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# Towards a Fourth Paradigm in European Competition Policy?

## A Historical Perspective (1957–2023)

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### Abstract

Following an historical approach (including the gathering of new archival documents from various European countries), this article revisits the history of European Union's Competition policy, from its inception in the 1957 Treaty of Rome (whose articles on this field have remained unchanged) to the Digital Markets Act / Digital Services Act (DMA / DSA) adopted in 2022.

It claims that four main paradigms have shaped the history of the European competition policy. The first – the public interest paradigm – was dominant in Western Europe up to the 1980s (section 2: Genesis), but not within the EEC, where a more syncretic approach dominated in the Treaty of Rome (section 3: Syncretism), before the advent of a second paradigm – the ordoliberal paradigm – which prevailed from 1962 to 2002 (section 4: Revelation). Then, it declined against the rise of the third paradigm – consumer welfare (section 5: Reformation). The emergence of a fourth paradigm, 'the excess of market power', since 2015, will then be assessed (section 6: Counter-Reformation).

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His most recent books in English include: *Reinventing Europe. The History of the European Union, 1945 to the Present* (eds with Brigitte Leucht and Katja Seidel, Bloomsbury, 2023); and *Governing Europe in a Globalizing World. Neoliberalism and its Alternatives* (Routledge, 2018). The author thanks David Gerber, Frédéric Marty, Heike Schweitzer and Anselm Küsters for constructive and sometimes conflicting comments on an earlier version of this paper. All interpretations and errors are mine.

## 1. Introduction

Since the Treaty of Rome of 1957, the articles defining European competition policy have remained unchanged, but their interpretations have evolved. This study argues that it is possible to identify four different paradigms, i. e. a broad set of beliefs about the right interpretation of the Treaty of Rome that is informed by the dominant intellectual, political and institutional context of the time. Economists, lawyers, civil servants and politicians are not computers implementing a coded-program, but rather fleshy human beings embedded into wider sets of ideological beliefs, values and scientific knowledge. The term ‘paradigm shifts’ designs in this paper an overhaul of the main objectives and of the implementation tools of European competition policy. It does not refer to a complete revolution in this public policy, as European institutions are marked by continuity and a strong inertia: all new developments must incorporate past primary and secondary legislation. Within this institutional and legal framework, however, room for interpretation exists, and therefore ‘paradigm shifts’ may be observed. They depend on the intellectual evolution of legal and economic thinking, on the economic and political context, and on the balance of power between decision-makers.

The continuity between the Treaty of Rome creating the European Economic Community (EEC) and the current Lisbon Treaty (Treaty on the Functioning of the European Union, or TFEU) provides the ground for the historical methodology that lies at the heart of this paper. Indeed, Articles 85 and 86 of the Treaty of Rome, respectively on cartels and on abuse of dominant position, have found their way in the current Articles 101 and 102 TFEU. The debate on the interpretation of these articles was fought in the literature, during conferences — notably those similar to the GCLC, where this volume stems from — but also within the closed premises of national and European institutions. Hence, this contribution will use archives of various governments (Britain, France, Germany) and of the European Commission to reconstruct the debates on the interpretation of articles 85-86 EEC / 101-102 TFEU<sup>2</sup>. It

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<sup>2</sup> This article was written without extensive references to archives in footnotes. For more details about the topics covered herein, see: Laurent Warlouzet, *Governing Europe in a Globalizing World: Neoliberalism and its Alternatives following the 1973 Oil Crisis* (Routledge, 2018), 156-179; Laurent Warlouzet, *Europe contre Europe. Entre liberté, solidarité et puissance depuis 1945*, (Cnrs editions, 2022), 229-256 and 327-345 ; Laurent Warlouzet, *The Centralization of EU Competition Policy: Historical Institutional Dynamics from Cartel Monitoring to Merger Control (1956–91)*, *Journal of Common Market Studies*, 54, 3 (2016), 725-741; Laurent Warlouzet, *The EEC/EU as an Evolving Compromise between French Dirigism and German Ordoliberalism (1957–1995)*, *Journal of Common Market Studies*, 57, 1 (2019), 77-93. More generally on the history of competition policy, see: Hubert Buch-Hansen & Angela Wigger, *The Politics of European Competition Regulation. A critical political economy perspective* (Routledge, 2011); Tim Büthe, “The Politics of Competition and Institutional Change in European Union: The First Fifty Years”, in Sophie Meunier, Kathleen McNamara (eds), *Making history: European integration and institutional change at fifty*, Oxford, Oxford University Press, 2007, pp. 175-193; Michelle Cini & Lee Mc Gowan, *Competition policy in the European Union* (Palgrave, 2019); Frédéric Marty, *Towards an Economics of Convention-Based Approach of the European Competition Policy*, *Historical Social Research*, 40, 1 (2015), 94-111; Kiran Klaus Patel & Heike Schweitzer (eds), *The historical foundations of EU competition law up to 1980* (Oxford UP, 2013); Sigfrido Ramirez, Andy Smith, Matthieu Montalban, “Competition policy: ever present but far from all conquering”, in Bernard Jullien, Andy Smith (eds), *The EU’s Government of*

will also rely on the interviews of former commissioners, DG Competition officials and competition policy experts<sup>3</sup>. Thanks to these new primary sources, this study will underline the complex interplay of many member-states— West Germany and others — in this history, and the growing role of the European Commission<sup>4</sup>.

Four main paradigms have shaped the history of the European competition policy. The first — the public interest paradigm — was dominant in Western Europe up to the 1980s (section 2), but not within the European Economic Community (EEC), where a more syncretic approach dominated in the Treaty of Rome (section 3), before the advent of a second paradigm — the ordoliberal paradigm — which prevailed from 1962 to 2001 (section 4), when it declined against the rise of the third paradigm — consumer welfare (section 5). The emergence of a fourth paradigm, called ‘the excess of market power’, since 2015, will then be assessed (section 6).

## 2. Genesis: The Public Interest Paradigm (1890–1970s)

At the origin of competition policy was the public interest paradigm. It rests on two ideas: 1) competition concerns are only one element among many for state authorities willing to monitor the markets, alongside social, regional, industrial and strategic criteria; and 2) the state authorities are the best actors to balance those various criteria and decide accordingly.

The prevalence of the public interest paradigm during most of the twentieth century is logical, as it was a high point of state intervention in the economy, with two long world wars and the setting up of welfare states and of dirigist industrial policies. A majority believed that, since the 1929 crisis had amply demonstrated the failure of *laissez-faire*, state or quasi-state authorities were the best placed to define the ‘public interest’, as a balance between different objectives, mostly high growth, low inflation, technical modernization, regional balance and social fairness.

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*Industries: Markets, Institutions and Politics* (Routledge, 2014), 141-164; Wolf Sauter, *Coherence in EU competition law* (Oxford UP, 2016); Xavier Vives (eds), *Competition Policy in the EU. Fifty Years on from the Treaty of Rome* (Oxford UP, 2009).

<sup>3</sup> The author interviewed former commissioners Frans Andriessen and Peter Sutherland, former DG Claus-Dieter Ehlermann, former DG Competition officials Jonathan Faull, Anne Houtman, Michel Petite, Armand Saclé, Helmut Schröeter, and John Temple-Lang, as well as competition expert Valentine Korah. He has also met Ernst-Joachim Mestmäcker. Bar the last two, all of those interviews are available on the website of the European Union Historical Archives: [https://archives.eui.eu/en/oral\\_history](https://archives.eui.eu/en/oral_history).

<sup>4</sup> For lack of space, this article disregards three major actors in this process: the national competition authorities, the European Court of Justice, and the US actors (both institutional and intellectual). See for example : Julie Bailleux and Antoine Vauchez, eds, *Exploring the Transnational Circulation of Policy Paradigms. Law Firms, Legal Networks and the Production of Expertise in the Field of Competition Policies* (EUI working paper, 2014).

Besides, competition policy — defined as an active monitoring of market by state authorities designed to promote their efficiency according to the neoclassical vision of the ‘pure and perfect competition’ — is a relatively recent phenomenon. Indeed, the sheer concept of ‘pure and perfect competition’ dates back to the late nineteenth century. Before that, state authorities promoted market competition mostly in exceptional circumstances, to avoid hoarding during food crisis for example — an intervention documented even under the Roman empire, when Emperors had to provide ‘food and games’ for the city of Rome’s inhabitants including by tinkering with prices and business practices<sup>5</sup>. Later on, in 1791, a French law passed during the French Revolution banned corporations, and in the meantime forbade most forms of what we now call ‘agreements’ or ‘cartels’. According to David Gerber, this statute was a watershed, as it ‘embodied the idea that law could be used to protect economic freedom’.<sup>6</sup> A new law was then passed under Napoleon to ban concerted action to manipulate ‘the price of foodstuffs or other commodities [...] above or below that which natural and free competition would have set’. French jurisprudence developed along those lines in the nineteenth century, in particular around the notion of ‘fair competition’, but without a coherent policy.

The first modern competition law was the US Sherman Act, enacted in 1890.<sup>7</sup> It was called ‘antitrust’, as it aimed at combatting the excessive concentration of power of the most powerful businessmen sometimes stigmatized as ‘robber barons’, who were often organized in ‘trusts’ coordinating the collusion of companies. The primary example was oil, with the dominance of Standard Oil until its dismantling in 1911 after a lawsuit based on the Sherman Act.

In Europe, competition policy appeared in the aftermath of World War II under various influences: the European willingness to emulate the US model to increase productivity; the US active promotion of it; and the distrust of cartels, which were associated with totalitarian regimes.<sup>8</sup> In reaction to 1930s protectionism and cartelization, Western elites promoted ‘embedded liberalism’ — namely an

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<sup>5</sup> Paul Veyne, *Bread and circuses : the historical sociology of a political pluralism* (1990).

<sup>6</sup> David Gerber, *Law and competition in twentieth century Europe: protecting Prometheus* (Oxford university Press, 1998), 183; see also for many examples of French case-law : Alessandro Stanziani, *Rules of Exchange. French Capitalism in Comparative Perspective, Eighteenth to Early Twentieth Centuries* (Cambridge UP, 2012), 248-278.

<sup>7</sup> On US competition policy, see: William E. Kovacic and Carl Shapiro, “Antitrust Policy: A Century of Economic and Legal Thinking”, in *Journal of Economic Perspectives*, 14, 1 (2000), 43-60; Stephen Martin, *The goals of Antitrust and Competition Policy*, Purdue CIBER Working Papers, 2007-003.

<sup>8</sup> A few provisions existed before 1945 in several European countries under different guise, see : Gerber, *Law and competition*, 115-165.

association of free-market, free-trade, and strong state intervention in terms of industrial, monetary and welfare state policies.<sup>9</sup>

Within this framework, a few Western European states adopted provisions that are associated nowadays with competition policy, but which were referred to differently in those days: e.g. the fight against 'restrictive practices', price policy, the monitoring of 'monopolies'. Among the six founding members of the EEC, only three had some provisions in this regard when the Treaty of Rome was signed: the Netherlands, since 1956; France, since 1953; and Germany, with the Allied decartelization laws. The UK passed a law on monopolies in 1948, and another one on 'restrictive trade practices' in 1956. With the exception of the new German law passed in 1957, the implementation was weak, since those provisions were embedded into wider economic policies following broader industrial, social, regional and strategic criteria.<sup>10</sup>

However, the promotion of competition did exist even within the public interest paradigm. France, for example, had suffered from food shortages in the 1940s, despite being one of the most important producers of agricultural goods in the world. In reaction, the state severely repressed all practices that could increase price, such as restrictive vertical distribution agreements. In the 1950s and 1960s, stringent legislation was enacted and implemented to force producers to sell their products to supermarkets. Edouard Leclerc, one of the pioneers of French supermarkets, actively lobbied the French government to pursue a stringent policy in this area. With regard to industrial policy, the French state used the threat of what we would refer to today as 'competition policy provisions' to dismantle horizontal cartels among suppliers of the state-owned utility EDF.<sup>11</sup> Since EDF held a monopoly over electricity production in France, it was also a monopsony for the French suppliers, who tended to share the national markets alongside pre-war positions. Hence, in France, as in most European countries, competition provisions were embedded into price policy and industrial policy.

Only in West Germany was a genuine competition policy enacted, with the 1957 law, thanks to an ordoliberal impetus (see part 3). It was independent from other public policies and was self-referential, as it promoted free competition simply for its own sake, and not to attain another objective. However,

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<sup>9</sup> John Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, International Organization, 36, 2, (1982), pp. 379-415; Marie-Laure Djelic, *Exporting the American model: The post-war transformation of European business* (Oxford University Press, 2001).

<sup>10</sup> The Netherlands was described as a "cartel paradise" for example: Wendy Asbeek Brusse, Richard Griffiths, "Paradise Lost or Paradise Regained? Cartel Policy and Cartel Legislation in the Netherlands", in Stephen Martin (eds.), *Competition Policies in Europe* (Elsevier, 1998), 15-40; in the UK, the Monopoly commission explicitly used a public interest test: Stephen Wilks, *In the public interest. Competition Policy and the Monopolies and Mergers Commission* (Manchester UP, 1999).

<sup>11</sup> Claude Didry, & Frédéric Marty, *La politique de concurrence comme levier de la politique industrielle dans la France de l'après-guerre*, *Gouvernement et action publique*, 5(4), (2016) 23-45.

even in West Germany, the influence of the public interest paradigm was clearly visible in the many exemptions to the 1957 law, not only in terms of sectors but also in terms of practices (export cartels during the first decades). Many scholars underlined the tolerance shown by Ludwig Erhard, the minister of economy who passed the 1957 law, for the concentration into large companies.<sup>12</sup> Some ordoliberalists were also dissatisfied with a law they considered to be too soft. On a macro-level, public subsidies to companies were on a par in West Germany and France until 1981 if all types of subsidies (including regional ones) are taken into account.<sup>13</sup> Later on, a famous case of industrial policy trumping competition policy occurred in 1988, when the government overruled the decision made by competition authorities to ban the merger between Daimler-Benz and MBB in 1988.<sup>14</sup> In 1989, the minister of economy Helmut Haussmann and his deputy Otto Schlecht, both centre-right free-marketiers, considered that the German competition authorities were sometimes too severe given that companies needed to grow. More generally, the West German welfare state was strengthened in the 1950s as well with codetermination laws and pension reform. To sum up, Western Germany was not a paradise of free market, but rather a 'coordinated economy' where competition policy rules were useful to avoid collusion and to maintain high competitiveness<sup>15</sup>.

Eventually, this public-interest approach declined in the late 1970s and 1980s. State interventions to steer markets were now considered mostly inefficient: planning became impossible with the rise of international trade; price policies, which could be useful in times of shortages, seemed pointless in a world of mass consumption and diversified items; and industrial policies often ended up in regulatory capture (with massive subsidies unloaded on companies close to the political leaders) and/or in excessive concentration leading to high consumer prices.<sup>16</sup> A market-based approach came to prevail.

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<sup>12</sup> Volker Berghahn, *The Americanisation of West German Industry, 1945-1963*, (Berg, 1986), 157-181; Jan-Otmar Hesse and Eva-Maria Roelevink, "Cartel Law and Cartel register in German 20th century History", in Susanna Fellmann, Martin Shanahan (eds.), *Regulating Competition. Cartel Registers in the Twentieth Century World*, (Routledge, 2016), pp. 191-207.

<sup>13</sup> Warloutzet, *Governing Europe*, 106.

<sup>14</sup> Archiv des Liberalismus, Gummersbach, A 49-68, note on the FDP Bundestagfraktion meeting on 31 August 1989; A 49-272, note from 7 November 1989.

<sup>15</sup> West Germany epitomized the "coordinated market economy" for the "Varieties of Capitalism" scholars. See: Peter Hall, David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford UP, 2001).

<sup>16</sup> Warloutzet, *Governing Europe*, 164-6.

### 3. Syncretism: The Compromise of the Rome Treaty

The Treaty of Rome of 25 March 1957, which created the European Economic Community (EEC) that is still at the basis of the current European Union (EU), is a syncretic document in many ways, since it is simultaneously intergovernmental and supranational, market-oriented and regulatory. The same is true for the 'rules governing competition' of the Treaty of Rome, whose main aim was to ensure market integration: it was pointless to remove state barriers to trade if private barriers were erected through cartels and other market-sharing agreements. An additional motivation was the counter-model of the German cartelisation under the Nazi regimes. These motivations explained why relatively stringent provisions regarding competition policy were enacted in the 1951 Treaty of Paris, which created the European Coal and Steel Community (ECSC), the direct ancestor of the EEC.

Strikingly, the provisions of the 1957 Treaty of Rome on competition policy have remained largely unchanged in the current TFEU, with the same three articles:

- article 85 EEC (now article 101 TFEU,) establishing a prohibition on certain agreements affecting intra-European trade (para 1-2), with exemptions (para 3);
- articles 86 EEC (now article 102 TFEU, ex article 82 TEC) prohibiting the abuse of dominant position;
- articles 90 EEC (now article 106 TFEU, ex article 86 TEC) stipulates that companies in charge of 'services of general economic interest' are both concerned by these rules, and at the same time partially exempted.

An historical enquiry into the origins of the Treaty of Rome's competition rules dismisses the simplistic interpretation that would ascribe the origins of European competition rules solely to German ordoliberal thinking, or to the US antitrust tradition. On the contrary, the cross-examination of European, French and German archives of the negotiations reveals that many actors played a part. The main negotiators of the provisions on competition were the French and Germans. US officials played a much less important role than during the ECSC negotiations: in 1956–57, Stalin was dead, so the fear of Cold war turning hot was subsumed. Besides, since the Marshall Plan was over, Washington did not have any financial leeway over most of the six EEC member-states.

In Bonn, German archives show that the main priority of the principal West German negotiator, Alfred Müller-Armack, who is usually associated with ordoliberalism, was not to promote an active European competition policy, but rather to avoid any European threat over the future German law<sup>17</sup>.

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<sup>17</sup> German national archives, B 102/134647, note Deringer, 7 November 1958; note Albrecht, 13 November 1958; Reiner Schulze, Thomas Hoeren (eds), *Dokumente zum Europäischen Recht, Band 3 : Kartellrecht (bis 1957)*, (Springer,

German negotiators refused both European provisions too distant from the German model, and a powerful Commission.

In Paris, French negotiators wanted an effective competition policy, and they refused any strong centralization on the Commission<sup>18</sup>. The French had imagined a system based on a stringent harmonisation of competition law by member-states themselves, but under close supervision from the Commission and the Council. If one member-state did not act, the Commission could inquire and propose a solution. If this solution was not implemented, then the Council could impose a compromise by qualified majority voting. It seems that the French feared a non-implementation of competition rules by their neighbours. During the 1950-1951 ECSC negotiations, Paris had always insisted on stringent rules against the biggest companies in order to avoid any reconcentration of West German industries.<sup>19</sup> During the period 1956-57, the French remained wary of the larger West German companies, and thus insisted on the same treatments for restrictive practices and for dominant position (sometimes called 'concentration').

The final substantive compromise was based on the German distinction between cartels and abuse of dominant position, with French input in the detail of the wording and inspiration from the ECSC blueprint. Discriminatory practices particularly targeted by French price policy were included (see in particular those listed in article 85 EEC, para 1, a, d and e, and article 86, a, c and d). The French also secured article 90 EEC, which protected state-owned companies and most industrial policy provisions.

From an institutional point of view, since both the French and the German were relatively wary against the Commission, it fell to the Belgians (and to the three Benelux countries in general: Belgium, the Netherlands and Luxembourg) to insist on the need to empower the Commission<sup>20</sup>.

The syncretic nature of the Rome Treaty was recognized by different legal scholars having conducted historical research on the origins of article 86 EEC.<sup>21</sup> The same is true for article 85 EEC. Both

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2000) : notes of Meyer-Cording, 5 November 1956; Vermerk betreffend die Konferenz über den Gemeinsamen Markt vom 05.11-07.11.1956, 8 November 1956.

<sup>18</sup> On the French influence and its limitations, see: Warlouzet, *Le choix de la CEE*, pp. 269-276; Historical Archives of the European Union, CM3, 236, document from the secretariat of 4 July 1956; Doc Mar. Com. 37, 4 September 1956.

<sup>19</sup> Brigitte Leucht, "Expertise and the Creation of a Constitutional Core Europe: Transatlantic Policy Networks in the Schuman Plan Negotiations", in Michael Gehler, Wolfram Kaiser, Brigitte Leucht (eds.), *Transnational Networks in Regional Integration. Governing Europe, 1945-83* (Palgrave Macmillan, 2010), 18-37.

<sup>20</sup> Historical Archives of the European union, CM 236, doc. MAE 252/56, 3-5 september 1956 ; see also the account of von der Groeben, who chaired the negotiations as a representative of the German government : Hans von der Groeben, "Europäische Integration aus historischer Erfahrung: Ein Zeit-zeugengespräch mit Michael Gehler," *Zentrum für europäische Integrationsforschung (ZEI) Discussion Paper no.C108/2002*, 2002, p. 17

<sup>21</sup> Pinar Akman recognizes: "It is still puzzling to the author why Article 82 EC [former article 86 EEC or 102 TFEU] was couched in such a vague term" : Pinar Akman, *Searching for the Long-Lost Soul of Article 82EC*, in *Oxford Journal of Legal Studies*, 29, 2 (2009), p. 297 ; Heike Schweitzer admits similar uncertainties: Heike Schweitzer, "Parallels and

articles are relatively clear in terms of targets, but not in terms of methodology (i.e. which legal and economist criteria are relevant) and of procedure (i.e. notification procedure or not, role of the various EEC institutions). Competition could be interpreted as a protection of private rights or as part of public law and of the regulatory role of the state. Similarly, its objective may be the promotion of economic efficiency, and/or of economic freedom. What we perceive today as vagueness was, however, logical in the context of 1956 Western Europe, where almost no competition policy in the contemporary sense of the word existed. Moreover, it mirrors the ambiguity of other chapters of the Treaty, for example those on agriculture, whose multiple objectives laid out in article 39 EEC often contradicted themselves. This language translated the difficult political compromises that were reached to conclude the Treaty.

#### 4. Revelation: the Adoption of the Ordoliberal Paradigm (1962–2002)

The ordoliberal paradigm revealed competition policy as a stand-alone policy. By contrast with the public interest approach, the ordoliberal paradigm curtailed the state's role as a guardian of a liberal political and economic order. It was developed by German-speaking scholars in reaction to the totalitarian experience of Nazi Germany, and even earlier, as a response to certain turbulent episodes of the Weimar Republic, such as hyperinflation.<sup>22</sup> In their understanding, political liberalism and economic liberalism are strongly intertwined: individual liberties had to be protected against any dominant power, be they state authorities or conglomerates. The state must not intervene in the economy in an attempt to steer it with discriminatory tools, but it has a key role to play by monitoring the markets in order to avoid any excessive concentration of power. Emphasis is laid on the defence of the small actors, such as small and medium companies. Despite the divisions among ordoliberals, it is possible to sketch an ordoliberal-inspired competition policy through its focus on the preservation of the liberty of competitors, by establishing a level playing field (which does not mean the shielding of

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Differences in the Attitudes towards Single-Firm Conduct: What are the Reasons? The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art 82 EC", in Claus-Dieter Ehlermann, Mel Marquis (eds.), *European Competition Law Annual: 2007. A Reformed Approach to Article 82 EC*, (Hart Publishing, 2008), 119-164.

<sup>22</sup> A standard account on ordoliberalism and its influence in Europe is: Gerber, *Law and Competition*. More recently on ordoliberals and European integration, see: Quinn Slobodian, *Globalists* (Harvard University Press, 2018). A lively debate exists on David Gerber's book about the ordoliberal influence on the EEC/EU competition policy. Pinar Akman and Hussein Kassim tend to dismiss it as a myth: Pinar Akman, Hussein Kassim, 'Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy', *Journal of Common Market Studies*, 48, 1 (2010): 111-132. Conversely, Anselm Küsters's PhD seeks precisely to identify ordoliberal thinking and language within EEC/EU competition policy through a traditional and innovative (using data-mining) approach: Anselm Küsters, *The Making and Unmaking of Ordoliberal Language. A Digital Conceptual History of European Competition Law*, PhD, Univ. Frankfurt am Main, 2022 (forthcoming Klostermann, 2023), pp. 452-453.

sub-efficient competitors) and its emphasis on legal formalism rather than on a full effect-based economic analysis.

As alluded to before, the ordoliberal way of thinking did not translate fully in the 1957 German competition law, as indeed is always the case with all economic theories. Many exemptions remained, and senior ordoliberals were disappointed with the law. Besides, debates existed on how to define an ordoliberal competition policy from the technical point of view.<sup>23</sup> Suffice to say, however, that in a comparative perspective, the West German situation was quite unique in 1957, with a law explicitly promoting competition for its own sake, with stringent provisions against cartels and, more importantly, the setting up of an independent authority, the Bundeskartellamt, which quickly became a powerful institution.<sup>24</sup>

The translation of the ordoliberal model at the European level was not a preordained outcome. Most of the ordoliberals were opposed to, or at least wary of, the Rome Treaty.<sup>25</sup> Going further, the emergence of an ambitious European competition policy was not anticipated for three reasons: first, no strong competition policy existed in Western Europe; second, France and West Germany refused any major delegation of power to EEC institutions (even though German rhetoric often paid lip service to federalism); and third, the previous experience of the European Coal and Steel Community (ECSC)'s competition policy was disappointing — despite ambitious provisions the 1951 Treaty of Paris, the High Authority imposed only a mild restraint on the reconcentration of German industry.<sup>26</sup>

Hence the real paradigm shift occurred in February 1962 with the adoption of Regulation 17/62, which interpreted article 85 EEC on cartels and transformed the 'rules governing competition' of the Rome Treaty into a full-fledged supranational policy. It imposed two major shifts: 1) EEC competition policy was a stand-alone policy defined by the competition-only criterion, and not by the public-interest assessment; and 2) the European Commission played a major role in its implementation, because the decision was made to impose a procedure of notification, whereby all agreements had to be notified to the Commission, which then decided alone on their compatibility with the Treaty of Rome.<sup>27</sup> Member-states had only a minor consultative role, and the Court of Justice merely reviewed the

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<sup>23</sup> Schweitzer, *Parallels*.

<sup>24</sup> Gerber, *Law and competition*, pp. 280-294.

<sup>25</sup> Slobobian, *Globalists*.

<sup>26</sup> Laurent Warlouzet, & Tobias Witschke, The difficult path to an economic rule of law: European competition policy, 1950–91. *Contemporary European History*, 21(3), 2012, 437-455.

<sup>27</sup> Whereas « The Treaty of Rome did not dictate such centralization » according to Gerber, *Protecting*, 349.

Commission's decision (whereas it was up to the Court to settle a conflict in several schemes considered before that).

This system was presented as a logical consequence of the Treaty of Rome by its promoters. But, during the early years of the negotiation leading up to Regulation 17/62, a majority of member-states led by France defended a completely different system, based on the abuse principle (absence of notification) and a decision-making system associating the member-states and the Commission.<sup>28</sup> Only a change in majority in Belgium in 1961 (the Belgians leant on the French approach before that, and then shifted to the German one),<sup>29</sup> the lack of efficiency of French negotiators, and a trade-off with Germany over the common agricultural policy (decided in January 1962 as well) allowed Regulation 17/62 to be adopted. The role of the first commissioner for competition, Hans von der Groeben, who was a former top German negotiator of the Treaty of Rome, and who was surrounded in Brussels by a team mostly influenced by German ordoliberalism, was also instrumental<sup>30</sup>. Von der Groeben insisted on putting the Commission, and not the Council or the ECJ, at the centre of the system<sup>31</sup>. Hence, the shift to the ordoliberal paradigm with Regulation 17/62 was by no means a foregone conclusion: a cartel policy with a stronger involvement of the Council or of the Court and no notification procedure could have emerged. The final compromise on Regulation 17/62 was secured in December 1961 after Bonn accepted a French request for a tougher regime for distribution agreements, eventually embedded in article 22 of the Regulation<sup>32</sup>. Initially, Regulation 17/62 was a Pyrrhic victory for the European Commission, as it was drowned under more than 36,000 notifications in a just few years. Ironically, this situation owes much to the French insistence on targeting vertical distribution, which made up the bulk of the agreement notified to the Commission. A US expert of comparative cartel law estimated in 1962 that the French law was stricter than the German one with regard to vertical restraints.<sup>33</sup>

The first cartel ban, the famous *Grunding-Consten* decision of 1964, was a vertical distribution agreement between a German producer and a French distributor. The West German government

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<sup>28</sup> For a summary of the negotiation of Regulation 17/62: Warlouzet, *The Centralization*; for a detailed account: Warlouzet, *Le choix de la CEE*, 304-332; Sibylle Hambloch, *Europäische Integration und Wettbewerbspolitik* (Nomos, 2009), 79-125.

<sup>29</sup> On this Belgian shift, see the CNPF archives (Roubaix), 72 AS 1504, note Lartisien for Villiers on the meeting of 21-22 November 1961.

<sup>30</sup> On the Commission's: Katja Seidel, *The process of politics in Europe: The rise of European elites and supranational institutions* (IB Tauris, 2010).

<sup>31</sup> Hambloch, *Europäische*; Warlouzet, *The Centralization*; and German national archives (Koblenz), B 102/259228, note BMWi, EA4, 13 November 1961.

<sup>32</sup> German national archives (Koblenz), B 102/2592294, note BMWi, EA4, Epphardt, 16 décembre 1961.

<sup>33</sup> Stefan A. Riesenfeld, *Antitrust Laws in the European Economic Community*, *California Law Review*, 459, 1962, 473.

opposed the ban, but it was overruled by the Commission, a decision that shows how von der Groeben remained independent from its government.<sup>34</sup>

Eventually, the Commission progressively solved its backlog problem in the 1980s by multiplying the decisions and the block exemptions. The European Court of Justice usually supported this dynamic, as it contributed to the overarching goal of market integration, even if the Court was often critical of the soundness of certain economic judgments (starting with the first cartel ban, *Grunding-Consten*, in 1966)<sup>35</sup> and on the procedures. Besides, the Commission experienced many hurdles outside the cartel remit. In the 1960s, Hans von der Groeben and other German experts influenced by ordoliberalism considered extending competition policy to the control of mergers and state aids, but the dominance of national neomercantilist policies prevented the Commission to encroach on member-states in this area before the mid-1980s.<sup>36</sup>

## 5. Reformation: The ‘Consumer Welfare’ Paradigm (since 2003)

Major overhaul of competition policy occurred in 2003–4 in what is generally described as a progressive transition from the ordoliberal approach to the consumer welfare paradigm, first from the procedural point of view, and then from the substantive point of view.<sup>37</sup> From the procedural point of view, the definition of common legal and economic criteria accepted across a vast community of competition policy experts, as well as the development of efficient national competition policies in all EU states since the 1990s, allowed the Commission to abandon the framework of regulation 17/62. Regulation 1/2003, adopted by the Council in 2002, decentralized the implementation of some cartel rules to national authorities, while keeping a strong power of coordination. The notification procedure was shelved as companies were now obliged to assess the legality of their practices themselves. The main substantive characteristic was the adoption of a more economic approach, based on the recent development in industrial organisation economics, whereas the previous approach was based more on legal formalism. The priority became the defence of ‘consumer welfare’, which could be calculated. In

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<sup>34</sup> Warlouzet, *Governing Europe*, 158.

<sup>35</sup> EC Court of Justice: joined cases 56 and 58-64, judgment of the Court of 13 July 1966, *Établissements Consten S.A.R.L. and Grunding-Verkaufs-GmbH v Commission of the European Economic Community*; Gerber, *Protecting*, 352-368; on the Court’s critics and the role of lawyers: Lola Avril, “How lawyers became essential intermediaries between firms and the European Commission. Procedural reform in competition cases (1962–1983), in Lennaert van Heumen and Mechthild Roos, eds, *The Informal Construction of Europe* (Routledge, 2019), 163-180.

<sup>36</sup> Warlouzet, *Europe contre Europe*, 244.

<sup>37</sup> For an overview: David J. Gerber, *Two Forms of Modernization in European Competition Law*, *Fordham International Law Journal*, 31, 5, 2007, pp. 1235-1265.

addition, cartel-busting was also fostered through the leniency procedure, which gave more initiative to private actors.<sup>38</sup> In merger control, Regulation 139/2004 kept a more centralized framework, while at the same time promoting the more economic approach. It was then proposed for block exemptions regulations and for the abuse of dominant position in a 2009 communication.<sup>39</sup> The EU Court of Justice adopted it rather belatedly.<sup>40</sup>

The roots of this evolution are located in the 1990s. First, from an administrative point of view, DG Comp felt the need to concentrate on the most salient cases — those that define the jurisprudence — and thus to be alleviated from the burden of the notification system. Archival document from 1995 shows that Claus-Dieter Ehlermann (who was then Director General for Competition) and Philip Lowe (Director of the Merger Task Force) were still preoccupied by the problem of backlog, which could be further reinforced by the perspective of the Eastern Enlargement.<sup>41</sup> They actively sought solutions to enable DG Comp to concentrate only on the most serious case. Second, the legal formalism and paucity of economic judgement of several Commission bans was sternly criticized by the Tribunal of first Instance of the Court of Justice. It even reversed a merger ban for unsound economic judgement in 2002.<sup>42</sup> Third, the intellectual development of industrial organization economics provided a readily available toolkit shared on both sides of the Atlantic — sometimes called ‘Post-Chicago Antitrust Economics’.<sup>43</sup> Fourth, this development was part of a wider ‘Americanization’ of Europe that had returned since the 1980s: whereas the USA looked into Western Europe’s exceptional high growth for inspiration in the 1960s, the reverse was true in the Reagan years, when the USA enjoyed a higher growth rate than Germany and won the Cold War.

The intellectual debate between the ordoliberal and the Second Chicago School was indeed raging as of the 1980s. The first group was spearheaded by Ernst-Joachim Mestmäcker, a prominent second-

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<sup>38</sup> On the genuine efficiency of the leniency programme : José Manuel Ordóñez-De-Haro, Joan-Ramon Borrell, Juan Luis Jiménez, *The European Commission's Fight against Cartels (1962–2014): A Retrospective and Forensic Analysis*, *Journal of Common Market Studies*, 56, 5, 2018, 1087-1107.

<sup>39</sup> Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02.

<sup>40</sup> Judgment of the General Court of 26 January 2022, Intel Corporation Inc. v European Commission, Case T-286/09 RENV.

<sup>41</sup> Laurent Warloutet, “The internal market and competition”, in *The European Commission, 1986-2000. Histories and memories of an Institution*, Luxembourg: EU Publications Office (2018), 269-273.

<sup>42</sup> EU Court of Justice, Order of the Court (Grand Chamber) of 9 June 2010, European Commission v Schneider Electric SA, Case C-440/07P.

<sup>43</sup> Steven Salop, Carl Shapiro, Jean Tirole’s Nobel Prize in Economics: the Rigorous Foundation of Post-Chicago Antitrust Economics, *Antitrust*, 29, 2, Spring 2015, 78-81.

generation ordoliberal who had been an advisor to von der Groeben in the 1960s.<sup>44</sup> The second group, the Second Chicago School scholars, insisted on the necessity to prioritize economic goals, mostly consumer welfare.<sup>45</sup> Legal scholars such as the British Valentine Korah and the Belgian René Joliet (who was judge at the ECJ between 1984 and 1995) criticized, beginning in the early 1980s, several decisions of the Commission that they considered as too legally formalistic and not grounded in economics. Korah stigmatized DG IV 'dogmatic' severity against vertical agreements, whereas, in her opinion, many of them were useful to avoid 'free-riders' (companies that benefit from a service without paying for it, such as after-sale services protected by exclusive distribution agreements). She criticized a policy that was meant to protect competitors (in particular SMEs) at the expense of competition, and hence of consumers. At the same time, the US lawyer Barry Hawk levelled the same criticisms against the Commission and spread them through the Fordham conferences, a major transatlantic forum on competition policy. Those criticisms did not leave the Commission officials unscathed. Some of these officials envisaged a more economic approach as soon as the early 1980s — notably Claus-Dieter Ehlermann and John Temple-Lang, who were then members of the legal service — but the ordoliberal impetus was maintained.<sup>46</sup>

In the meantime, despite this administrative continuity, a major evolution occurred at the political level. Commissioners Peter Sutherland and Leon Brittan held the competition portfolio from 1985 to 1992. They used both the ordoliberal heritage of DG IV, and their Anglo-Saxon zeal (the Irishman Sutherland studied in the US; and Brittan, a British man, was a prominent Thatcherite), to expand the remit of European competition policy towards new areas: mergers, state aids, and the liberalization of telecommunication and or air transport.<sup>47</sup>

In the 1990s, Director General Claus-Dieter Ehlermann, a German man with a different vision than the ordoliberal one (originally, he came from a social-democrat background), agreed to consider a

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<sup>44</sup> Mestmäcker was influenced both by ordoliberalism and by Hayek. He was adamantly hostile to the « more economic approach ». See : Claire Mongouachon, « Les difficultés d'une interprétation ordolibérale de la constitution micro-économique de l'Union européenne » in Guillaume Grégoire and Xavier Miny (eds), *The Idea of Economic Constitution in Europe* (pp. 344-379) (Brill Nijhoff, 2022).

<sup>45</sup> Warloutzet, *Governing Europe*, 162-163

<sup>46</sup> This debate occurred within the framework of the famous Philip Morris case (British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities, 17 November 1987, cases 142 and 156/84, ECR 4487): Laurent Warloutzet, "The Difficult Quest to Implement Cartel Control: Grundig-Consten (1966) and Philip Morris (1987)", in Bill Davies et Fernanda Nicola (eds.), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press, 2017), 261-277.

<sup>47</sup> Warloutzet, *Governing Europe*, 171-4 ; Warloutzet, *Europe contre Europe*, 233-256 ; Michelle Cini, Lee Mc Gowan, *Competition Policy in the European Union* (Palgrave, 1998), 31-35.

radical overhaul of EU competition policy.<sup>48</sup> Philip Lowe, the director of the Merger Task Force, responded enthusiastically and emphasized the need for a stronger economic approach. He later became Director General from 2002 to 2010, during the enforcement of Regulation 1/2003 and the adoption of Regulation 139/2004. Those two landmark texts were adopted under the stewardship of Commissioner Mario Monti (1999–2004), the first economist to hold this position. The creation of an independent cartel office was even envisaged to hermetically separate the instruction of competition case from political pressure, before being rejected by DG Comp, who wanted to keep undisputed leadership over the orientation of competition policy in all areas.

The new approach puts an emphasis on consumer welfare, but is not a strict copy of the Second Chicago School's prescriptions. EU competition policy has remained more interventionist than what neoliberal scholars such as Robert Bork or Richard Posner would have liked. A synthesis between the integrationist impetus (the necessity to unify the internal market), the ordoliberal heritage (which had remained prevalent notably in certain ECJ rulings), the Second Chicago school critique, and the industrial economics toolkit have emerged, known as the 'Brussels School'.<sup>49</sup>

## 6. Counter-Reformation: The 'Excess of Market Power' Paradigm? (since 2014)

Since the advent of Margrethe Vestager, a Danish liberal, at the helm of the Commission's portfolio for competition in 2014, a new paradigm tentatively called the 'excess of market power' is slowly taking shape. It is a response to a phenomenon of reconcentration of companies, especially the so-called GAFAM, which usually enjoy a dominant position in their respective sectors<sup>50</sup>: this position was fostered first by the rise of new network industries that enjoyed a winner-takes-all effect, and second by a lenient US antitrust enforcement. At some point, Facebook even projected to launch its own currency. In addition, the potential of control on private life that those IT giants wield is a worrying development, especially at a time of rising populism.

Both dynamics have been also criticized by US scholars, notably Luigi Zingales, who feared a new 'Medici Vicious Circle', when private companies took over the political structure, such as in late

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<sup>48</sup> Warlouzet, *The Internal Market*, 279 ; see also : Stephen Wilks and Lee Mc Gowan, *Disarming the Commission : the Debate over a European Cartel Office*, *Journal of Common Market Studies*, 33, 2, 1995, 259-273

<sup>49</sup> Catherine Prieto, David Bosco, *Droit européen de la concurrence. Ententes et abus de position dominante* (Bruylant, 2013).

<sup>50</sup> The widely used acronym GAFAM designates Google, Apple, Facebook, Amazon and Microsoft. Since Google's parent company is Alphabet, and Facebook's is Meta, the acronym has morphed but the original version still sticks. Those companies are also known as the « Big Five ». Apple does not have a dominant position in the smartphone market but its brand is so powerful that it wields enormous market power.

medieval Florence.<sup>51</sup> A new approach, sometimes called ‘New Brandesian’, in reference to US Supreme Court judge Louis Brandeis (1919–1939), underlines the inadequacy of standard antitrust and of the ‘consumer welfare approach’ to capture the breadth of the GAFAM’s market power. It is embodied, among others, by the young law scholar Lina Kahn, who was hired as chairwoman of the Federal Trade Commission in 2021.<sup>52</sup>

The ‘excess of market power’ paradigm is defined here by three features: 1) a focus on the repression of new forms of market power in the digital economy, symbolized by high-visibility fines against Apple, Google and Amazon since 2016 (market power is targeted as a problem in its own right even if consumer welfare can be increased in the short term); 2) creativity in legal and economic reasoning, with, for example, a wide use of the notion of fiscal aid (against Apple, but also against actors in other sectors such as Fiat or Starbucks); and 3) attention to non-competition criteria such as the protection of privacy, media plurality, digital plurality, or the protection of the environment. Hence, although it targets mostly the GAFAM, it also concerns multinationals in more traditional business lines. Some elements hint at the more severe stance of commissioner Vestager compared to her predecessors Joaqim Almunia (who wanted to settle one of the Google cases that led to a fine under Vestager) and Neelie Kroes (who criticized the Apple ruling). In parallel, the previous approach against more traditional anticompetitive behaviours was still enforced, with record fines against cartels. However, some of the most prominent rulings, notably the 2016 Apple decision with a record €13 billion reimbursement request, were overturned by the Tribunal of First Instance. These legal challenges in the courts, the lack of guidelines to regulate such a new sector, and the long delay of investigation (especially in the rapidly changing environment of digital technology) demonstrated the limitation of the legal framework in the eyes of the Commission.<sup>53</sup>

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<sup>51</sup> Luigi Zingales, *Towards a Political Theory of the Firm*, *Journal of Economic Perspectives*, 31, 3, 2017, 113-130; see also: Thomas Philippon, *The Great Reversal. How America Gave up on Free Markets* (Harvard University Press, 2019).

<sup>52</sup> Lina M. Khan, *Amazon’s Antitrust Paradox*, *The Yale Law Journal*, 126, 3, 2017, available at SSRN. On Brandeis’s doctrine : Patrice Bougette, and Frédéric Marty, *Information Exchange among Firms: The Coherence of Justice Brandeis’ Regulated Competition Approach*, Gredeg Working Paper No. 2020-56, available at SSRN.

<sup>53</sup> On the process leading to the DMA: Michelle Cini & Patryck Czulno, “Digital Single Market and the EU Competition Regime: An Explanation of Policy Change”. *Journal of European Integration*, 44(1), 2022, 41-57. In particular: “Perhaps because digital markets are relatively immature and the Commission has not yet had built up enough of a track record, online platforms have tended to resist Commission control. Indeed, one of the functions of the new draft legislation would be to help nudge gatekeepers into cooperating with the Commission” (p. 47). M. Vestager also benefited from an enlarged portfolio in the von der Leyen Commission (when she was vice-president in charge of competition and of the digital market), compared to the Juncker Commission (when she was merely a commissioner in charge of competition policy).

Margrethe Vestager strove to reinforce her legal toolkit by obtaining two new pieces of legislations, the Digital Markets Act (DMA) and the Digital Services Act (DSA), both adopted in 2022.<sup>54</sup> The DSA is less concerned with competition and more with regulating online content, both to avoid hate speech, misinformation, etc., and to promote transparency in transactions. The DMA marks a fundamental shift in EU competition policy, since 1) the Commission enacts specific sectoral rules, whereas its previous approach has often been sectoral-neutral (even if there are specific rules for telecommunications, energy and the banking sector, among others); 2) it aims at the largest companies in the digital sectors only (the so-called ‘digital gatekeepers’); 3) market power seems to be targeted per se through a list of ex-ante prohibition, and not only in case of blatant abuse observed ex-post through an economic analysis; and 4) many non-competition criteria are promoted, such as privacy and plurality.

The DMA led to diverging interpretations, all of them recognising it as a watershed. For Anselm Küsters, the DMA, as well as several landmark decisions taken under the leadership of Margarethe Vestager against the GAFAM, can be read in part as a return to an ordoliberal-inspired approach that protects competitors rather than consumer welfare.<sup>55</sup> Frédéric Marty estimated that this evolution echoes both ideas promoted in the USA by Brandeis in the 1920s, and ordoliberal thinking (even though the DMA is not ordoliberal, since it follows a more regulatory approach).<sup>56</sup> Conversely, a fear to the return of the ‘public interest’ era, when many conflicting goals and systematic political interference paralyzed competition policy, had also been expressed.<sup>57</sup> So far, however, the examination of the case-law does not seem to vindicate the fear of ‘greenwashing’, namely the lenient exemption from competition rules of restrictive regulations for loose environmental justifications.<sup>58</sup> Another bone of

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<sup>54</sup> DMA: Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector; DSA: Regulation 2022/65 of the European Parliament and of the Council on a Single Market For Digital Services of 19 October 2022.

<sup>55</sup> Frédéric Marty, « Évolution des politiques de concurrence en droit de l’UE : de la Wettbewerbsordnung ordolibérale à la More Economic Approach néolibérale ? », in Guillaume Grégoire and Xavier Miny (eds), *The Idea of Economic Constitution in Europe. Genealogy and Overview*, Leiden, Brill, 2022, pp. 325-329; Küsters, *The Making and Unmaking*, 452-453. Anselm Küsters also underlines the interlinkage between the debate on the 10<sup>th</sup> reform of the GWB and the DMA: Anselm Küsters, *Gestaltung des EU Wettbewerbsrechts im digitalen Zeitalter: Ein quantitativer und qualitativer Vergleich von Konsultationsverfahren, Expertenbericht und jüngsten Reformvorhaben* (Peter Lang, 2022).

<sup>56</sup> Frédéric Marty, and Thierry Warin, *Digital Platforms’ Information Concentration: From Keystone Players to Gatekeepers* (December 22, 2020). CIRANO Working Paper 2020S-70, available at SSRN.

<sup>57</sup> This debate lies at the heart of the GCLC conference entitled ‘The Transformation of EU Competition Law: Next Generation Issues’ (25-26 March 2022), from which this collective volume originates. See also : Luc Peepkorn, *Competition Policy is not a Stopgap!*, *Journal of European Competition Law & Practice*, 12, 6, 2021, 415–418.

<sup>58</sup> This fear of greenwashing is expressed in: Maarten Pieter Schinkel, *Green Antitrust: (More) Friendly Fire in the Fight against Climate Change*, SSRN papers 3749147, 2021; For a more sobering assessment: Walid Chaiehloudj, “Le droit de la concurrence est-il un frein à la protection de l’environnement”, *Contrats concurrence consommation*, 2022, 4 (4), pp.13-24 ; see also the convergence of competition and environmental policy in the condemnation of a German car cartel on 8 July 2021 : “The five car manufacturers Daimler, BMW, Volkswagen, Audi and Porsche possessed the technology to reduce harmful emissions beyond what was legally required under EU emission standards. But they

contention would be the potential of conflicting implementation between the Commission (which is the sole enforcer of the DMA) and the 27 national authorities, as well as the parallel implementation of traditional competition rules and of the DMA (which is based on article 114 TFEU on the approximation of laws rather than on articles 101-102 TFEU).<sup>59</sup>

More generally, Vestager's move should be understood in the broader context of the global return of neomercantilism since 2014.<sup>60</sup> Neomercantilism means here the active promotion of national firms by open or disguised protectionism. It is akin to nationalism in the political sphere. EU trade partners have become more aggressive since the 2010s and especially since 2016, with the difficult negotiation on Brexit and the election of Donald Trump as US President. President Trump carried out an openly protectionist trade policy, with a massive increase of US custom duties. China has continued to wage an efficient neomercantilist trade policy, stoking growing fear in the EU — even in Germany, when Mittelstand firms were threatened by Chinese takeovers in 2016. As a result, more countries are calling for a more interventionist industrial policy, from France — where this rhetoric has never disappeared — to Poland — where the PiS government has pursued a policy of 're-Polonisation' of certain strategic companies. Even EU trade and industrial policies have been complemented with more proactive tools since the beginning of the Commission chaired by Jean-Claude Juncker in 2014, starting with the 'Juncker Plan' and the Important Projects of Common European Interest (IPCEI). Even the European central bank has appeared to move away from its cherished market neutrality, with its policy of actively promoting green bonds announced in July 2022.<sup>61</sup>

It is thus no surprise that EU competition policy is also reacting to this trend, particularly because the digital challenge can also be read through a neomercantilist lens in two respects. From an economic point of view, a new strategic sector dominated by foreign firms is emerging. Even if those firms are mainly based in a staunch ally of the EU, the USA, this situation could change in the future if Digital giants based in authoritarian regimes rise, or if the USA adopt a Trumpian orientation. From a political point of view, the digital challenge, while broadly positive in terms of lowering consumer prices and disseminating knowledge, is also a problem: aggressive nationalism and parochial prejudices are

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avoided to compete on using this technology's full potential to clean better than what is required by law. (...). It is illegal under EU Antitrust rules. Competition and innovation on managing car pollution are essential for Europe to meet our ambitious Green Deal objectives." (Commission press release, 8 July 2021).

<sup>59</sup> On all those points, see: Assimakis Komninos, *The Digital Markets Act: How Does it Compare with Competition Law*, SSRN papers 4136146, 20 July 2022.

<sup>60</sup> On this neomercantilist shift: Warloutet, *Europe contre Europe*, 399-434.

<sup>61</sup> "Central banks and markets. The visible hand", *The Economist*, 16 July 2022.

fuelled by unregulated social media, which are sometimes hijacked by authoritarian regimes to subvert elections in Western liberal democracies.

However, Vestager's policy cannot be interpreted as protectionist, since 1) there is hardly any European competitors of the GAFAM to preserve<sup>62</sup>; 2) the fines levelled against the GAFAM remain minimalistic compared to their lavish profits; 3) the Commission did not depart from its non-neomercantilist stance, with a track-record showing no evidence of particularly targeting US companies (rather the reverse)<sup>63</sup>; and 4) the US administration under Joe Biden (2021–present) has also embraced a more regulatory discourse against the GAFAM. The ban of the Alstom-Siemens merger in 2019 illustrates this point: Vestager took the rare decision of prohibition despite intense pressure from the French and the German governments to accept it.

Arguably, Vestager's policy fits more into the social-liberal vision of European integration that was promoted since the Marshall Plan, rather than in any kind of neomercantilist reflex.<sup>64</sup> According to this vision, which associates the notions of 'liberty' and 'solidarity', European integration rests on the creation of a unified internal market open to its neighbours, as well as on a set of rules protecting the weakest against the detrimental effect of trade liberalisation. This is consistent with the fact that, at the national level, competition policy has also been defended by some centre-left leaders keen on curbing big business.<sup>65</sup> In 1961, for example, it was the arrival of centre-left parties in the Belgian government that prompted its shift to the German position, which was seen as more severe against cartels.

On the whole, the recent turn against market power could be interpreted as a reaction towards a new context, marked both by the emergence of new monopolies in the digital sector and by a global return of neomercantilism, rather than as a sheer return to the public-interest principle. The situation is not the same as in 1962: policies based on the competition-only criterion have now been in force for decades in all EU countries; the jurisprudence still exists; and even if the Rome Treaty articles have remained the same, other treaties put a stronger emphasis on competition than before. In particular,

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<sup>62</sup> However, the DMA could concern a couple of European companies, such as SAP.

<sup>63</sup> Sebastian Billows, Sebastian Kohl, Fabien Tarissan, *Bureaucrats or Ideologues? EU Merger Control as Market-centred Integration*, *Journal of Common Market Studies*, 59, 4, 2021, pp. 762-781; Anu Bradford, Robert J. Jackson Jr., and Jonathan Zytick, *Is EU Merger Control used for Protectionism? An Empirical Analysis*, *Journal of Empirical Legal Studies*, 15 (1), 2018:165-191.

<sup>64</sup> On the opposition between market-oriented, social and neomercantilist Europe: Warlouzet, *Europe contre Europe*; and on the years spanning 1973 to 1986: Warlouzet, *Governing Europe*.

<sup>65</sup> David Spector, *La gauche, la droite et le marché* (Odile Jacob, 2017). In Germany, see for example the book authored by the far-left politician Sarah Wagenknecht, *Freiheit statt Kapitalismus: über vergessene Ideale, die Eurokrise und unsere Zukunft* (Campus Verlag, 2012).

the objectives of the Lisbon Treaty include the development of 'a highly competitive social market economy' (article 3 TEU), and its protocol 27 defines the internal market as 'a system ensuring that competition is not distorted' (article 3 TEU).

## 7. Conclusion

Even if incongruous in publications dealing with competition policy, the religious vocabulary is a useful reminder that all public policies are based on a set of beliefs. In this religious war, the Treaty of Rome was a syncretic document, open to multiple interpretations, and written at a time when competition policies were feeble. This relative flexibility explains the four paradigm shifts, each of them dependent on a particular intellectual and political context. 1) The public interest approach, which was dominant before the EEC competition policy took off, was a 'Genesis', since it laid the ground for a state intervention to monitor the markets. 2) The ordoliberal impetus was a 'Revelation', since it invented the self-referential European competition policy. It left a deep mark on the EEC/EU since 1962, notably by inventing a system hugely centralized on the Commission, which was not imposed by the Treaty of Rome. 3) Then came the 'Reformation', a radical overhaul meant to rationalize, albeit within the same framework (self-referential competition policy). And finally, 4) the 'excess of market power' paradigm is a sort of 'Counter-Reformation', since it is not a simple return to ordoliberalism, but rather an adaptation to a more neomercantilist world. Those paradigm shifts are not surprising, especially in light of the history of US antitrust, where constant reinterpretation of ancient texts and doctrines are carried out, as witnessed by the very name of the current 'Neo-Brandesian' approach, which refers to an interwar judge.

Those changes were not brutal and clear-cut. Overlaps between the approaches have persisted. Obviously, those paradigms are ideal-type: they never materialize as such in reality, as they are mainly categories of thoughts. The flexibility of the Treaty is not absolute, as its wording, the secondary legislation and the case-law must be taken into account; but a certain room of manoeuvre exist to adapt to the evolution of the intellectual, institutional and economic framework. The solution of relying more on a coordination of national competition policies, which was promoted by the French in 1956, was discarded in 1962, only to be revamped in 2003 once the Commission had established a firm doctrine and could depend on efficient national authorities.

Compared to a traditional account of EU competition policy history, this study has confirmed the US antitrust and the German ordoliberal influences, while at the same time emphasizing four neglected factors. First, the Treaty of Rome still remains in place today, as it was both relatively flexible and bold,

delivering a genuinely European competition policy at a time when hardly any policy of this kind existed in Western Europe. Second, this flexibility was used by many actors to shape the EEC/EU competition policy, and not only by the Germans. The French were insistent on getting an effective competition regime, and they imprinted their mark with a focus on restrictive vertical agreements. Belgian actors were also important during critical junctures. Third, the ‘modernization’ of the 2000s started with controversies between ordoliberal and promoters of the Second Chicago School as of the early 1980s. Fourth, in this field marked by a firm centralisation of the European Commission, several European commissioners played an instrumental role in promoting paradigm changes, notably von der Groeben, Sutherland, Brittan, Monti and Vestager.

Nowadays, the urge is to go beyond religious war by defining more clearly what the new paradigm means. Gauging the economic effects in terms of consumer and global welfare of environmental, social, societal (privacy, plurality) and strategic criteria is almost impossible, especially because the timespan to judge the impact of an agreement can be very long; but certain guidelines and principles can be laid out. After all, the *Altmark* ruling was instrumental in defining a set of principles that were helpful in establishing which state aids were acceptable, despite the large number of conflicting logics at stake.<sup>66</sup> This debate on the measurability of non-economic criteria is all the more important as it overtakes competition policy, and concerns all EU policies more broadly.<sup>67</sup>

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<sup>66</sup> EU Court of Justice, Judgment of the Court of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht*, case C-280/00.

<sup>67</sup> See more generally on the relationship between law, economics and politics: Jediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a law-and-political-economy framework: Beyond the twentieth-century synthesis*, *Yale Law Journal*, 129, 6, 2019, 1784-1835.