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THE RISE OF EUROPEAN COMPETITION POLICY, 1950-1991:  
A CROSS-DISCIPLINARY SURVEY  
OF A CONTESTED POLICY SPHERE

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ISSN 1028-3625

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Printed in Italy, October 2010

European University Institute

Badia Fiesolana

I – 50014 San Domenico di Fiesole (FI)

Italy

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## **Abstract**

Competition policy is perhaps the field in which the European Commission has the most extensive powers. Born institutionally in 1950, European competition policy now has a sixty year-long history. This paper argues that its history has not been peaceful, and that it has been characterized by heated debates. In a first methodological part, an assessment is made of the growing multidisciplinary academic debates relating to this topic. A claim for a methodology combining historical sources (archives) and a focus on the relationship between ideas and institutions. Then the paper turns to an empirical application of the methodology just described. In particular, it examines the history of European competition policy, using new archival findings in three steps: the institutional basis in 1950-62 (part II); the failure of the neo-functional momentum in 1962-81 (part III); and the rise of a powerful policy in 1981-91 (part IV).

## **Keywords**

Competition policy, History of European Integration, Theory of European Integration, European Commission, European Court of Justice.





## Introduction\*

In May 2009, the European Commission condemned the US giant firm Intel to a hefty fine of more than 1 billion euros for engaging in anticompetitive practices (EU Commission, 2009). This decision clearly shows the central position of EU competition policy in the political economy of Europe and the world, and in the European integration process. This paper argues that this situation was not achieved in a linear fashion but is the result of an evolving relationship between ideas and institutions which can only be understood through an historical lens.

The strength of European competition policy is drawn from three main conditions. To begin with, its institutional decision-making process was drastically centralized ever since its inception in 1962, and it remained highly centralized for another 40 years. During that time, it was the Commission that prioritized policy and decided on cases relating to anticompetitive practices, without any prior agreement from the member states or the European Parliament. The Commission benefited from independent sources of information (since companies had strong incentives to notify potentially anticompetitive agreements directly to it) and, subject to limits, it can set the level of fines according to its own priorities. Secondly, in terms of scope, the remit of the Commission as a competition authority is one of the most extensive in the world. It is competent to combat cartels and restrictive commercial practices, but it also has the power to review, *ex ante*, potentially harmful mergers and state aids. Indeed, the Commission's competence to review state aids *ex ante* distinguishes it from any other competition authority in the world. Thirdly, European competition policy is stronger than most national European competition policies. In this field, it was not the member states which decided to coordinate or to transfer one of their public policies to the European level; rather, it was predominantly the Commission which developed a new field of action and established its own competition policy. In addition, the Commission has broader powers in competition policy than it has in any other area. In the agricultural sector, for example, the Commission is obliged to follow the financial guidelines and price negotiations agreed by the member states. By contrast, while the European competition regime is regularly criticized for its neoliberal zeal, it stands as a solid and effective policy field in 2010, as Commissioner Joaquín Almunia<sup>1</sup> takes charge, sixty years after the prospect of a European competition regime was envisaged in the Schuman Declaration of 1950.<sup>2</sup>

These features explain the renewed interest in the origins of European competition policy from three convergent points of view. In the field of history, since academic studies are dependent on the usual 30-year rule regarding the opening of archives, the 1950s and the 1960s have now been thoroughly studied and explorations have been conducted into the 1970s and the early 1980s. In light of these developments a first conference was organized on the history of European competition policy in 2007 (Bussière-Warlouzet, 2008).<sup>3</sup> Secondly, the reform of European competition policy, which began to take hold toward the end of the 1990s, has dramatically changed the intellectual basis and working methods of this policy, with a shift away from its German origins. This has triggered a need to study history in order to better understand the current debates. This can be seen perhaps most

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\* The author is grateful to Kiran Klaus Patel, Mel Marquis, Katja Seidel and an anonymous reader for their helpful comments.

<sup>1</sup> See the list of Commissioners for competition in the annexes at the end of this article. Other annexes include a glossary and a chronology.

<sup>2</sup> The date of 1950 is highlighted here because it marks the "institutional birth" of European competition policy (with the Schuman declaration). However, the idea of international competition law had been discussed in other fora (in particular the Havana Conference in 1947), and in theoretical terms the notion of common European economic policies had been discussed before 1950.

<sup>3</sup> The conference was held in Paris (14-15 September 2007) and was organized by Éric Bussière, Brigitte Leucht, Katja Seidel and Laurent Warlouzet.

clearly in the work of legal scholars, who have focused in particular on the history of Article 102 of the Treaty on the Functioning of European Union (Schweitzer 2007 & 2008, Akman 2009) (ex-Article 82 EC / 86 EEC<sup>4</sup>). History has thus been used by non-historians as a heuristic tool. Interestingly, the same approach was applied in a recent economic study on mergers (Lyons 2009). Lastly, in political science, as competition policy now has quite a long history, new studies have been developed in order to link current reforms to historical debates. While political scientists specializing in competition policy have developed a new synthesis on their topic (Cini-McGowan, 2009), a new debate has emerged on the rise of a neoliberal Europe. This in turn has triggered the publication of several provocative articles (Buch-Hansen and Wigger, 2009; Akman-Kassim 2010).

In line with this growing literature on the history of European competition policy, this paper will attempt to put forward a first synthesis of these debates. It will argue for the need to develop a genuine historical methodology based on the relationship between constructivism and historical institutionalism. In a second step, on the basis of this approach it will proceed with an empirical study of the history of European competition policy from 1950 to 1992. The history is divided into three stages: the foundations of European competition policy (1950-62); the failure of the neofunctionalist dynamic (1962-85); and the subsequent decisive strengthening of this policy (1985-91). In particular, new historical findings based on first-hand archival research will be presented for the 1955-1973 period.

## I. The Academic Debate

The academic debates regarding the history of European competition policy have been lively, and two complementary approaches have emerged. This division is heuristic, as both approaches have sometimes been adopted by the same scholars. The first has concentrated on EEC institutions and the decision-making process, employing an approach that is mainly institutional. The second has considered the evolution of this policy field as one element of a larger trend; scholars taking this approach have generally adopted a constructivist and critical perspective.

### *The focus on EEC institutions*

A first series of studies placed emphasis on the EEC institutions, their decision-making process, and especially the supranational actors involved. This approach was first developed by political scientists that specialize in competition policy, including in particular Michelle Cini and Lee McGowan. In 1998, they published an important book (as of 2008 in its second edition) on European competition policy which included a very useful historical chapter. In those days, they felt isolated in their field of study: "Competition policy is one of the least understood of all the European Union's policies. Dominated almost exclusively by lawyers and economists, it has only recently been subject to systematic scrutiny from a political and public administration perspective" (Cini-McGowan, 1998, 1). Cini and McGowan thus extensively researched the development and functioning of European competition policy from an institutional point of view in order to close this gap. They focused on the decision-making process of the EU institutions, in particular the European Commission and its Directorate General for Competition (often called 'DG Comp' today; formerly known as 'DG IV'). The task for Cini and McGowan was to understand how the relevant institutions gained their competences, and how these competences were used. The role of the Commissioner for Competition was given special emphasis, in particular those acting in the 1980s (Peter Sutherland and Leon

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<sup>4</sup> The 2007 Treaty of Lisbon modified the numbering of the provisions of the 1997 Treaty of Amsterdam, which itself modified the numbering of the 1957 Treaty of Rome (establishing the European Economic Community, or "EEC"). The two main provisions mentioned in this paper are: Article 85 EEC, relating to restrictive agreements such as cartels (i.e., Article 81 EC under the Treaty of Amsterdam numbering and now Article 101 under the Treaty of Lisbon numbering); and Article 86 EEC relating to the abuse of a dominant position (Article 82 EC and now Article 102).

Brittan), when European competition policy started to gain momentum (Cini-McGowan, 1998, 31). In this regard, other studies have shown the dynamism and the skills of Leon Brittan as British Commissioner for Competition (Joana-Smith, 2002, 129-132). The focus on EU institutions is noticeable in all of Michelle Cini's studies, especially in her editing of the reference volumes on "European Union Politics" (Cini, 2003-2010). Lee McGowan has continued to concentrate on competition policy and has published several articles on the whole history of European competition policy (McGowan and Wilks, 1995; McGowan, 2007).

From a theoretical point of view, some of these studies have clear affinities with the neofunctionalist tradition. In this perspective, the development of competition policy follows a logical progression. It stems from functional pressures (technical arguments), the "spillover" process (the supranational institutional momentum), and the "shift of loyalty" from political and economic actors toward a European level of regulation, as the latter is considered to be more efficient. The paper mentioned above by Lee McGowan interprets the history of EU competition policy through a refined neofunctionalist lens. He stresses that his interpretation provides a useful "mid-range theory that is applicable to the dynamics and development of individual sectors" such as, in this instance, competition policy (McGowan, 2007, 13). From this perspective the supranational institutions' ability to benefit from various actors' support, and to respond to the market's needs to progressively increase their competences, is underlined. This process is both incremental and unavoidable. Another notable neofunctionalist contribution is the interpretation of the negotiation of the 1989 Merger Regulation by Tim Büthe and Gabriel Swank (Büthe and Swank, 2007). Tim Büthe then applied this neofunctionalist framework to 50 years of European competition policy history (Büthe, 2007), showing the importance of companies' complaints and ECJ rulings. By contrast, by focusing less on the decision-making process and more on discourse, another recent paper on the same topic showed how ideas (dismissed as "myths propagated by the Commission": Akman and Kassim, 2010, 112) have been used by the supranational institutions to strengthen their power (Akman and Kassim, 2010).

In the historical field, the institutional approach has been applied especially in studies of the 1950s and the 1960s, thanks to the opening of historical archives. In this context, a broad debate has emerged. On the one hand, some scholars have placed emphasis on the strength of transnational and/or supranational networks in the building of an ambitious European competition policy, both in the ECSC Treaty negotiations with Atlantic networks (Leucht, 2008) and during the first year of the EEC with the ordoliberal network (Hambloch, 2002 and 2007). In the latter case, Hans von der Groeben, the first EEC commissioner for competition policy, emerges as a particularly important figure (Elvert, 2004, 96-102). On the other hand, other academics have adopted a more intergovernmentalist vision. They have highlighted the clear failure of supranational actors to establish competition as a serious policy arena. For example, Tobias Witschke has studied the setbacks suffered by the High Authority in the application of its competition policy to the Ruhr steel industry (Witschke, 2009). Frank Pitzer has interpreted the first year of the EEC Commission's activity in the competition field as confirming Moravcsik's liberal intergovernmentalist framework (Pitzer, 2009).

In studying the same period as Pitzer and Hambloch, I have noted the success of the Commission's competition officials during the negotiations related to Regulation 17/62 (1960-62), but this was followed by a rebirth of the intergovernmental dynamic in the implementation of the Regulation (Warlouzet, 2010, 269-338). This was true for competition policy but also for many other economic policies discussed after 1962 (Industrial Policy, Economic and Monetary Union, etc.), when the member states learned to use the EEC institutions more efficiently (Warlouzet 2010, 494-495). This chronology follows the general evolution of the EEC: after the "honeymoon" (Marjolin, 1986, 304) of the 1958-62 period – in which the Hallstein Commission launched many initiatives without any efficient control on the part of the member states, this soon changed and the member states began to play a growing role, especially from 1963 onwards. This evolution, marked by notorious crises, has been confirmed both by general studies of European integration history (Ludlow 2005) and by a sectoral study on the CAP (Knudsen 2009).

The EEC institutions are not only studied from the decision-making point of view, but also by means of a cultural approach. Michelle Cini studied DG IV's administrative culture and the influence of both the Germans and of the legal training that was predominant among DG IV officials (Cini, 1996, 465-66). In her Ph.D, Katja Seidel went further and carried out a systematic study of DG IV's officials, their norms, backgrounds, ambitions and working methods (Seidel, 2008 and 2010, 153-172). By comparing the situations in DG IV and DG VI (agriculture), she clearly underlined the strengths and weaknesses of the German pro-competition policy network in the 1960s.

By providing in-depth studies of the complex European decision-making process – sometimes by comparing competition policy with other EEC policies, these research efforts lay the foundations for a better understanding of the European integration process. A complementary perspective has been provided by a more critical approach, which is described below.

### ***The constructivist and critical approach***

In contrast to the approach centred on the EEC institutions, another tendency in academic studies has been to consider the strengthening of European competition policy as an expression of a broader dynamic, namely the rise of neoliberal ideas in the 1980s which replaced the older consensus on “embedded liberalism” (Ruggie, 1982). In this regard, the development of European competition policy can be regarded as one of the many consequences of the progressive conversion of European elites to a new economic doctrine of public policy. This doctrine includes the promotion of free trade, the introduction of free-market principles in new areas (former state monopolies), and a limitation of the Welfare State.

From a theoretical point of view, a constructivist approach, whose emphasis lies in the power of ideas, is the clear choice of many academics, and it is often combined with a critical perspective. In this approach, actors' attitudes are based on conflict and social competition. Many studies emphasise the role of non-state actors and, in particular, transnational companies. The aim here is to show how such companies managed to influence the outcomes of the negotiations to improve the environment for business. Their influence on political actors – both at the national and at the EEC/EU levels – is decisive in explaining the decision-making process. For his study, Bastiaan van Apeldoorn adopted a “Gramscian historical materialist” and a “critical” perspective (Van Apeldoorn, 2002). He focused on the importance of the European Roundtable of Industrialists (ERT), an interest group consisting of various European transnational firms, in the priority choices in the 1980s-1990s (above all, the “completion” of the internal market), a fact already underlined by previous studies (Middlemas, 1995, 139; Cowles, 1995). Van Apeldoorn showed that the ERT was divided between a “neo-mercantilist” group and a “neoliberal” group, the latter being less hostile to the trend (beginning around 1988) toward a strong competition policy. Yet the link between the ERT's activities and the debates on competition policy is not clearly demonstrated. This problem is tackled in Hubert Buch-Hansen's Ph.D (Buch-Hansen, 2008), in which it is argued that the ERT was linked to the Commissioner for competition policy. In particular, the ERT lobbied in 1988-89 in order to push for the adoption of the Merger Regulation, which had been stalled since the early 1970s (Buch-Hansen, 2008, 155-158, 174). Like Van Apeldoorn, Buch-Hansen too adopts a neo-Gramscian perspective and underlines the importance of the shift in ideas (the rise of neoliberal ideas) and the role of transnational firms, whose strong interest in a single set of competition policy rules within the EEC led it to provide clear support for a supranational policy. Even scholars with a more intergovernmental approach (who do not follow this constructivist and critical approach) have recognized the role of international companies and their influence on EEC institutions, in particular in the adoption of the 1989 Merger Regulation (Bulmer, 1994; Pollack, 2003, 281-299).

Beyond companies, other non-state actors such as networks of lawyers and law firms have been taken into account. From a general perspective (i.e., without focusing on competition law), Antoine Vauchez has underlined the influence of such networks and firms (Vauchez, 2008). With regard to

competition policy, Yves Dezalay has stressed the fact that US law firms encouraged the adoption of strong pan-European provisions on competition policy in the 1980s in order to increase their activities in Europe, as they had a competitive advantage in this field (Dezalay, 1992, 143). Studying the recent reform culminating in Regulation 1/2003, Angela Wigger has highlighted the influence of law firms, many of whom stood to gain from decentralization and a greater emphasis on private enforcement (Wigger, 2007). Lastly, in a provocative pamphlet based on extensive research on the history of ideas and on recent academic literature, François Denord has interpreted the whole history of European integration – and especially competition policy – as an institutional proxy for transnational neoliberals to implement their ideas (Denord, 2009).

The constructivist and critical approaches have one obvious strength. They underline the fact that the development of a strong European competition policy is not natural or automatic but stems from a political and ideological choice. Moreover, these approaches provide an antidote to a pro-EEC/EU institutions tendency which characterizes certain institutional studies. For example, the approach adopted by Lee McGowan in the paper mentioned above seemed to imply that a strengthening of European competition policy was logical and inevitable (McGowan, 2007). However the neoliberal orientation of this public policy is not “natural” – either from an economic perspective (as a logical response to globalization) or from a political point of view (as a mechanical consequence of the dynamics of European integration). It is important to stress that other choices could have been made. For example, a competition policy relying more on national authorities could have emerged, or there could have been more support for creating a new supranational body independent of the Commission – a longstanding request of the German government (Warlouzet, 2010, 291; Cini-McGowan, 1998, 132; Pitzer, 2009, 442).

However, the focus on EEC institutions has obvious advantages because it leads to clearer descriptions in terms of decision-making processes. Many studies adopting the critical approach remained vague in this regard. A large number of them rely solely on witnesses’ accounts, public sources (discourses, reports), or mere parallels in terms of discourses, even though such evidence is insufficient to demonstrate a causal link. The impression of a conspiracy of elites sometimes emerge, a rather unlikely hypothesis. For these reasons, a different approach is necessary.

### ***History, Ideas and Institutions***

To deepen our knowledge of European competition policy, a threefold approach is necessary: a rigorous historical methodology, a clear understanding of the role of ideas in politics, and a historical institutionalist perspective.

To begin with, the historical methodology is based on an emphasis on chronology and contingency, and the use of archival sources. The focus on chronology means that there is no continuity in terms of the decision-making process, of the preference of actors or of the ideological paradigm. For example, the power of the Commission was not identical in 1961, at the peak of Hallstein’s influence, and in 1968, under the more modest leadership of Rey, even if the institutional provisions were, strictly speaking, the same (Even the 1966 Luxembourg compromise did not formally affect the rules in the Treaty of Rome from a legal point of view, although the Treaty’s political interpretation was altered). Likewise, a “neoliberal” in the 1950s is not the same as a “neoliberal” in the 1990s. Moreover, the need to take into account the contingencies of the historical process makes it essential to avoid any mechanical interpretation. Therefore, rigorous historians reject a “grand theory” of European integration, including any teleological narratives based on a natural evolution towards a “United States of Europe”. Lastly, historians use archival sources. They bring new insights and uncover long-buried information. While archives should not be considered a philosopher’s stone, transforming the imperfect work of scholars studying current debates into path-breaking studies revealing hidden truths, they do shed new light on old debates.

Secondly, the role of ideas must be linked to the decision-making process. Studying ideas through books, articles and discourses is not sufficient. Peter Hall has shown the conditions that are necessary for economic ideas to become influential: they must be considered useful (“economic viability”); they must interact with an administrative structure able to implement them (“administrative viability”); and they should be adopted broadly enough to have a meaningful impact (“political viability”) (Hall, 1989, 371-374). In other words, both the ideological and the institutional contexts must be taken into account. The “Varieties of Capitalism” literature (Hall-Soskice, 2001) has already studied these links, but they have done so mainly by comparing national situations rather than by focusing on the European integration process.

Thirdly, a historical institutionalist perspective is especially useful in the context of European integration. One of the main strengths of the EEC/EU is its capacity to produce “institutions”, which could be defined as “formal organizations and as informal rules and procedures that structures conflict” (Steinmo-Thelen, 1992, 2). Historical institutionalism takes into account these processes and takes account of the fact that actors’ preferences are not fixed and given *ex ante* but are “shaped by the institutional context” (Steinmo-Thelen, 1992, 8). In a convincing article, Paul Pierson applied this perspective to European integration studies (Pierson, 1996). He showed that no actor is able to control the long-term development of institutions, as the decision-making process is too complex to be fully mastered by only one actor.

In particular, as the EEC/EU is a “community of law”, the legal debates, such as those concerning the evolution of the interpretation of the competition rules, are a particularly important object of study. This explains why the public policy perspective needs to be taken into account from the institutional, legal and administrative points of view, as doing so will enable us to understand how apparently minor decisions can have long-term effects.

Several historical studies have already investigated some of these paths. In his studies on the car sector and European integration, Sigfrido Ramirez merged the two approaches. He has shown the influence of several large firms such as Fiat or Renault in different European competition policy debates (Ramirez, 2006; Ramirez, 2007, 621-640; Ramirez, 2008). The studies elaborated by Brigitte Leucht and Katja Seidel have linked ideas and the European decision-making process through transnational networks and supranational institutions (Leucht 2008, Seidel 2010). Lastly, in my own work, I have attempted to interpret European integration as a contest between several projects of Europe supported by conflicting – and sometimes overlapping – networks, be they national, supranational or transnational (Warlouzet, 2009a and 2010). In this perspective, interests are taken into consideration but are not treated as immutable or as purely rational. They are embedded within ideological preferences stemming from the actors’ personal backgrounds (family, education, nationality, professional career) and institutional positions (the need to defend a country, a ministry, a company, an interest group, etc.).

To sum up, this paper is an attempt to bridge a gap between European integration studies and the “Varieties of Capitalism” literature by using a historical methodology applied to the history of EEC competition policy. The foundations of this policy were laid from 1950 to 1962. In a second step, from 1963 to 1981, the difficulties faced by supranational actors in developing an efficient competition policy clearly illustrate the limits of the neofunctionalist momentum. Lastly, in the period from 1985 to 1991, European competition policy underwent enormous changes despite its unchanging institutional framework.

## **II. The Foundations of European Competition Policy (1950-62)**

### *The competition policy embedded in the Common Market*

On 9 May, 1950, French Minister for Foreign Affairs Robert Schuman launched, with the well-known *Schuman Declaration*, a new conception of European integration (Schuman, 1950). Schuman's speech introduced two new and related ideas. From an institutional point of view, he abandoned the federalist method (though not the ultimate federalist aims). Schuman laid out a vision that relied on neofunctionalist processes.<sup>5</sup> The initial step was to launch a project of European integration in a limited but decisive area (coal and steel) in order to create a "*de facto* solidarity" between France and Germany and other willing partners. In economic terms, the creation of a common market for coal and steel triggered the need to create a public authority to regulate these markets, which were severely distorted by trade barriers, cartels and geographic price discrimination. More precisely, three motivations lay behind this crucial first push toward a united Europe. Firstly, the French officials wanted to control the deconcentration of the German coal and steel industries in order to avoid the rebuilding of the great *Konzerne* of the interwar period (Poidevin-Spierenburg, 1992, 223). Cartels were tolerated during the inter-war period (Barjot, 1994), but the ideological context shifted in the 1940s. Secondly, French companies were interested too, but for different reasons. On the one hand, French steelmakers sought access to German coal at the same price as their German counterparts. On the other hand, steel consumers such as French carmaker Renault wanted a strong anti-cartel policy in order to benefit from lower prices (Kipping, 2002). Lastly, the transatlantic networks that linked the Americans, Jean Monnet and German ordoliberalists (notwithstanding their differences in terms of economic doctrine) wanted to use competition policy as a tool to establish a modernized Europe, more efficient from both an economic and political point of view compared to the pre-war situation (Leucht, 2008).

As a result, the Treaty of Paris creating the European Coal and Steel Community (ECSC) included antitrust provisions that had no real precedents in Europe. These provisions were linked to two important principles. Firstly, decision-making power was granted to a supranational institution – the High Authority – that was formally independent from the member state governments. Secondly, the Commission was given competence to regulate in a wide range of commercial practices, i.e. its mandate went beyond cartels as such (restrictive and unjustified agreements between independent companies) and covered mergers (or "concentrations" between companies) and other forms of potentially distortive commercial conduct (in particular to deal with price discrimination).

However, there was a stark contrast between these strong legal provisions and the weak policy that was actually put into practice by the ECSC High Authority. The competition policy, as implemented, was in fact timid and inconsistent (Houssiaux, 1960). The main flaw was the lack of independence from the member states, which constantly interfered with the High Authority's decisions. The French archives reveal several examples of this interference and interstate bargaining. In 1959, for example, the German Minister of Economics, Ludwig Erhard, sent a letter to his French counterpart (Jean-Marcel Jeanneney, Minister of Industry) to defend a concentration in the German steel sector.<sup>6</sup> Erhard specifically asked for the support of the French Government in order to influence the French members of the High Authority, despite the fact that their independence was clearly underlined in the Treaty of Paris (Article 9 ECSC). There was indeed a significant difference between the words of the Treaty and the way things worked in practice, as Pierre-Olivier Lapie, a French member of the High Authority,

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<sup>5</sup> Of course, neither Robert Schuman nor Jean Monnet – who wrote the Schuman Declaration with his team – portrayed themselves literally as "neofunctionalists". The concept was developed years later by Ernst Haas (Haas, 1958).

<sup>6</sup> Archives of the *Fondation nationale des sciences politiques* (FNSP, Paris), 2DE12, notes of 23 September 1959 (Prime Minister Private Cabinet) and of 15 October 1959.

regularly kept the French Government informed about the most sensitive cases.<sup>7</sup> This confirms Tobias Witschke's assessment of an ECSC merger policy dominated by interstate bargaining and by the efforts of companies to influence a High Authority unable to fulfill its ambitious mandate (Witschke, 338-341). Eventually, the High Authority authorized the vast majority of the cartels and mergers (ECSC, 1963).

To conclude, the ECSC experience left three legacies for European competition policy: (i) the inclusion of competition rules in a Treaty designed to initiate a process of European integration through the opening of markets ; (ii) a formally strong institutional framework; and (iii) weak implementation.

### ***The Treaty of Rome (1957): a flexible framework***

The European Economic Community (EEC) was created by the Treaty of Rome, which was signed on 25 March 1957 and which entered into force on 1 January 1958. A study of the Treaty of Rome negotiations, as depicted in the archives,<sup>8</sup> clearly reveals the influence of two dynamics. On the one hand, the ordoliberal German network had a specific interest in developing a strong competition policy. On the other hand, the ECSC experience – and its strengths as well as its weaknesses – were important in the debates (Warlouzet, 2007, 525-532; Warlouzet, 2010, 274-276). Another significant aspect of the negotiations is that the US model was less influential, and Americans were less involved, than had been the case when the ECSC was conceived. The intellectual debate surrounding the Treaty of Rome was thus clearly dominated by the ECSC experience and by the efforts of German ordoliberals to ensure coherence between the competition rules of the Treaty and those that would soon be introduced in the German Law Against Restraints of Competition.<sup>9</sup>

Ordoliberalism is a German doctrine based on political and economic liberalism (Gerber, 1998, 237-252). According to this doctrine, in order to build a sound new Germany after the traumatic Nazi experience, a new order based on the rule of law and respect of individual liberties was essential. Thus, every actor, including the state and the most powerful companies, had to conform to the requirements of the law, in both the political and economic fields. At the same time, the public authorities had to limit their interventions in the economy in order to foster a free-market dynamic. Furthermore, the state was to be “strong” and responsible for preventing powerful economic actors from threatening or harming the weakest (i.e., smaller companies, consumers, etc.). A strong competition policy was thus necessary to police against, for example, cartel agreements that would increase prices artificially. The ordoliberal school was very influential in Germany, and in particular its associates included Ludwig Erhard, who was a powerful German Minister of Economics (1949-1963),<sup>10</sup> and his deputy Alfred Müller-Armack, who represented Germany in negotiating the competition law provisions of the EEC Treaty (Commun, 2003, 175-199). The Germans advocated a strong policy against cartels, and they succeeded in securing the inclusion of, among other provisions, Article 85 EEC.<sup>11</sup>

However, the Germans also had to take into account the positions of the other delegations – including in particular that of the French negotiators. France's own competition law had been on the books for a long time, but in general its competition regime was weak. Furthermore, the competition

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<sup>7</sup> Archives of the FNSP, Paris, 2DE70, letter of Lapie for Debré, 20 July 1961.

<sup>8</sup> The main sources are the CM3 fund in the EU archives and, from the German point of view: Schulze-Hoeren, 2000, 156-308.

<sup>9</sup> The Gesetz *gegen Wettbewerbsbeschränkungen* (GWB) was adopted on 27 July 1957.

<sup>10</sup> Ludwig Erhard subsequently also served for a brief period as German Chancellor (1963-1966).

<sup>11</sup> There was some disagreement among the Six as to how the competition rules would be implemented, and as to whether they would be directly applicable. As suggested below, such questions were effectively put aside, with the understanding that they would be addressed later by means of Community legislation.



policy debate was only of secondary importance in the broader context of the EEC negotiations, especially for French officials (Warloutet, 2010, chapter 1 and pp. 271-4). This was partly due to the salience of other issues (the balance of power among the institutions, the Common Market, France's overseas territories, agriculture) but it was also due to the experience of the ECSC. In light of the weak impact of competition law under the Treaty of Paris, the future EEC competition regime was given comparatively little attention.

Therefore, the competition policy provisions of the Treaty of Rome were open to debate, both in terms of the nature of their content and in terms of the vertical balance of powers (that is to say, the allocation of enforcement responsibilities between national and supranational institutions). With regard to cartels, Article 85(1) EEC could be interpreted either as an outright ban on cartels (the German interpretation);<sup>12</sup> or it could be seen as establishing a more tolerant principle of "abuse" (the French interpretation – which relied on the fact that the wording of Article 85 EEC was close to that of Article 59 *bis* of the 1953 French Law: Fabre, 1958, 262). Some German officials would have preferred a clearer ban on cartels.<sup>13</sup> Likewise, with regard to the abuse of dominance there was significant uncertainty concerning the interpretation of Article 86 EEC (Schweitzer, 2008, 128 ff.). In both cases, the vertical allocation of competences was not defined in the Treaty but was left open to future legislation (a compromise expressed in Article 87 EEC).

Thus, it is impossible to consider the outcome of the Treaty of Rome's negotiations as either a success (Müller-Armack, 1971, 114) or as a failure (Buch-Hansen/Wigger, 2009, 28-29) for the ordoliberalists, as everything depended on the interpretation of the provisions of the Treaty. Finally, although the institutional structure of the ECSC was only transposed to the EEC in an amended form that somewhat diminished the role of the Commission, this institution remained influential within the framework of the new regime. While the Commission appeared to have less formal power than the High Authority, the scope of the Commission's authority was in fact far wider, as the EEC concerned the whole economy and not only certain select industrial sectors.

### ***Regulation 17/62: a success for the Commission***

In order to implement the competition rules in the Treaty of Rome it was necessary to resolve two main issues: the competences to be assigned to the Commission, and the priorities of enforcement. Article 87 EEC stipulated that, within three years, the Commission had to propose a Regulation to the Council providing a framework in which to implement Articles 85 and 86. Regulation 17/62 (EEC Council, 1962a) was a clear answer to both of these issues.

A detailed archive-based study of the Regulation 17/62 negotiations in 1960-61 shows the decisive influence of the German ordoliberalists and the clear failure of their opponents (Warloutet, 2010, 322-324).<sup>14</sup> The most influential actors belonged to a strong network located at the Commission around the Germans Hans von der Groeben (the Commissioner for Competition), Ernst Albrecht (Von der Groeben's chief of staff), and Hermann Schumacher (the director of the cartel unit at DG IV). They were also supported by some members of the German Government, especially Erhard and Müller-

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<sup>12</sup> By virtue of the exemption contained in Article 85(3), not all restrictive agreements were banned. Only those which restricted competition and could not be justified were targeted.

<sup>13</sup> Vermerk betreffend die Konferenz über den Gemeinsamen Markt vom 05.11-07.11.1956, Bonn, November 1956, (source: Bundesarchiv, Koblenz, Bestand B 141) in Schulze-Hoeren, 2000, 204-205; EU archives/CM3, Müller-Armack statements during the meeting of the 13 November 1956, document of the 20 November 1956.

<sup>14</sup> Von der Groeben success is sometimes explained by an intergovernmental exchange between Germany (concentrated on Competition Policy) and France (focused on CAP) in late 1961/early 1962. This is only partially true as French officials were almost isolated in their opposition to the Commission in December 1961. They feared being isolated as qualified majority voting was required (Warloutet, 2010, 319-321). Therefore, two other factors should be taken into account: French errors and Von der Groeben's capacity to outmanoeuvre its opponents through a skilful use of procedures and intellectual debates throughout the negotiations, in 1960-1961 (Warloutet, 2010, 288-323).

Armack. They were united by shared ordoliberal values and objectives (Seidel, 2010, 165-6) and developed a global economic project encompassing cartels but also state aids and legal harmonization (Hambloch 2009). The Director-General of DG IV, the Dutch socialist Pieter Verloren van Themaat had a different background but shared the same aims (Seidel, 2010, 84, 135 and 165).

This ordoliberal network succeeded in securing the adoption of Regulation 17/62. Its features had a long-term influence on European competition policy. One of the primary features of the Regulation was a system of notification: essentially, all agreements between companies operating within the EEC, to the extent that they restricted competition within the meaning of Article 85(1), had to be declared to the Commission.<sup>15</sup> An important qualification was that, as seen above, the EEC Treaty did not provide for merger rules, and consequently under Regulation 17/62 mergers did not have to be notified.

The Commission could choose to conduct an inquiry (in cooperation with the member state authorities) if it suspected that companies were engaged in anticompetitive practices. An advisory committee, composed of delegates from the member states, would then give its opinion on the case. In a last step, it was for the Commission alone to decide how to dispose of the case. Thus, the Commission gained a virtual monopoly of power both in terms of information and of decision-making. In terms of doctrine, the rigorous ordoliberal interpretation of Article 85 was followed: practically all restrictive agreements of any significance were banned unless they were authorized by the Commission.

The 1950-1962 years laid the basis of the European competition policy in terms of ideology (ordoliberalism) and institutions: information was centralized, decisions were taken by the Commission, and priority was given to the fight against restrictive agreements. This project was based on a strong principle stemming from the ECSC: the need for this public policy to achieve the goal of creating a common market, an ambition which lies at the core of the European integration process. These four features (ordoliberalism, centralization both of information and of decision-making, and the aim to create a common market) established strong path-dependencies for the development of competition policy in Europe.

### **III. The Failure of Spillover: The Proposal of a Merger Regulation (1962-81)**

The “spillover” process is at the heart of the neofunctionalist dynamic. It describes the pressure for further integration in related areas that is created by integration in a given policy area or (economic) sector. Thus, once the Commission had secured important powers for cartels, it could have built on this success to strengthen its powers in related fields mentioned in the Treaty of Rome: mergers (which were covered only indirectly and incompletely by Articles 85 and 86 EEC), state aids (Articles 92-94 EEC) and state monopolies (Articles 37 and 90 EEC). For various reasons, however, the Commission did not manage to trigger a successful spillover in these other fields.

#### ***The initial setback in implementing Regulation 17/62***

Regulation 17/62 attributed strong powers, but also a high degree of responsibility, to the Commission. Formally, at least, the Regulation required the Commission to take decisions regarding the validity of the agreements notified, in order to give the companies involved a secure legal environment.

However, an important mistake was made in this regard by von der Groeben and DG IV: as they initially received very few notifications, they chose to encourage further notifications (Warlouzet, 2010, 324-326). In particular, DG IV was especially interested in distribution agreements. Such

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<sup>15</sup> Under Regulation 17/62, the Commission had exclusive competence to grant individual exemptions under Article 85(3) EEC.

agreements typically consist of a contract between a producer and a retailer that sells goods or services. Often, though not always, the producer grants an exclusive or a quasi-exclusive sales territory to the retailer in exchange for the retailer's commitment to provide a specific service (for example, promotional or after-sales services).

The monitoring of this type of agreement was a particular concern for the French decision-makers. Paradoxically, while the French Government was the main opponent of Regulation 17/62 (as it was perceived as giving too many powers to the Commission and as being too ordoliberal), the Government was in favor of a strict system of regulation for distribution agreements (Warlouzet, 2010, 292-293 and 322-323). Indeed, French decision-makers were very keen to modernize the French distribution sector in order to control inflation. The focus of competition policy in France was thus not on cartels or on mergers, but on other commercial practices. For example, "refusals to sell" (i.e., situations where, for example, a company refuses to sell its product to a distributor) were severely condemned because they hampered the development of modern forms of stores such as supermarkets. Small retailers put pressure on their suppliers to limit their sales to these new competitors, and the suppliers themselves were keen sometimes to prevent the development of these new actors (Adams, 1989, 223-228). Thus, French officials adopted a rather strict policy with regard to the distribution agreements.

At the EEC level, the notification procedure established by Regulation 17/62 was not compulsory for distribution agreements. However, France secured Article 22, which stipulated that, within a year of the Regulation's entry into force, the Council (on a proposal of the Commission) was to examine the possibility of making the notification procedure mandatory for certain types of agreements (i.e., distribution agreements according to the preferences of the French<sup>16</sup>).

In 1962, the interpretation of Regulation 17/62 was unclear both for officials and for the business organizations.<sup>17</sup> In particular, more clarity was needed with regard to the proper legal treatment of distribution agreements.<sup>18</sup> In order to settle this problem, the Commission sought to encourage the notification of such agreements. To that end it adopted Regulation 153/62, which introduced a simplified notification procedure for certain exclusive agreements (EEC Council, 1962b), and it published a communication on the subject of notification (EEC Commission, 1962). However, the situation remained unclear for many companies, which did not know if they had to notify their agreement or not.<sup>19</sup> In a letter to UNICE (*Union des industries de la Communauté européenne*) – the main EEC-wide business organization – von der Groeben expressly asked companies to notify their distribution agreements, including those for which the need to notify was unsure.<sup>20</sup> He said that the Commission would be "moderate" and "understanding" for the companies who "trusted" it.

It seems that the Commission wanted to encourage further notifications because it received too few notifications in 1962.<sup>21</sup> Only 800 notifications were gathered in November 1962.<sup>22</sup> However, von der

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<sup>16</sup> This compromise was reached in October 1960: French National Archives, SGCI funds (the SGCI is a service in charge of European cooperation), 1979.0791/264, letter from Verloren van Themaat (Director General of DG IV) to Joseph Fontanet, french Deputy Minister for Internal Trade, 28 October 1960; on the end of the negotiations: 1979.0791/264, note of the SGCI/FO, 16 December 1961.

<sup>17</sup> Archives of the French Business Organization (*Conseil national du patronat français* or CNPF), 72 AS 1504, note on a meeting of the International Chamber of Commerce (ICC)/ "Commission des pratiques restrictive affectant la concurrence", 6 February 1962.

<sup>18</sup> CNPF Archives, 72 AS 812, Annex of the meetings of the CIFE (*Conseil des fédérations industrielles européennes*: Business organization at the "Great Europe" scale), note of Colombier (CNPF), 12 October 1962.

<sup>19</sup> CNPF Archives, 72 AS 812, note on the meeting of the CIFE, «comité de l'intégration», 3-4 January 1963 ; EU archives, BAC 89/1983/9/145, letter from de Koster (UNICE) to von der Groeben, 5 January 1963.

<sup>20</sup> EU archives, BAC 89/1983/9/213, letter from von der Groeben to de Koster (UNICE), 23 January 1963.

<sup>21</sup> Archives of the French Ministry of Foreign Affairs, DECE 1259, note "MC", 15 January 1963

Groeben was aware of a possible risk: an excess of notifications that the Commission would be unable to study.<sup>23</sup> Thus, he sought to secure the possibility of issuing “block exemptions”, whereby the Commission would be able to exempt certain types of agreements, *en bloc*, from the prohibition against restrictive agreements. As envisaged, a category of agreements would be eligible for such a blanket exemption if the Commission estimated that, even if the agreements in question did restrict competition, any harm would be offset by their expected economic benefits. The Commission’s proposal was made officially in November 1962.<sup>24</sup> The aim of the measure was twofold: to avoid receiving notifications of agreements unlikely to be pernicious, and to lift the burden of declaring *ex post* that most of the agreements that had already been notified were harmless. This tool would have been a logical addition to Regulation 17/62 from the Commission’s standpoint: on the one hand, Regulation 17/62 had the effect of centralizing information and putting it under the Commission’s control; on the other hand, block exemptions would have regulated this flow of information according to the Commission’s priorities.

However, the member states refused to grant the Commission a general competence to adopt block exemptions. They underlined the fact that Regulation 17/62 gave to the Commission an obligation to implement Article 85 in a comprehensive way, without any possibility to exempt categories of agreements by itself. The Council insisted on reserving its legislative prerogatives with regard to such a significant reform.<sup>25</sup> It was also argued that the Commission needed to have a sound foundation of jurisprudence before deciding on exemptions.<sup>26</sup> After protracted negotiations (five of the six member states were still opposed to the Commission’s proposal in September 1964<sup>27</sup>), agreement was reached only in February 1965 with the Regulation 19/65 (EEC Council, 1965).<sup>28</sup> This Regulation gave to the Commission the power to propose block exemptions to the Council. The first Regulation concerning block exemptions was designed specifically to deal with distribution agreements, but it was not adopted until March 1967 (EEC Council, 1967), almost five years after having been mentioned by von der Groeben in mid-1962.

This triggered a situation that was virtually untenable for DG IV, as more than 36,000 notifications were sent to the Commission in a single year.<sup>29</sup> Both administratively – the DG IV was still a new unit, created only 4 years earlier and with only 64 A-grade officials in 1964 (Goyder, 1993, 34) – and intellectually, this task was overwhelming. Indeed, defining a doctrine of competition policy was difficult even within a single European country in 1962, as this type of public policy was very new in Europe (the most important laws having been adopted in 1948 and 1956 in the UK, 1953 in France, 1957 in Germany). At the scale of the Common Market, defining competition policy was a near-impossible task, as the economic structure, the statistical data and the relationships between companies were very different across different countries and sectors.

Under those circumstances, DG IV was unable to issue a single decision before September 1964, when it decided the famous *Grundig-Consten* case (EEC Commission, 1964). This case concerned a

(Contd.) \_\_\_\_\_

<sup>22</sup> French National Archives/SCGI, 1979.0791/262, proceedings of the 12th conference of experts in Competition Policy, EEC, 22-23 November 1962.

<sup>23</sup> CNPF Archives, 72 AS 1544, note on a meeting between UNICE’s representatives and von der Groeben, 15 July 1962.

<sup>24</sup> Archives of the French Ministry of Foreign Affairs, RPUE 609, telex from the permanent representative, 12 November 1962.

<sup>25</sup> French National Archives/SCGI, 1979.0791/262, proceedings of the 12th conference of experts in Competition Policy, EEC, 22-23 November 1962; French Ministry of Foreign Affairs Archives, RPUE 609, telex from the permanent representative, 12 November 1962; RPUE 615, telex from the permanent representative, 27 February 1964.

<sup>26</sup> Archives of the French Ministry of Foreign Affairs, RPUE 615, note of Ph. Cuvillier, 11 February 1964.

<sup>27</sup> Archives of the French Ministry of Foreign Affairs, RPUE 615, telex from Jean-Marc Boegner, 21 September 1964.

<sup>28</sup> French National Archives/SGCI, 1988.0516/6, note of the Council EEC, 2 February 1965.

<sup>29</sup> French National Archives/SGCI, 1979.0791/262, proceedings of the meeting of experts on Competition Policy, 18 September 1963.

distribution agreement between a German producer (Grundig) and a French distributor (Consten). After this landmark case, the Commission took only a handful of formal decisions. Indeed, only four decisions were formally taken between *Grundig-Consten* and the completion of the Treaty of Rome's "transitional period" in July 1968.<sup>30</sup> The fact that the Commission's first formal decision and the first block exemption both concerned distribution agreements shows the importance of this path dependency: the Commission's policy-making and enforcement activities were significantly limited as a consequence of the early emphasis placed on vertical agreements – and in particular on distribution agreements, which constituted the bulk of the 36,000 notifications (Vaughn, 1973, 126-129).

To conclude on the implementation of Regulation 17/62, the main failure may be attributed to a flawed Commission strategy. This strategy relied on two complementary tools: the centralization of information through a notification system, and block exemptions to regulate this flow of information. However, while von der Groeben succeeded in activating the first dynamic in 1962, he was unable to secure the adoption by the Commission of any block exemptions until 1967. For the Commission this chronological discrepancy was destructive. It very likely contributed to the failure of the Commission to realize its full potential as an efficient enforcer of competition law.

This error stems both from a political error on the part of von der Groeben (the underestimation of the reluctance of the member states to grant the Commission competence to adopt block exemptions) and from technical and administrative limitations of DG IV. As the Commission was unable to issue decisions on important cases with sufficient speed, its credibility in the definition of an EEC-wide competition policy was undermined.

Both of these weaknesses should also be seen in the context of the overall inauspicious environment: competition policy was still very new in Europe, and the incentive to notify agreements was initially insufficient. Indeed, some officials remarked that the notification were very limited in sectors in which cartels were believed to be operating.<sup>31</sup> The archives of large companies also witness the fact that some of them deliberately chose not to notify their agreement because of the uncertainty of the Commission's policy (Warlouzet, 2010, 327).

### ***An attempted "spillover" from antitrust to mergers***

Following the setback described above in relation to vertical agreements, the Commission kept a low profile on competition policy matters for several years. However, at the beginning of the 1970s, in what appeared to be a more promising context the Commission tried to relaunch a "spillover" by seeking legal authority to vet mergers. The establishment of a system to control the "concentration" of companies had been discussed from the mid-1960s in a context of mergers among European undertakings on a national basis and in terms of growing competition from larger US companies (Warlouzet, 2010, 376-378). This concern with regard to "concentrations" triggered the development of merger control in the British and German national competition policies in, respectively, 1965 and 1973 (Buch-Hansen, 2008, 125-131). Moreover, another issue raised its head during those years: the protection of consumers. The *Institut National de la Consommation* was created in France in 1966, and in the UK the *Office of Fair Trading* was established in 1973. At the European level, the problem was discussed at the 1972 Paris Summit (EEC Commission, 1973a, 165) and in studies conducted by the OECD and the Council of Europe in 1971 (EEC Commission, 1972, 198). Lastly, the eruption of the monetary crisis (1971) and the oil crisis (1973) prompted fears of inflation. The EEC Council issued an official resolution on this issue in December 1973 (EEC Commission, 1974, 13). For competition policy this created a better ideological context: robust enforcement of competition rules can be an important tool to protect consumers and to limit inflation.

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<sup>30</sup> *DRU-Blondel* (n°65/366/CEE, 8 July 1965); *Hummel-Isbecque* (n°65/426/CEE, 17 September 1965); *Maison Jallate-Hans Voss* (n°66/5/CEE, 17 December 1965); *Transocean Marine Paint Association* (n°67/454/CEE, 27 June 1967).

<sup>31</sup> Archives of the French Foreign Ministry, RPUE 614, note of Jean-Marc Boegner, 5 June 1963.

From an internal point of view, the Commission tried to enhance its stature by means of a twofold strategy. At the grass roots level, DG IV, which was still constrained by path-dependencies resulting from Regulation 17/62, applied a progressive approach to solve the backlog problem. New block exemptions were issued in 1971 and 1972, and the Commission pursued a “pseudo-legislative” programme (Van Gerven, 1974, 42): the Commission used “soft law” such as communications to deter further notifications and to dispose of the older ones. Moreover, a new Commissioner, Albert Borschette, was appointed in 1970. He seemed to bring new ambitions to DG IV, and he launched a bold communication policy (Allen, 1977, 96). He convened press conferences to inform the public both of decisions already made and of the state of investigations in progress. Beginning in 1972, yearly reports on competition policy were issued. Lastly, DG IV started new initiatives such as fining companies, condemning non-European companies and conducting sectoral studies (EEC Commission, 1972, 84, 107 and 157). Thus, in evaluating the output of DG IV in the 1970s, academics were able to offer a balanced assessment of DG IV’s activities, underlining both its successes and its failures (Allen, 1977, 95-97; Swann, 1983, 92).

In this rather more favourable context, DG IV launched the initiative in the hope of establishing a merger control regime. In 1965, Commissioner von der Groeben had already arranged for the preparation of an expert report on the possibility of using Articles 85 and 86 EEC as a basis for such a regime.<sup>32</sup> The conclusions drawn in the report were moderately positive with regard to both provisions. The Commission then chose to use Article 86 EEC as the principal basis for its competence to authorize or reject proposed mergers (Markert, 1975, 68). A first decision to block a merger was taken in 1971 in the *Continental Can* case (EEC Commission, 1971). In February 1973, in an appeal against the Commission’s decision in the same case, the European Court of Justice confirmed the Commission’s power to control mergers on the basis of Article 86 EEC (ECJ, 1973). In light of the Commission’s victory, but also considering the legal ambiguity of attempting to regulate mergers on the basis of Article 86 – which dealt only with the abuse of dominance (Jacquemin, 1975, 136-139), Borschette appeared to benefit from a clear window of opportunity within the College of Commissioners.<sup>33</sup> Furthermore, the Commission received the explicit support of the European Parliament in a June 1971 resolution and the implicit backing of the member states at the Paris Summit of October 1972 (European Commission, 1972, 11; Markert, 1975, 68-69).

Internally, the Commission had in fact been preparing a draft Merger Regulation since late 1972 (i.e., since even before the ECJ’s ruling in *Continental Can*).<sup>34</sup> This draft Regulation was submitted to the EEC Council in July 1973,<sup>35</sup> and it purported to provide, above all, a procedural framework that would have been roughly analogous to Regulation 17/62. As in the case of the latter instrument the proposal sought to establish a system of notifications to the Commission, which would then have exclusive competence to decide on the compatibility of large mergers with the Treaty of Rome. Another similarity with Regulation 17/62 is that an advisory committee was to be composed of delegates from the member states. Partly in order to avoid an excess of notifications, and partly to avoid depriving the member states (especially Germany and the UK) of the ability to regulate any merger with a cross-border element, a threshold was established: above the threshold, mergers would be dealt with by the Commission; below the threshold, the national authorities retained their competence. The proposed Regulation received the support of the European Parliament and of the Economic and Social Committee in February 1974 (EEC Commission, 1975, 19). The oil shock of 1973 seemed to encourage the Commission’s ambitions, and Borschette explicitly linked competition

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<sup>32</sup> EU Archives, BAC 26/1969/602/43, doc. SEC (65) 3500, “Le problème de la concentration dans le Marché commun”, 1 December 1965.

<sup>33</sup> EU Archives, normal record of the 241st session of the Commission, 21 February 1973, XIXI.

<sup>34</sup> EU Archives, BAC 71/1988/1/274-276, note Schlieder for Borschette, 23 January 1973.

<sup>35</sup> EU Archives, BAC 71/1988/6/18-65, proposal of regulation from the Commission to the Council, 18 July 1973, doc. COM (73) 1210 final.

law enforcement to the fight against the sharply rising rate of inflation.<sup>36</sup> In December 1973, DG IV opened a sector inquiry in the oil industry with a view toward detecting and preventing any abuse of dominance (EEC Commission, 1974, 24-25). At the same time, Altiero Spinelli, who at that time was the Commissioner for Industry (1970-76), stated that he wanted to see Article 86 EEC used in order to launch an investigation of IBM's business practices in Europe.<sup>37</sup> Indeed, Spinelli supported a general offensive by the Commission to closely monitor the action of *all* multinational companies operating in Europe. Thus, whereas competition policy and industrial policy stood in opposition in the 1960s (Warlouzet, 2010, 462), a convergence appeared in the 1970s.

Yet despite the circumstances just described, and despite the support of other supranational EEC institutions, the Commission failed to secure support for the draft Merger Regulation from the institution that mattered most, the EEC Council. A working group of the EEC Council began studying the proposal in June 1974 (EEC Commission, 1975, 19), but no decisions came until 1989, fifteen years later. The spillover process was clearly stalled.

### ***Deadlock: the protracted debate on the Merger Regulation***

The momentum toward the adoption of a Merger Regulation was a result of a lack of motivation by the member states. The deadlock in the Council stemmed from two sets of factors.

Firstly, external reasons are often underlined. Hubert Buch-Hansen rightly points out that the economic debate was still more influenced by "embedded liberalism" than by neoliberal ideas (Buch-Hansen, 2008, 139-140). Indeed, the discussions at the Council level ran into delays as early as 25 July 1974 because COREPER required a new document in which DG IV was asked to explain the compatibility of merger control with other initiatives relating to common policies in fields such as industrial policy, regional policy and social policy.<sup>38</sup> Another obvious external shock was, as already mentioned, the 1973 oil crisis. Although the Commission tried to launch new initiatives to stem the effects of the crisis, paradoxically the crisis made it more difficult to take decisive action at the European level, as demonstrated by the complete lack of solidarity among the member states in the crucial field of energy. These events, together with other circumstances such as the electoral defeat of the pro-EEC British Prime Minister Edward Heath in 1974, brought what had been the optimistic 1969-73 period to an abrupt close.

The internal reasons for this failure have been less widely studied, but they too are important for understanding why the "spillover" into merger control did not materialize despite the support of some of the EEC institutions. In retrospect it appears that DG IV's capacity to steer the agenda continued to be constrained by the path dependencies generated in the 1960s. Having failed to define a policy for the efficient implementation of Regulation 17/62 in the 1960s, DG IV was still very strongly criticized in the 1970s for its lack of a convincing economic philosophy. Its approach was condemned as too ordoliberal, i.e., too legalistic and too remote from economic reality (De Jong, 1975, 59; Allen 1977, 97-8 and 110). As if to confirm this view, DG IV took only a few decisions in those years, and some of these were overturned by the ECJ. In the well-known *Continental Can* case, for example, the interpretation of the Treaty was favourable to the Commission (possibility to apply Article 86 EEC to mergers), but on unrelated technical grounds the decision was annulled (ECJ, 1973).<sup>39</sup> Within the

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<sup>36</sup> EU Archives, BAC 71/1988/5/44-48, draft of a speech by Borschette at the Economic and Social Committee, 5 November 1974.

<sup>37</sup> EU Archives, Spinelli Fund, AS 31, note SEC (73) 4300/3, 19 November 1973. On the *IBM* case, see Arthe van Laer's Ph.D (Van Laer, 2010, Chapter XIII).

<sup>38</sup> EU Archives, BAC 71/1988/8/102, note DG IV-A2 PMS, 30 July 1974.

<sup>39</sup> More important than the technical defeat for the Commission was the endorsement by the ECJ of the Commission's economic and legal reasoning. The Commission's arguments in this respect had been framed by Ernst-Joachim Mestmäcker in his capacity as Commission advisor (Schweitzer, 2007, 18-20).

Commission, some of the most distinctly ordoliberal features of the draft Merger Regulation were the object of internal discussions. In particular, DG III (in charge of Technological and Industrial Affairs) questioned the *ex ante* notification system.<sup>40</sup> And in 1974, following the first enlargement, a DG IV official from the UK suggested adopting an *ex post* control system by making explicit reference to the British and American systems.<sup>41</sup> In this context, it appears that the ordoliberal influence began to fade.

The Commission's inability to advance an economic vision to unify the member states is noticeable in the draft Merger Regulation itself, which explicitly draws inspiration from two failures: the enforcement of Article 66 ECSC and the experience in connection with Regulation 17/62.<sup>42</sup> When the draft Regulation was studied, many delegates of the member states criticized it because it was too reminiscent of the system established under the ECSC Treaty.<sup>43</sup>

Another clear instance of path dependency related to the legal base for the draft Regulation. DG IV interpreted the expert report of 1965 as an encouragement to use Article 86 EEC instead of Article 85 EEC in order to control mergers. However, as noted above, Article 86 EEC did not provide a very sound basis for merger control because by its terms it appeared incapable of applying to acquisitions by a non-dominant firm (Jacquemin, 1975, 136-139; Swann, 1983, 120). Consequently, Borschette decided to base the draft Regulation on Article 235 EEC, the so-called "flexibility clause".<sup>44</sup> According to Article 235, additional powers not enumerated in the Treaty could be claimed by the Community legislature if necessary to attain one of the Community's objectives. However, Article 235 stipulated that the Council had to act by unanimity to adopt the appropriate measures, whereas measures based on Articles 85 and 86 EEC required only qualified majority voting.

The proposal was the subject of heated debate. The delegates of the member states<sup>45</sup> and the European Parliament<sup>46</sup> underlined three criticisms in 1973-74: it was said that the envisaged threshold was too low (i.e., that too many mergers would fall within the Commission's jurisdiction); the time allotted for the Commission to reach a decision (3 months, with the possibility of an extra 9 months for complex cases) was too long; and the criteria for banning a merger were too imprecise, as the Commission had not formulated a satisfactory substantive test. The latter critique had already been mentioned within the Commission in internal notes, but it also appeared in a study by the US law firm Cleary & Gottlieb, which was provided to DG IV.<sup>47</sup> In particular, Article 1 referred to a public interest criterion by which to assess notified mergers. According to one expert, this "could become the source of dangerous and discriminatory power", as the decision could be "linked with a policy goal quite independent of competition policy" (Jacquemin, 1975, 143-144). Such a public interest criterion thus posed the risk of significant unpredictability as to how the Commission would apply its merger control policy (Buch-Hansen, 2008, 136). From the perspective both of the member states and of companies doing business in Europe, the ambiguity of this criterion was a clear flaw.

Yet another failure of the Commission lay in its rigid attitude during the negotiations. Borschette hardly modified the draft Regulation even after this first round of criticism (EEC Commission, 1975, 19). Six of the nine member states supported the Regulation with amendments (Germany, Belgium, the Netherlands, Denmark, Ireland, Luxemburg), and two others were unsure (France, United

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<sup>40</sup> EU Archives, BAC 71/1988/6/75, note on the meeting of the *chefs de cabinet*, 16 July 1973.

<sup>41</sup> EU Archives, BAC 71/1988/8/56-58, note DG IV (author: Wright), 1 August 1974.

<sup>42</sup> EU Archives, BAC 71/1988/1/ 119-123, note DG IV/A-2, 30 May 1973, and note of W. Schlieder, 25 May 1973.

<sup>43</sup> EU Archives, BAC 71/1988/1/19-23, 24<sup>th</sup> meeting of the national experts, 2 July 1973, doc IV/492/93.

<sup>44</sup> EU Archives, BAC 71/1988/6/66, speech of Borschette at the Commission, 18 July 1973.

<sup>45</sup> EU Archives, BAC 71/1988/1/19-23, 24<sup>th</sup> meeting of the national experts, 2 July 1973, doc IV/492/93.

<sup>46</sup> EU Archives, BAC 71/1988/8/109-121, communication for the Commission, note from Schlieder (DG IV A-2) to Borschette, 20 July 1974.

<sup>47</sup> EU Archives, BAC 71/1988/2/11, memorandum on the proposal of the European Commission for a Regulation on the control of mergers and acquisitions, from Cleary, Gottlieb, Steen and Hamilton, 30 July 1973.



Kingdom); but Borschette refused to make any compromises (Allen, 1977, 107). After his premature death in 1976 (he was born in 1920), Borschette was replaced by Raymond Vouel, a Commissioner who kept a relatively low profile. No new proposals regarding merger control were made until 1981 (EEC Commission, 1982, 26).

To conclude, the detailed archival study clearly shows why the Commission was unable to take advantage of the spillover dynamic that seemed to be supported by some of the supranational institutions (European Parliament, ECJ, Commission). The ordoliberal ideas may have been too theoretical and poorly understood, and it had no strong support outside Germany. In these circumstances, the Commission's lack of political shrewdness and its incapacity to define a clear economic doctrine of implementation limited its ability to set the agenda. Thus, the promoters of the original Merger Regulation were unable to overcome the path dependencies resulting from Regulation 17/62 and from the merger control experience of the ECSC (and, relatedly, from the Treaty of Rome itself, which did not provide clear directions with respect to mergers). With regard to this aspect of European competition policy, ideas and institutions did not come together successfully.

#### **IV. The Rise of a Powerful Competition Policy (1981-91)**

In only a few years, from 1981 to 1991, European competition policy was strengthened dramatically in multiple areas. In seeking to explain this watershed, reference could be made to external factors, but their explanatory power is insufficient. The reinforcement of DG IV's legitimacy was a crucial element, as the example of the 1989 Merger Regulation clearly shows.

##### *A favourable context*

In the 1980s, the ideological and political contexts were clearly more propitious for the development of competition policy. The development of neoliberal ideas<sup>48</sup>, based on the limitation of the State to the role of referee in an economy driven only by free-market dynamics, spread quickly from Great Britain with Thatcher (1979) and the US with Reagan (1981) (Fourcade-Babb, 2002, 542-556). Even before these turning points, an evolution was visible in 1976, when Callaghan in Great Britain and Barre in France were appointed as Prime Ministers. This neoliberal trend clearly supported the development of an influential competition policy (Buch-Hansen, 2008, 151-158), even if the implications for the enforcement of competition law varied.

In political terms, the Commission benefited from a very dynamic period from 1985 to 1992, under the presidency of Jacques Delors (President from 1985 to 1995). The "Delors relaunch" was based on a cocktail made up of the personality of Delors (Drake, 2000), the changing economic context (Defraigne, 2008, 71-74)<sup>49</sup>, the support of supranational institutions (the ECJ, the European Parliament), of non-state actors (multinational companies) and of member states, particularly after the resolution of the British rebate issue in 1984 (Sandholz and Zysman, 1990; Ludlow, 2006, 218-232). The decision-making process was eased by an increasing use of qualified majority voting after the Single European Act (1986), even if this Treaty did not affect the competition rules established in the Treaty of Rome.

This favourable environment allowed DG IV and its Commissioners to greatly expand their powers (Cini-McGowan, 1998, 29-35). The backlog of restrictive agreements requiring attention was subdued by the adoption of numerous block exemptions, including in particular a renewed regime for

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<sup>48</sup> The term "neoliberal" is somewhat ambiguous. It is used here to describe market-based economic policies such as the retreat of the state from economic and social regulation (through privatization, the dismantling of part of the welfare state, tax cuts, etc.). See Fourcade-Gourinchas, 2002, 533-4.

<sup>49</sup> For example: the challenges posed by American and Japanese multinationals, the shift to post-fordism reforms, the limits of the national industrial policies, etc.

distribution agreements (Goyder, 1993, 211-235). In pursuing its policy the Commission adopted a pragmatic approach. It agreed to strike a compromise between a formalistic approach and the needs of companies calling for a legal environment providing greater certainty for business and investment. One consequence of this compromise was the partial abandonment of an approach inspired by ordoliberal theory. This shift can be seen by considering the events in connection with the 1984 block exemption for motor vehicle distribution (Ramirez, 2008, 71-78). On the merger front, the Commission finally managed to obtain the EEC Council's approval of a new Regulation in December 1989. Moreover, DG IV extended its action to new fields such as state aids and the liberalization of sectors that had previously been shielded from competition and propped up by state intervention.

In this light, the old policies and dynamics (block exemptions, a merger control regulation based on the model of Regulation 17/62, spillover to other fields according to the context) made a reappearance, but this time with a more fruitful outcome for the Commission. These developments were linked to a steady and more general reinforcement of this institution.

### *The Commission's leadership capacity*

In order to take advantage of this favourable context, the Commission needed to show itself to be efficient and legitimate in the field of competition policy. Without this internal reinforcement, the relaunch of Europe in the 1985-1992 period could easily have left competition policy largely on the sidelines. Indeed, the envisaged "completion" of the Single Market did not automatically entail the creation of a strong competition policy, except from a purely theoretical neoliberal point of view. Neither the Cockfield Report (EEC Commission, 1985) nor the Single European Act (1986) proposed or included new provisions in this area.

The Cockfield Report did not deal with competition policy in any depth. It only contained a brief reference to state aids (pp. 39-40). By contrast, an entire section was devoted to the need to foster cooperation between companies (pp. 34-38). In 1986, the Single European Act could easily have been interpreted as an incentive to subordinate competition policy to the priorities set by the common research and technology policy.<sup>50</sup> Indeed, the Single European Act did not introduce any changes in the field of competition policy but there is an entire "Title" for research and technology policy (articles 130f to 130q). For example, in Article 130f (3) it is stated that: "In the achievement of these aims, special account shall be taken of the connection between the common research and technological development effort, the establishment of the internal market and the implementation of common policies, particularly as regards competition and trade." The "aims" are defined earlier in Article 130f: "to strengthen the scientific and technological basis of European industry" (§1) by encouraging companies to cooperate (Articles 130f(2) and 130g).

From an economic point of view, beyond the Single European Act, the main turning points of the 1985-1992 period related to regional policy (the Delors Packages) and to Economic and Monetary Union (the Maastricht Treaty and the Monetary Crisis of 1992). Thus a mere coordination of national competition policies could easily have been considered sufficient. The reinforcement of a supranational competition policy was not automatic.

The first sign of a new kind of leadership in relation to European competition policy lay in personal factors, with the appointment of dynamic Commissioners beginning in 1981. For example, Frans Andriessen (1981-85), who prior to his appointment had been the Dutch Minister of Finance, wanted to use competition policy as a device to help re-launch European integration (Cini-McGowan, 1998, 31; Middlemas, 1995, 249). His successors, lawyers Peter Sutherland (Irish, 1985-89) and Leon Brittan (British, 1989-93), introduced both proactive methods from the Anglo-Saxon professional world and a more neoliberal policy agenda. Brittan in particular was very keen to ensure that all of his

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<sup>50</sup> On the attempt to create a common research and technology policy: Van Laer, 2010.

technical actions in the competition policy field contributed to the promotion of a neoliberal vision of Europe (Joana-Smith, 2002, 131-132, 151). A former minister in the governments of Margaret Thatcher, Brittan remained close to her throughout his tenure in Brussels. He led several conservative associations (Joana-Smith, 2002, 41, 215) and his brother, Samuel Brittan, was an influential neoliberal journalist working for the *Financial Times* (Fourcade-Babb, 2002, 552).

Meanwhile, as new Commissioners set a new tone at the political level, DG IV also managed to strengthen its legitimacy. The resolution of the backlog of notified agreements was the main proof of DG IV's capacity to overcome the path dependency described earlier and to implement a more effective enforcement strategy. An alliance between the DG IV staff – still mostly influenced by an ordoliberal background – and top officials with an Anglo-Saxon style of leadership lay at the heart of the Commission's success (Montalban, Ramirez, Smith, 2009, 27).

### ***The example of the Merger Regulation***

Agreement on the Merger Regulation of 1989 can be attributed to two specific dynamics, in addition to the factors mentioned above. The first is the spillover triggered by the ECJ's judgment in the *Philip Morris* case (ECJ, 1987). The catalytic effect of this judgment has been widely mentioned in the literature (Buch-Hansen, 2008, 164-7; Cini-McGowan, 1998, 118-199), even by scholars who emphasize the decisive role of member state preferences and bargaining power (Bulmer, 1994, 431; Pollack, 2003, 285-6). Indeed, the fallout from the *Philip Morris* case is the main theme of one important paper (Büthe-Swank, 2007).

In its judgment, issued in November 1987, the ECJ confirmed the Commission's power and duty to use Article 85 EEC directly to prohibit the acquisition by a company of a significant minority shareholding in a competing firm. This went somewhat beyond *Continental Can*, which concerned Article 86, because under Article 85 there was no need for the Commission to show that the acquiring company was already dominant prior to the transaction. In a second step, Commissioner Sutherland began to launch several investigations into merger cases. In 1988, he forced important European companies to modify their proposed mergers, and he even succeeded in deterring one merger operation (George-Jacquemin, 1990, 235-237; Bishop, 1993, 301-3; Bulmer, 1994, 431). The Commission's prolific activity led to a state of great uncertainty. Companies responded by lobbying their national governments to revisit and adopt the dormant Merger Regulation in order to have a clearer and more structured legal framework, and above all to have a predictable time frame for the review of their transactions. In the interim, some companies in fact notified their planned mergers to the Commission even in the absence of a regulation (Pollack, 2003, 285). Under the circumstances, the member states came to a quick agreement and voted in 1989 for the Merger Regulation, i.e. Council Regulation 4064/89.<sup>51</sup> This instrument was modelled to some extent on the example of Regulation 17/62, in the sense that the Commission acquired a monopoly of information (notification of mergers large enough to have a "Community dimension") and (where the latter threshold was satisfied) a monopoly of decision.<sup>52</sup>

The adoption of the Merger Regulation can clearly be assimilated to a neofunctionalist dynamic, as it was driven by the actions and decisions of non-state actors and supranational institutions. The dynamic was set in motion by the competitors of Philip Morris (i.e., R.J. Reynolds and British American Tobacco), which had brought proceedings against the acquisition by Philip Morris of shares in another competitor, Rothmans (Büthe-Swank, 2007, 25-26). As for supranational institutions, the ECJ played its part by affirming the Commission's powers, and following the ECJ's judgment the

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<sup>51</sup> In 2004, this Regulation was replaced and further refined by Council Regulation 139/2004.

<sup>52</sup> Regulation 4064/89 did establish an advisory committee consisting of delegates from the member states. However, as with the advisory committee under Regulation 17/62, the opinion of the committee did not have any binding effect *vis-à-vis* the Commission.

Commission itself began intervening more actively in transactions over which its jurisdiction had previously been in doubt. Moreover, when the Commission turned its attention again to preparing a new draft of the Merger Regulation, DG IV was able to improve the draft from a technical point of view, as the deadline for taking a decision was accelerated and the criteria by which to define the “Community dimension” concept were more precisely specified (Goyder, 1993, 392, 405). Thus, the Commission was able to respond more successfully to the ECJ’s rulings than it was able to do after *Continental Can*.

The second factor that can be underlined is the game actors played in the EEC Council negotiations. The member states’ positions have been studied mainly from the point of view of the German and the British Governments (Bulmer, 1994, 435-439; Pollack, 2003, 288-290). Both of these countries succeeded in imposing their views, in particular by ensuring the adoption of competition as the sole substantive criterion by which to assess a merger. This represented a significant development since, other criteria such as the “public interest” had been mentioned in the initial proposals of 1973, 1981 and even 1988 (Commission, 1982, 26). The Sutherland draft of March 1988 mentioned, for example, the need to take into account: “improving production and distribution [...] promoting technical or economic progress [...] the competitiveness of the sectors concerned with regard to international competition and the interests of the consumers” (Bulmer, 1994, 435).<sup>53</sup>

In explaining this success, some have stressed the importance of the British and German points of view, as both the UK and Germany already had a national competition authority competent to deal with mergers (Bulmer, 1994, 437). However, two factors seem to have been underestimated in the literature. Firstly, the agreement of the British Government could be considered surprising: Thatcher had already refused to support the proposed Merger Regulation in 1981 because of her opposition to supranationalism (Buch-Hansen, 2008, 163). Moreover, in the second half of 1988, she was very irritated by what she perceived as the excessive powers given to the Commission in the Single Market programme (Middlemas, 1995, 145, 228-30, 300). Lastly, although the UK underwent an ambitious neoliberal policy of deregulation from 1979 onwards, its merger policy remained weak and characterized by “permissiveness” during the 1980s (George, 1990, 128), despite the increased severity of the “Tebbit guidelines” of 1984 (Schwarz, 1993, 636). In that light, one might speculate that a decisive but neglected factor was the role played by British officials based at the European Commission (including Brittan) to convince their counterparts in London, and to europeanize their conceptions. Archival evidence would be needed to support this hypothesis.

Secondly, the “surprising” agreement of France (Bulmer, 1994, 438) was decisive, as this country traditionally favoured industrial and social policies over competition policy. The literature explains this about-turn with two convincing arguments. From an economic point of view, the French were willing to accept an increase of regulatory activity at the European level in order to reduce the power of the German competition authorities, whose decisions were seen as discriminating against French companies (Bulmer, 1994, 438). In particular, the Minister of European Affairs Edith Cresson supported the Regulation because the German Bundeskartellamt had rejected Thomson’s acquisition of Grundig (Middlemas, 1995, 503; Schmidt, 1996, 160). From a political point of view, as France held the presidency of the EEC Council during the second semester of 1989, the French Government, and especially Foreign Minister Roland Dumas, was very keen to secure a successful outcome in this protracted debate (Schwartz, 1993, 648).

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<sup>53</sup> Under Regulation 4064/89, the Commission was required to take into account “the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition” (Article 2(1)). France obtained partial satisfaction with Article 21(3), which stated that “Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation”, but the prior approval of the Commission was necessary except in specific cases (public security, plurality of the media and prudential rules) (Aubry, 2009, 68). Article 21(3) of Regulation 4064/89 now appears as Article 21(4) of Regulation 139/2004.

Two other factors can be underlined as well. Firstly, the pro-competition element of the French elite is often underestimated. However, it was influential in the 1960s (Warlouzet, 2010, 315-317) and it became even stronger in the 1980s. For example, Jacques Delors, who was Minister of Finance and Economics (1981-84) before joining the Commission, had unsuccessfully supported a reform that would have moved French competition policy closer to the EEC model in the early 1980s (Brault, 1987, 65). Furthermore, at the end of the 1980s, the socialist Government of Michel Rocard considerably scaled down French industrial policy (Schmidt, 1996, 165-181). This movement was led by the Minister of Industry, Roger Fauroux. A former CEO of the multinational company Saint-Gobain, Fauroux understood perfectly the needs of European companies. He therefore supported the Merger Regulation in order to enhance legal certainty for business (Schwarz, 1993, 648).

Secondly, the Commission had acted very shrewdly as an enforcer. In the period prior to the adoption of the Merger Regulation it applied Article 85 EEC mainly to merger cases involving British companies. However, as soon as the Regulation was adopted, Commissioner Brittan shifted his focus to more mercantilist countries such as France and Italy (Ross, 1994, 131-132). He sought a test case to demonstrate the Commission's new powers. In two mergers involving French and Italian companies in 1991, he managed to obtain concessions (Ross, 1994, 133-15). The first transaction to be blocked was the proposed ATR/De Havilland merger in late 1991. ATR was a Franco-Italian aircraft company that wanted to buy its Canadian competitor, De Havilland. The prohibition of this merger triggered indignant reactions from French officials, and Dumas even tried to bring the case before the Council to reverse the Commission's decision (Ross, 1995, 179) – although this was clearly inconsistent with the Regulation. However, what seems significant is that the Commission did not run the risk of open conflict with France and Italy until after agreement on the Regulation had already been secured.

Moreover, in contrast to what we have seen with regard to Regulation 17/62, the Commission (notwithstanding the controversy over the *De Havilland* case: Menon-Hayward, 1996, 272-274 ; Jenny, 1993, 202-203) rapidly demonstrated its ability to apply its merger control powers successfully. Although notified mergers are seldom subject to outright prohibition, most transactions are subject to negotiation with the Commission, following which it is common for the merging parties to make pro-competitive concessions in return for clearance (Büthe-Swank, 2007, 29).

To conclude, it appears that two complementary dynamics fostered this decisive reinforcement of European competition policy. On the one hand, the ideological context was more favourable due to the growing influence of neoliberal ideas. This helped to make it possible for both the most neo-mercantilist governments (France) and the most hostile to supranationalism (the UK) to accept an increase in the Commission's powers. As was the case in the context of other issues in the late 1980s-early 1990s, the Commission successfully promoted market-based reforms by using the ambiguity of the concept of "market" (Jabko, 2006, 10). On the other hand, the improvement in the technical and political capacities of the Commission was a decisive factor. This improvement enabled the Commission to take advantage of both this new ideological context and of the spillover dynamic activated by multi-national companies and the ECJ.

## **Conclusion**

The historical methodology used in this paper and the focus on the relationships between ideas and institutions shed new light on three important factors.

Firstly, institutional constraints can influence outcomes. Path dependencies arising from previous events or previously negotiated bargains prevent actors from adopting completely new frameworks. In particular, Regulation 17/62 constrained a large part of the development of competition policy in terms of both weakness (the backlog problem and the attention given to vertical agreements while secret, hard core cartels may well have been neglected) and strength (the centralization of information-gathering and of decision-making by the Commission). Furthermore, one is struck by the fact that an

agreement reached in 1962 in a field considered by many actors to be of minor importance could have such a long-term influence. This demonstrates that the EU “regulatory state” (Majone, 1999, 2) – in which the rise of competition policy is an important element – does not merely date back to the 1980s. It has emerged from a much longer process.

Secondly, the technical features of institutions and of debates are also crucial. The charisma of actors and the balance of power can remain secondary if the technical debate is flawed. As DG IV was unable to demonstrate its capacity to smoothly apply a genuinely efficient competition policy in the 1960s and the 1970s, it was unable to take advantage of the spillover dynamic supported by the ECJ in its *Continental Can* judgment in 1973. By contrast, in the 1980s DG IV was more efficient and more successful in pursuing its policy initiatives. Purely legal arguments matter: while DG IV and the experts providing it with advice focused in 1965 on Article 86 EEC as a proper legal instrument for the control of mergers, the inadequacy of that provision in cases of mergers involving non-dominant companies posed a lingering problem. The ECJ in its *Philip Morris* judgment of 1987 helped to solve the problem by adopting a flexible interpretation of Article 85, but in doing so revealed yet another possible gap and punctuated the need for a more precise procedural and substantive framework.

Thirdly, when assessing the balance of power, it is important to consider the divisions between the actors. The member states and the Commission are not unitary actors. The outcomes of negotiations are influenced by coalitions of national and supranational actors united by a common project. The German ordoliberals were the most successful in 1962 and the neoliberals succeeded in 1989. The opponents of a serious competition policy for Europe were numerous but they did not manage to produce a convincing counter-proposal. It is the coherence of the groups (which mobilize officials in both national and European institutions) and the effectiveness of their projects which are important. Their strength stems from their ability to formulate coherent proposals in both ideological and institutional terms. Thus, using this framework, the field of European integration studies could go beyond the “intergovernmental v. supranational” debate. It could provide a more nuanced picture of some of the most original features of the EU such as its powerful competition policy.

## **Annexes**

### ***The Commissioners for Competition***

- Hans von der Groeben (Germany) / Hallstein Commission (1958-67)
- Emmanuel Sassen (Neth.) / Rey Commission (1967-70)
- Albert Borschette (Lux.) / Malfatti, Mansholt and Ortoli Commissions (1970-76)
- Raymond Vouel (Lux.) / Jenkins Commission (1976-81)
- Frans Andriessen (Neth.) / Thorn Commission (1981-85)
- Peter Sutherland (Irl.) / Delors Commission (1985-88)
- Leon Brittan (UK) / Delors Commission (1989-1993)
- Karel van Miert (Belg.) / Santer Commission (1993-1999)
- Mario Monti (It.) / Prodi Commission (1999-2004)
- Nelly Kroes (Neth.) / Barroso Commission (2004-2010)
- Joaquín Almunia (Esp.) / Barroso Commission (2010-)

### ***Glossary***

- CAP : Common Agricultural Policy.
- CIFE : Conseil des fédérations industrielles européennes (European business organization).
- CNPF: Conseil national du patronat français (French business organization; since 1998: MEDEF).
- COREPER : Committee of the Permanent Representatives (of the member-states).
- DG IV : Directorate general IV of the EEC Commission.
- ECJ: European Court of Justice.
- ERT: European round-table of industrialists.
- ICC: International chamber of commerce.
- SGCI: Secrétariat général du comité interministériel pour les questions de coopération économique européenne.
- UNICE: Union des industries de la Communauté européenne (EEC business organization; since 2007: Business Europe).

### ***Chronology***

- 9 May 1950: Schuman Declaration.
- 18 April 1951: Treaty of Paris creating the ECSC (European Coal and Steel Community).
- 25 March 1957: Treaty of Rome creating the EEC (European Economic Community).
- 6 February 1962: Regulation 17/62.
- 23 September 1964: *Grundig-Consten* decision by the Commission.
- 2 March 1965: Regulation 19/65.
- 9 December 1971: *Continental Can* decision by the Commission.
- 21 February 1973: *Continental Can* ruling by the ECJ.
- 17 November 1987: *Philip Morris* ruling by the ECJ.
- 21 December 1989: Regulation 4064/89 (Merger Regulation).
- 2 October 1991: *ATR-De Havilland* decision by the Commission.

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