representatives of member states, experts, or policy networks, have seen several intense debates on the direction competition law should take. Interestingly, despite the very different backgrounds of the Commission's relevant staff, consensus on a forceful legal regime and public enforcement of competition law could ultimately be achieved. While the more Social Democrat imprint that European integration politics at large acquired during the 1970s led the Commission to take a somewhat more flexible stance towards crisis cartels for some time,³² the core of competition law doctrine remained untouched.

Thirdly, this does not mean that competition law evolved smoothly over time. The different chapters of this book show the serious conflicts that underlie its evolution. From the outset, battles were fought between proponents of a competition policy driven by varying political agendas and welfare objectives and proponents of competition law meant to constrain not only the exercise of private power but also the space for political intervention into the market. The priorities of public competition law enforcement were continuously redefined over time and determined by political compromise. For a long time, it was the joint commitment to the creation of an internal market that provided a common focus for actors from different camps. Standing behind it were fundamentally different ideas about the role of the market and the role of public authority, about competition versus cooperation, and about a utilitarian justification of the European project versus a joint commitment to the creation of a civil society on the basis of strong supranational individual rights—a debate that today lies at the heart of the heated discussions about a 'more economic approach'.

While these three arguments are situated at an empirical level, we argue at a methodological level for a history of competition law and policy that needs to be firmly embedded in wider trends of European integration. Fourthly, therefore, we plea for a widening of the analytical and empirical focus. This entails several things. Any given period under analysis has to be seen against the backdrop of longer-term developments. Such a long-term perspective, for instance, demonstrates how high the stakes actually were during the years in which Community competition law emerged: competition legislation in Western Europe after 1945 marked a radical rupture with the interwar years and the Second World War, when cartels were still considered positive and stabilizing features of an economy. Embedding the research broadly also

³¹ Rasmussen, 'Establishing a Constitutional Practice of European Law'.

³² On this wider trend, see, eg, Antonio Varsori and Guia Migani (eds), *Europe in the International Arena during the 1970s: Entering a Different World* (Brussels: Lang, 2011).

implies that the process of negotiating the legal competences regarding competition has frequently been part and parcel of wider deals between the member states and the emerging supranational institutions. An important example comes from the history of Regulation 17, which resulted from a package deal that also involved progress in the creation of the Common Agricultural Policy. In the negotiations, the German delegation went so far as to create a *junctim* between these two policy issues.³³ Moreover, the shifting role of the relevant institutional actors cannot be disregarded, a point that emerges plainly, for instance, when the strong standing of the Hallstein Commission (1958–67) is compared with the reduced role of the Commission under Hallstein's successor, Jean Rey (1967–70).³⁴ Transatlantic influences, as well as the lack thereof, must be added to the picture, too, as well as the role of European actors beyond DG IV, the Commission more broadly, and the ECJ. Transnational networks, experts, the representatives of various member states and alternative organizations such as the OECD have all energized the field of European integration and therefore have to be factored in.³⁵ Furthermore, the shifts of the macroeconomic environment in which the European Communities operated during the relevant time frame need to be taken into account.³⁶

Interdisciplinarity

To arrive at these and many other conclusions, we have opted for a particularly close form of collaboration between lawyers and historians. In fact, this book is the result of the first systematic interdisciplinary cooperation of lawyers and historians in EU studies. It brings together historians and lawyers in pairs in order to reassess the various aspects of the history of European competition law. In co-authored contributions, each of these teams has analysed a central question in the history of EU competition law and politics. Based on the latest

³³ See, eg, Pitzer, *Interessen im Wettbewerb*, 396. On the wider context of the CAP negotiations, see Kiran Klaus Patel, *Europäisierung wider Willen: Die Bundesrepublik Deutschland in der Agrarintegration der EWG* (Munich: Oldenbourg, 2009), 192–227.

³⁴ On the history of the Commission, see particularly Dumoulin, *The European Commission, 1958–72*.

³⁵ On the role of transnational actors, see Kaiser, Leucht and Rasmussen, *The History of European Union*; on the wider framework of international organizations in Europe, see Kiran Klaus Patel, 'Provincializing the European Communities: Cooperation and Integration in Europe in a Historical Perspective', in *Contemporary European History* 22 (2013), forthcoming.

³⁶ This, of course, has already shaped some of the earliest accounts of European competition law history; see Daniel G. Goyder, *EEC Competition Law* (Oxford: Clarendon Press, 1988).

state of the art as well as on primary research, this has led us to new answers. In following this approach, we are aware of the challenges of interdisciplinary research, including the different methodologies and the divergent stance as to normative judgements in the two fields. In this light, our project has a thoroughly experimental character, and it explores the potentials and limits of such an interdisciplinary cooperation. How can both disciplines profit from a structured dialogue, and how can this change our interpretation of European integration beyond the confines of a specific literature or discipline?

In this process, both sides have moved beyond the orthodoxies of their respective disciplines—and we as editors would like to thank our team members for their willingness to leave their comfort zones when embarking on this project. Maybe the most important difference between the two disciplines, as we learned during the project, is their stance on normative questions. While an explicit normative position plays a central role for lawyers—where the divide between academic research and legal practice is less firmly established than for historians (there is no world of practitioners for historians comparable to law, alas)—this is much less the case for historians. The lawyers on our team were willing to de-emphasize their normative concerns for an analytically driven scrutiny of the past. Simultaneously, their expertise in the nuances of the legal sphere was crucial for the project, as well as their insights into the practical consequences of laws, policy and court judgments. For their part, the historians were able to add a great deal regarding the politics undergirding the evolution of European competition law. Injecting the insights drawn from hitherto unused archival material has furthered our understanding of the role of the Commission and of the member states as well as of the wider historical context in which the concrete steps taken to advance the competition regime unfolded. Lawyers, by contrast, focus on administrative decisions or judgments and on ways to bring a larger set of decisions and judgments into a coherent line. In the legal community, battles fought fiercely at a given moment matter less over time as a consolidated case law emerges. In our project, both perspectives have been useful: while the historians have helped the lawyers to overcome the tendency to treat legal matters as ahistorical, the lawyers have pushed the historians not to get lost in sheer description of the past but rather to set their questions vis-à-vis a horizon of present-day concerns.

Together, both disciplines have also been able to compensate for the scarcity of archival sources revealing the inner deliberations of the ECJ, and together, they have arrived at new interpretations. While, in this and other contexts, historians sometimes overplay conflicts between diverging visions of actors, lawyers focus more on the auto-dynamic and self-executing dimension of law, which makes one hesitant to overplay any personal or political

opinions of actors in light of professional ethos and the force of law. Intense debates have thus challenged our often implicit assumptions, and have led us to an interpretation that balances and combines the various perspectives to a greater degree than in existing studies.

To this end, not only the interdisciplinary but also the international composition of our team has enriched the project. In general, both law and history are among the academic disciplines which to this day are characterized by significant methodological nationalism and a certain nation-centredness of discussions.³⁷ Our team was composed of scholars of very different backgrounds, and all of us have worked and lived for extended periods in host countries, often in more than one. This, together with the unique methods of cooperation employed, has helped to ameliorate some of the interpretative divides which characterize the state of the art.

To answer our questions, all chapters combine the analysis of the historical evolution of competition policy, on the one hand, with the history of the material legal dimension, on the other. We start with two chapters on the evolution of the substantive and procedural law, and then go on to reflect upon the most important exogenous influences. We have given preference to readable thought-pieces with a broad perspective over encyclopaedic or exhaustive description. All chapters cover the whole period under study and each of them deals with its topic comprehensively. At the same time, each chapter is based on a wide range of archival historical sources, legal texts, and legal, economic, and historical literature.

Other choices and other ways of organizing the book would have been possible. In the literature, some have argued that the Commission played an instrumental role in establishing the trajectory of European competition law and policy,³⁸ and therefore a chapter focusing explicitly on institutions, or for instance on the role of non-state actors such as companies, law firms, or groups such as the European Roundtable of Industrialists would have been possible. Or, instead of an actor-centred focus, a chronological organization of the book could have been an option. Instead, we opted for a topical approach that better allowed us to weave various perspectives (eg, of different actors or different chronological layers) together while also forging a close dialogue between the various contributions. Some important topics were left aside. This is true, in particular, for merger control. This omission was deliber-

³⁷ As one of the starting points in the debate about methodological nationalism, see Andreas Wimmer and Nina Glick Schiller, 'Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences', in *Global Networks 2* (2002), 331–4.

³⁸ See, eg, Warlouzet, 'The Rise of a European Competition Policy'; Cini and McGowan, *Competition Policy in the European Union*.

ate and logical, however, as merger control only became a concrete dimension of European competition law after the end of our period of study.³⁹

Contributions

The first chapter, co-authored by Sigfrido M. Ramírez Pérez and Sebastian van de Scheur, scrutinizes the general direction of Community competition law in the period under discussion by highlighting the evolution of the law on Articles 85 and 86 EEC (Articles 101 and 102 TFEU). Compared to the current state of the legal and historical debate about the central objective of European competition policy, they manage to harmonize two strands of interpretation which have long confronted each other. Thanks to their dual focus both on DG IV of the Commission and on the ECJ, Ramírez Pérez and van de Scheur are able to identify a crucial split in the ideational orientation and practice of the two institutions: in DG IV, German Ordoliberalism played an important role but never fully dominated, as some in the literature have claimed. Instead, there was a competing, more ‘Keynesian’ conception of competition policy, and this alternative to Ordoliberalism became particularly influential during the 1970s. While the Commission’s stance on competition was thus characterized by internal conflicts and shifting orientations, the ECJ adopted a consistent and powerful doctrine that embedded the goal of market integration in the pursuit of effective competition.

The next contribution, by Lorenzo Federico Pace and Katja Seidel, takes stock of the drafting history and the role of Regulation 17/62 in the evolution of Community competition law and policy. As with the first chapter, the authors here present a fresh argument that manages to reconcile rival interpretations. Pace and Seidel argue that while the text of Articles 85 and 86 show a substantial French influence, Regulation 17/62—and thus the procedural rules governing the implementation and public enforcement of substantive competition law—was more reflective of the German economic and legal tradition and understanding of competition. Simultaneously, they reveal that, despite some tensions, Regulation 17/62 was premised on the overall consensus to create a competition law culture in Europe. For this

³⁹ For a summary of the discussion relating to the prolonged efforts, from the 1960s to the 1980s, to secure a merger regulation, see Laurent Warlouzet and Tobias Witschke, ‘The Difficult Path to an Economic Rule of Law: European Competition Policy’, in *Contemporary European History* 21 (2012), 437–55. See also Bruce Lyons, ‘An Economic Assessment of European Commission Merger Control: 1958–2007’, in Xavier Vives (ed.), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford: Oxford University Press, 2009), 135–75; Simon Bulmer, ‘Institutions and Policy Change in the European Communities: The Case of Merger Control’, in *Public Administration* 72 (1994), 423–44.

reason, Article 85 was interpreted as a strict prohibition of agreements and concerted practices in restraint of competition—a prohibition unknown in most member states at that time. Moreover, the Regulation's notification system turned into a sort of transmission belt, transferring the new prohibition to each of the member states' competition laws. Taken together, these dynamics led to a revolutionary way of regulating relations between undertakings through previously little-used antitrust provisions.

Adrian Kuenzler and Laurent Warlouzet then assess the influence of the national traditions of competition policy on the Community as well as the flows from the European level back to the national tier. They contend that the progressive strengthening of European competition policies in the post-war decades mainly resulted from a convergence of sorts, and is less due to a diffusion process emanating from Brussels or the sheer force of one specific national model, like German Ordoliberalism. Instead of seeing 'Europeanization' as a top-down operation or a bottom-up movement, they stress the parallel and entangled moves into the direction of a partially 'Europeanized' form of competition policy in Western Europe. At a normative level, Kuenzler and Warlouzet argue that, due to this confluence of diverging traditions, the history of European competition law was shaped by two very different approaches—a more public-interest centred approach on the one hand, and a more judicial approach on the other. While the first dominated in the period until the early 1970s, the second gained in importance thereafter. In the end, they both had a strong bearing on European competition law and reveal a valid, but largely unexplored and unexpected source of legitimacy for a categorical pair of opposites in competition law: rule-based versus case-based forms of reasoning.

Complementing this focus on dynamics within the Community and the member states, Brigitte Leucht and Mel Marquis scrutinize American influences on European competition law and similarly walk the middle line in their interpretation, circumscribing the amount as well as the limits of transatlantic exchange. They contend that European actors did in fact draw on US antitrust ideas and that the history of European competition law was informed by a continuous transatlantic dialogue. DG IV officials and competition-policy experts formed part of a wider transatlantic landscape of intellectual exchange. Still, reference to the United States remained highly selective, and motivations undergirding this process of transatlantic exchange altered over time. In comparison to the Commission and its development of policy, the ECJ and its judgments often disregarded or (implicitly) opposed American ideas. Such resistance or indifference, it is argued, may lie in the fact that the ECJ was motivated by a quest for an autonomous, non-derivative understanding of competition law as part of an effort to express its constitutional mission of laying the building blocks for a collective European identity.

Thorsten Käseberg and Arthe Van Laer assess, in their chapter, the relationship between the competition policy and industrial policy. They stress that the period under study has been characterized by many different patterns of interaction, but that at the end of the day, European competition policy-makers often kept the upper hand vis-à-vis attempts to adapt competition policy to national or European industrial policy objectives. Simultaneously, they have managed to limit and to shape the gestalt of national and European industrial policies much more than the other way around. The legal set-up of the respective policies, the relative institutional power of DG III (in charge of industrial policies) and DG IV, the prevalent economic paradigm, and the leadership qualities and personal networks of key actors are the main factors explaining the relationship between these two policies evolved since the 1950s.

The next chapter stands out in comparison to the preceding ones in two respects. At a formal level, it only has a single author, Ernst-Joachim Mestmäcker, who has combined a remarkable scholarly career with the role of advisor to the Commission on competition issues since the early days of the Community. For these reasons, he is one of the principal actors of the early years of European competition law. At the level of content, Mestmäcker links together the various preceding chapters from the personal perspective of one who has lived through, and significantly influenced, this era. He thus addresses the central issues that the other papers also discuss, such as the tension between the idea of a community or union developing from a multinational international law treaty on the one hand, and the concept of an autonomous legal order on the other; the relationship between law and economics; and the relationship between competition policy and industrial policy, rounding off the volume with his concise analysis.

The final chapter, penned by the editors of this book, will discuss recent reforms of EU competition law and present-day concerns in light of their historical foundations, thus tracing areas of continuity and change. As such—and since it explicitly adopts a normative position—it is quite different in nature from the other contributions to this volume. Debates on the ‘more economic approach’ of the last fifteen years or so have tended to emphasize the discontinuities. By contrast, a historical perspective reminds us of the achievements of fifty years of European competition law. Issues once fiercely debated have become mainstream policy today, among them the relatively clear separation of competition law and other public policy goals, the application of competition rules to state-regulated sectors or the concurrent applicability of Community and national competition rules. Unwittingly, the ‘fight against cartels’ takes up an early Ordoliberal request which, in the early days, was overridden by a concern with vertical restraints such as restrictions on the re-selling of contract products into other territories. In other respects,

European competition policy has fundamentally changed. The entry into force of Regulation 1/03 constitutes a clear rupture with Regulation 17/62—a rupture competition lawyers still have to grapple with in some important respects. The legal versus discretionary nature of Article 101(3) TFEU under the new regime has not yet been fully resolved. The ‘more economic approach’—in particular its proposition to replace the goal of protecting the competitive process by the goal of efficiency—continues to be the most fundamental challenge to established competition law doctrine that European competition law has seen so far: the focus on a process resulting from the exercise of individual rights is replaced by a focus on outcomes to be justified along utilitarian lines. The basis for the legitimacy of EU competition law would thereby be changed. The belief in the ability to apply competition rules on the basis of predicted outcomes is conceptually related to the optimism traditionally underlying industrial policy.

Taken together, all these chapters provide, we suggest, a richer interpretation of EU competition law history than those appearing in previous works. This book is not ‘anti-Gerber’, but neither does it simply follow his—or any other—established line of argument. Intense discussion in an interdisciplinary setting has resulted in texts that come up with fresh claims which often combine hitherto unreconciled strands of interpretation. This is what makes our interpretation of the history of EU competition law and politics distinctive vis-à-vis competing accounts.

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