

Ein Keim, der wachsen muß: German Antitrust as the first Europeanised Policy (1950-1957).

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Abstract: From a theoretical point of view, this paper discusses some key hypotheses of the literature on ‘europeanisation’, and mainly that which holds that the intensity of adaptational pressures exerted by a European policy on a national-level policy depends on the latter’s ‘goodness of fit.’ In addition, it offers some insights that are relevant to the current controversy between proponents of rational choice and proponents of constructivism. From an empirical point of view, this paper deals with the relationship between European and competition German policies. The most widespread view among competition specialists is that German antitrust was propelled onto the European scene in a ‘bottom-up’ fashion. Contrary to such accounts, I argue that the first move was ‘top-down’. Before influencing the EC, the legal and political framework of German industrial organisation had itself been ‘europeanised’. Together with latter ordo-liberal (and other) influences, both policies reflect the influence of the historic franco-german compromise of February-March 1951. The core of the paper focuses on that process of europeanisation. It is argued that Germany was subject to intense pressures to adapt, in spite of the absence of formal legal rules requiring it to do so.

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I am grateful to Emilie Delivré (Department of History, EUI - Florence) for her assistance and for commenting on a first version of this paper. The many pre-existing, and the much fewer remaining errors are mine.

The German part of the title can be translated as ‘A seed that needs to grow’; it is a sub-title of a 1957 Frankfurter Allgemeine Zeitung article on ECSC competition policy by W. Throm (1957).

Introduction

Competition (or ‘antitrust’) policy deals with the ex post regulation of the competitive working of markets. In legal terms, it typically regulates (a) restrictive business agreements, both horizontal between competitors and vertical between suppliers and their customers, (b) conduct of firms enjoying a dominant, or monopolistic, position in their market, and (c) mergers and acquisitions leading to concentrations of market power. In political terms, it is usually associated with non-laissez-faire liberalism, with the American progressive movement of the 1890s-1910s, and with the German ordo-liberals.

At the European level, competition policy began life as the most contested of all policies. Due French insistence on, and German opposition to, having competition articles inserted in the Treaty of Paris (1951), European integration might not have happened at all. Yet, just some decades later, competition formed part of the hard core of European Community policies.

That evolution is surprising. No European country was ever known before the 1950s to actively promote competition. So, could it be that EC(SC) competition policy attained such a status without the support of Member States? The most straightforward and commonly accepted answer is ‘no.’ More specifically, despite resistance from some quarters, the argument goes, competition policy was able to thrive because of consistent and persistent German support. Evidence for that support includes (a) the pro-competition ideas developed by a group of German scholars called the ‘Ordo-liberals’ from the 1930s onwards (Amato, 1997: 2; Gerber 1998: chapter 7; Whish, 2001: 18), (b) the leading role played by German domestic antitrust debates and policy (Gerber, 1994; Seliger, 2003; Whish, 2001: 18), and (c) the staffing of the Commission’s DGIV with German lawyers – including the traditionally German-occupied post of DGIV Director General (Wilks and McGowan, 1996: 234).

Although it is acknowledged that the above ‘bottom-up’ view adequately explains some latter policy developments, I argue that it may lead to misleading conclusions about both the origins and the nature of EC competition policy. Rather than being based exclusively on a bottom-up relationship running from Berlin to Brussels, the history of EC competition policy rests on the prior ‘europeanisation’ of German industrial organisation. Notwithstanding its subsequent flourishing and the initial impetus by the US, German policy differs from that of all other Member States because of its earliest europeanisation.

In what follows, I first present some theoretical comments and the hypotheses to test empirically (Part I.A.), and some methodological comments (Part I.B.). I then turn to the empirical part, which seeks to explain a unique event, namely the passage of the German competition law of 1957. I first discuss the origins of the Treaty of Paris and the latter’s influence upon Germany (Part II.A.), and I then propose an overview of the politics of ECSC antitrust policy (Part II.B.). Finally, I discuss what made the passage of the German competition law possible in 1957 (Part II.C.). In the conclusion, I offer an evaluation of the results and an estimate of their uncertainty.

Part I: Theoretical and methodological issues

I.A. Theoretical issues: limits of the three-step model

In the past decade, the europeanisation of national public policies has attracted considerable academic interest.² This sub-section briefly reviews the most successful branch of that literature and comments on a few points therein that remain obscure. It also helps situate the empirical question at hand vis-à-vis that literature, and it presents the hypotheses tested in Part II.

I.A.a. Europeanisation and europeification

It is necessary to distinguish between europeanisation and europeification. Europeanisation (or ‘europeanization’ in US English) is a concept that has been rather stretched (Radaelli, 2000; Olsen, 2001). We need to carefully specify what the term means, because otherwise we may be talking about different political phenomena and processes.

Europeanisation may be defined as “the emergence and development at the European level of distinct structures of governance” (Risse, Cowles and Caporaso, 2001: 3). However, that means that something that already exists is being transposed to the European level. Yet there is no compelling theoretical reason to assume that all European-level policies were someday, somehow ‘pushed’ upwards from some national level. Perhaps a more accurate, precedent-neutral, term for the creation of European-level policies is ‘europeification.’ That concept therefore includes, but is not limited to, europeanisation as defined above. The difference between the two equals the sum of policies decided by Member States specifically for the European level, plus the sum of policies initiated by European institutions, possibly acting as runaway agents.³

² The theoretical discussion that follows is based primarily on Héritier, Knill and Mingers, 1996; Mény, Muller and Quermonne, 1996; Héritier et al. 2001; Cowles, Caporaso and Risse, 2001; Knill and Lehmkuhl, 2002; Börzel, 2003; Falkner, 2003; and Featherstone and Radaelli, 2003.

The literature on europeanisation is relatively recent, but already vast. A search for ‘europeanisation’ in the library catalogue of the European University Institute produced 464 results, 414 on ‘europeanisation’ and 50 on ‘europeanization’ (these figures exclude journal articles and works which deal with europeanisation, but do not explicitly include that word in their title or contents). That list included works on (a) the theory of europeanisation: 32; (b) the europeanisation of Member States’ societies (citizenship, democracy, preferences and strategies of interest groups, etc): 66; (c) the europeanisation of Member States’ national policies (social policy, foreign policy, environment, transport, education, telecommunications, etc): 92; (d) europeification (culture of supranational institutions, new policy areas): 52; and (e) the europeanisation of non-Member States: 35.

Cautiousness is due because of (a) my own language limitations, (b) the appearance of several titles which are irrelevant to the political phenomenon of europeanisation, and (c) the huge number of works on the europeanisation of non-Member States, due to the presence of the ARENA working papers. The distribution across time is as follows (2003 and 2004 are still under-represented):

Before 1991	‘91	‘92	‘93	‘94	‘95	‘96	‘97	‘98	‘99	2000	‘01	‘02	‘03	‘04
0	1	0	1	12	17	48	41	35	57	56	89	88	33	4

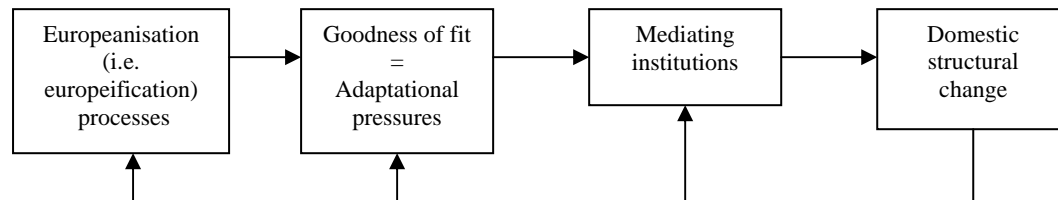
See also Hix and Goetz (2000).

³ One could object that in today’s relatively crowded national policy spaces there is no room for new policies. However, three counter-arguments can be readily advanced: (a) the crowding of the policy space may only be a contemporary impression and not so much an objective reality; (b) to the extent that we are not only interested in today, the past may provide clear examples of non-europeanised europeification; and (c) even where national policies already exist, totally new instruments may be first

The term ‘europeanisation’ can then be left to describe the effects of europeification upon domestic policies. Note finally that, just like europeification, europeanisation is not a recent phenomenon.⁴

I.A.b. Some unclear issues in the classic “three-step” model

A considerable number of successful studies of europeanisation are built around the classic ‘three-step’ approach (for the most complete presentation, Risse, Cowles and Caporaso, 2001: 6-12):



Despite its proven utility, some elements of that model are still unclear. As will become evident, most may be due to the fact that the literature has tended to focus exclusively on the study of the differential impact of mediating institutions. What follows presents an overview of these issues. Rather than advancing imperfect solutions, it means to provide a first estimate of the uncertainty of the empirical findings of Part II. The issues covered are the following four:

- The relationship (equation) between goodness of fit and adaptational pressures;
- The role of the first step, i.e. europeification;
- The measurement of goodness of fit, and hence the possibility of comparing policies; and
- The kinds of European policies that can create adaptational pressures.

First, a central hypothesis of the model is the so-called ‘goodness of fit’ assumption. It holds that European policies exert dissimilar adaptational pressures upon dissimilar national policies (which partly explains the differential impact of Europe). In terms of the “second image reversed” literature, it can be formulated as follows: *The greater the misfit (or the divergence) between policies at different levels of governance, the greater the adaptational pressures exerted by the higher level upon the lower one.* That relationship is assumed to be so strong that ‘goodness of fit’ and ‘adaptational pressures’ can be a priori equated. But do such pressures really depend only, or even predominantly, on ‘goodness of fit’? Doesn’t that boil down to misleadingly assuming an a-political organic functionality of legal, economic and political systems, and a complete equality of standing between Member States? As recent debates over the ‘stability pact’ have shown, equally unfit Member States may come under different degrees, and kinds, of pressure. Equating ‘adaptational pressures’ with ‘goodness of fit’ may thus be misleading because it may neglect a whole world of politics. Thus, it

introduced at the European level. In any case, the mere theoretical possibility of non-europeanised europeification renders the issue a matter of empirical investigation.

⁴ To my knowledge, the term was first widely employed in the context of the 1940s franco-german dispute over the future of the french-occupied industrial region of the Saar. Reacting to German demands for the return of the Saar to Germany, french diplomats proposed to ‘européaniser la Sarre’. What they meant was not that new European policies should be created, but that political and economic conditions in the Saar itself should now follow new rules.

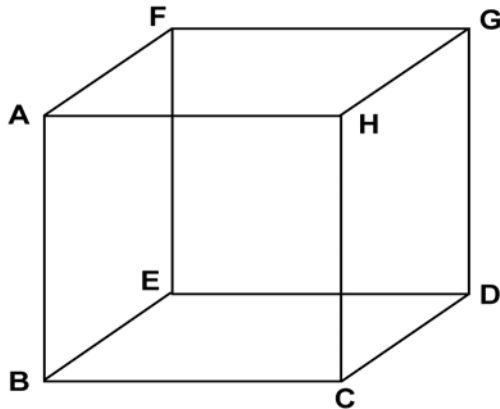
seems more realistic to theorise on the strength of pressures without excluding either their institutional source and their legal basis, or those factors that affect political actors' perception of their strength. Although this problem may be interpreted as a 'level of abstraction and operationalisation' problem, it also concerns the generalisability of our findings.⁵ Scholars interested in endogenising preferences and identities (e.g. historical institutionalists) should focus on the perception of real actors, i.e. on the perceptions of vectors and potential recipients of adaptational pressures. Crucially, the perception of adaptational pressures may depend on the particular phase at which the pendulum of integration happens to be (see generally Wallace, 2000: chapter 2). 'Adaptational pressures' are not an objective phenomenon whose scale of intensity transcends time. On the other hand, efforts to map 'goodness of fit' across policies, countries and time may seem tedious, but they will certainly assist in advancing theoretical claims with a greater degree of certainty.

Second, the role of the first of the three steps of the model, europeification, is often neglected. Analysts ultimately select cases on the basis of variance in mediating institutions. Yet, it is really the effects of europeification that we are studying. If europeification is the chronological and causal starting point, it might be justified to dedicate far greater attention to it. There are two reasons for that: (a) the start of a process may determine the range of subsequent possible outcomes – in the social sciences, that is the most important lesson learned from historical institutionalism (Mahoney, 2000; Pierson, 2000; Pierson and Skocpol, 2002; for slightly more nuanced views, see Lindner and Rittberger, 2003, and Crouch and Farrell, 2002); and (b) where there is even a theoretical possibility that 'goodness of fit' does not equate with 'adaptational pressures', focusing only on 'mediating institutions' and thereby neglecting the process of europeification may introduce the risk of omitted variable bias. Hence, even where the focus is on the effects of a European policy upon national ones, asking how europeification occurred in the first place may help answer important and relevant aspects of the research puzzle. How political processes start matters, not only for understanding subsequent dynamics in general, but also for specifying the nature and the intensity of adaptational pressures that national actors feel and interpret and that domestic institutions are put under.

Third, comparing adaptational pressures on various different ("differently different") national policies may be a tricky exercise, especially in the absence of perfectly valid and reliable indices. The first issue here concerns our ability to specify a geometrical space in (not merely along!) which to situate specific policies.⁶ Put differently, it regards the commensurability of differences among policies, which is a central component of the three-step model. Yet most political scientists agree that even very specific governmental tools can be operationalised, and experienced, as multi-dimensional policy spaces (e.g. Sabatier and Jenkins-Smith, 1993; Tsebelis and Chang, 2001). Policies may therefore differ but differently, i.e. along more than one continuum. The picture below may help clarify that point. It represents a policy space, which is simplified into three dimensions. Point 'E' represents the policy at the European level, which, again for the sake of simplicity, it held constant. All other points, and all points within the concave spaces defined by these letters, are possible situations of national policies.

⁵ In that context, see also Knill and Lehmkuhl (2002), as discussed below.

⁶ For a much-criticised method of specifying a simple continuum to situate positions on antitrust policy, see Weingast and Moran (1983).



Although it might be relatively straightforward to differentiate between policies E and A, estimating the intensity of adaptational pressures exerted by policy E on equidistant points, e.g. A and D, might be more tricky. Which is farther from E, A or D? And what about a country whose policy is situated both at D and C? Of course, the answer may be that A and D are on different axes, and that adaptational pressures on one axis matter more than on another. In that case, however, it is necessary to acknowledge that adaptational pressures do not depend (only) on goodness of fit.

Finally, an important issue concerns kinds of phenomena that create adaptational pressures. In particular, much of the existing literature deals either with the domestic impact of EC policies that Member States are legally obliged to implement (e.g. Héritier et al., 1996; Caporaso and Jupillee, 2001; Héritier et al. 2001), or with the domestic impact of non-policy issues (e.g. Checkel, 1999; Risse and Wiener, 1999; Risse, 2001; Beyers, 2002). Adaptational pressures created by non-prescriptive European policies, e.g. by policies that European institutions cannot legally oblige Member States to implement, such as competition policy, are disregarded. Even sociological studies on the ‘europeanising’ role of EU committees often assume that national implementation follows a line fixed by directives or regulations (e.g. Trondal, 2003). Arguably, that neglects much of the story of European integration: modelling only obligatory policies leaves the study of the effects of non-obligatory (i.e. vertically non-integrated) European policies under-developed. Similarly, it fosters the theoretical gap separating the literature on globalisation and capitalist diversity on the one hand, and that on europeanisation on the other hand.

New research, both theoretical and empirical, now attempts to fill such gaps. For example, Knill and Lehmkuhl (2002) convincingly argue in favour of considering three different mechanisms of europeanisation:

European policy making might impact upon domestic regulatory styles and structures in three basic ways. European policies might be: (a) very prescriptive and demand that Member States adopt specified measures in order to comply with EU requirements; (b) confined to changing domestic opportunity structures; or (c) in their weakest form, without any direct institutional impact at all since they primarily aim to change domestic beliefs and expectations. (p. 257)

Clearly, Knill and Lehmkuhl's second and third categories may refer to vertically *de jure* or *de facto* non-integrated policies, such as competition policy.⁷ Indeed, these authors predict that "Europeanization by changing domestic opportunity structures can be found in particular in many market-making policies", while "the dominance of [the more indirect mechanism of altering the beliefs and expectations of domestic actors] can be particularly observed in European policies whose aim is basically to prepare the ground for subsequent, institutionally more demanding policies..." (p. 258)

I.A.c. Hypotheses

The hypotheses to be tested here differ somehow from those tested in most works on the europeanisation of domestic policies. As mentioned above, most of these studies focus on cases where at least some degree of europeanisation can be legally enforced. By definition, sooner or later, there will be some degree of europeanisation. In such cases, the most interesting question is obviously whether all Member States converge equally, and with equal speed, towards the European model. Hence, the hypotheses to be tested relate mainly to factors facilitating or impeding the nature and timing of convergence efforts.

In the case of competition policy, the supranational character of the policy and the ensuing stricter allocation of tasks between the European and the national levels of government, warrant testing slightly different hypotheses. At the same time, these characteristics make competition policy a particularly interesting area for studying the phenomenon of europeanisation. In Eckstein's (1975) terms, it can be seen as a critical case study.

In competition policy, European institutions have always benefited from extended supranational powers. The constituency of the policy has always consisted mainly of the regulated firms and their lawyers: Member States have always had a saying, but the implementation of the policy has never depended on them. With private enforcement being rare, national courts have also been less influential than in other areas. The implementation of European antitrust rules thus depended on European institutions themselves. In this investigative policy area, there have never been Community rules (directives, regulations, court decisions) obliging Member States to take a specific course of action. Rather, a form of subsidiarity has always been respected, with 'Europe' regulating European-scale agreements and practices, and Member States regulating smaller, purely national or regional ones. The first and most interesting question is therefore whether such a policy can produce 'europeanising' effects upon national policies.

In order to answer that first question, three preliminary competing hypotheses are tested:

⁷ Note that, for Knill and Lehmkuhl, policy types (a), (b) and (c) are listed from the strongest to the weakest forms. That understanding may not be totally shared by other scholars. For example, Caporaso and Jupillee consider that "were Europeanization to cause a rethinking (or, in the extreme, abandonment) of traditional notions of work and family, we would be in the presence of domestic structural change of the most profound sort." (2001: 37) Of course, Knill and Lehmkuhl's concept of strength differs from Caporaso and Jupillee's concept of depth. In particular, the former may be more concerned with EU policy-makers' intent, while the latter may concentrate on their effect.

H1: *Europe creates europeanisation.* Europeanisation is the result of the genuine influence of European policy upon national ones; even without the force of law, the Community can put considerable pressure upon Member States to europeanise.

H2: *Europe creates europeanisation but is itself created by globalisation.* Europeanisation is the result of broader (global) trends towards greater policy convergence; it is due to a causally prior variable (e.g. US leadership, or learning in the world-wide epistemic community), and it is a biased, obscuring or irrelevant concept.

H3: *Convergence depends on a coincidence of national views.* Europeanisation is a coincidence, because purely domestic factors would have led to the same policy decisions and domestic structural adaptations.

These questions can obviously not be answered as such. As already mentioned, competition is not a vertically integrated policy, and so direct talk of ‘europeanisation’ is rare.⁸ Had ECSC and EEC antitrust relied more on national administrations and/or courts, the issue might have received greater political, business, journalistic and, accordingly, academic attention. It follows that the process of falsifying the hypotheses cannot rely only on direct evidence: circumstantial evidence is needed to make appropriate inferences. In addition, if empirical evidence shows enough support to warrant further investigation of the first hypothesis (europeanisation), the causal mechanism that led to the 1957 German law needs to be specified. For these reasons, the following three hypotheses are tested:

First, regarding the transformative role of europeification: europeanisation as a result of the participatory dimension of europeification. Here, the dependent variable is actors’ preferences at time $t+1$, $t+2$, ... $t+n$. The independent variable, which is tested against a null hypothesis of no effect of europeification, is participation in European-level negotiations and debates. The aim is to test whether a more constructivist, or a more rational account correspond better to the empirical data. Were the constructivist hypothesis to be confirmed, europeanisation would be a matter of time.

H4: *Institutions constitute: the europeification of a policy leads to participation and negotiation, and thus to changes in the identities and preferences of at least some core actors. Alternatively, institutions are only instruments: despite their participation in supra-national European committees and other policy-making forums, national actors maintain a predominantly nationally-defined set of interests.*

Second, regarding the intensity of adaptational pressures. Here, the dependent variable is the intensity of adaptational pressures. The independent variable is the institutional and substantive similarity of national policies with those of the European level, i.e. ‘goodness of fit’. That is tested against a liberal-intergovernmentalist hypothesis according to which adaptational pressures depend on specific deals struck between Member States.

⁸ It is less rare since the beginning of a new wave of europeanisation of domestic competition policies, starting with Greece in 1979 and France in 1986, and continuing with Ireland and Italy at the beginning of the 1990s, and Germany and the UK at the end of the 1990s.

H5: *Europeification creates equally strong adaptational pressures on equally fitting (or unfitting) domestic policies: the intensity of adaptational pressures depends on national policies' 'goodness of fit'*

H6: *Alternatively, adaptational pressures present no automatic character; rather, their intensity depends on specific deals struck between Member States, and Member States and European institutions.*

In presenting the variation of the independent variables, the text below focuses on the following questions:

- Did the ECSC have a competition policy which Germany could look at as a possible model?
- Was there convergence between the views of the High Authority and those of France and Germany regarding antitrust?
- Are there indices of political, economic, or legal forms of 'learning'?
- What were the links, if any, between the European and the domestic administrations?
- What were the links, if any, between the European and the domestic policy debates?
- Was the GWB similar to the policy of the ECSC?
- Was there a specific deal struck between Member States during the Paris Treaty negotiations?
- If so, did France, or the High Authority, or any other interested party, remind the Federal government, or the Ruhr, of the initial deal struck in Paris?

I.B. Methodological issues: the logic of inference, generalisability, and data

I.b.a. The logic of inference

As mentioned above, the aim here is not to estimate the respective values of different national mediating institutions across a number of countries. Such comparisons cannot, and probably should not, be totally avoided (see, for example, hypothesis H5 above). Nevertheless, the problem of measuring a large number of distances from a (moving) point renders classic millsonian methods of comparison less attractive, and case study methods more attractive. What follows is therefore explicitly geared towards finding appropriate observable implications which could disconfirm each hypothesis, while adopting a backward-looking and often comparative research design.

Particular stress is placed on initial conditions and preferences. This is consistent with the theory of path dependence, which emphasises the importance of initial events. Methodologically, it means that (a) a historical review paying close attention to issues of temporality is necessary, but it should be effectuated cautiously in order to avoid infinite historical regress, and (b) unless otherwise specified, the analysis may rest on the assumption of (modest) increasing returns.

The method chosen follows Lustick (1996), according to whom one should avoid "treating all historiography as one unsynthesized but synthesizable Historical Record, and ... picking and choosing from all historiography the bits one needs for a most convenient background narrative". (1996: 615) As far as possible, that problem has been addressed by using the technique of triangulation.

I.B.b. Generalisability

The case study concerns the passing of a competition law in Germany in 1957. It could well be that the results cannot be easily generalised to cover other countries, other policies, other eras, or broader international effects on domestic structures. Nevertheless, the case at hand seems worthwhile to investigate because, if there was europeanisation of German competition policy, the following may be true:

- German antitrust was the first europeanised domestic policy;
- The process of europeanisation of domestic policies started soon after the beginning of European integration;
- Europeanisation can occur even where European institutions do not explicitly create pressure for that to happen; and
- Deals between Member States matter as much as other mechanisms of europeanisation.

I.B.c. Data

The data used for this study were collected both from scholarly historical and political-scientific accounts, and from contemporary newspaper accounts. The former are Berghahn (1986), Bitsch (2001), Gerber (1998), Gillingham (1991), Goyder (1995), Haley (2001), Karagiannis (forthcoming), Spierenburg and Poidevin (1993), and Witschke (2003). The latter formed a corpus of more than 600 newspaper articles from the 1949 to 1957 editions of 'The Economist', 'Le Monde', and the 'Frankfurter Allgemeine Zeitung'. These newspapers were searched for articles containing one or more of the following words: 'Adenauer', 'antitrust', 'cartels', 'competition', 'Erhard', 'Etzel', 'ECSC', 'EEC', 'European Community', 'France', 'Germany', 'Mollet', 'Monnet' and 'Monopoly'. Two coders (Emilie Delivré, a specialist in the history of franco-german relations and myself) analysed approximately 300 articles each. 10% of each coder's articles (a total of 60 randomly chosen articles) was coded by the other coder, too. Inter-coder reliability was not formally estimated, but we believe that it was at least 90%.

More reliable data sources would have included the personal archives of Erhard, Etzel and Mollet, those of the CDU and SPD, and the archives of the leading business organisations in France and Germany.⁹ Regarding contemporary journalistic sources, Le Monde seems the most accurate. 'The Economist' took a resolutely pro-competition stance, and hence reported mainly the (arguably wrong) arguments of the anti-competition sides. As for the 'FAZ', it was unambiguously in favour of competition, but reported such views, or purely factual information, only. More such sources, such as Le Figaro and Die Welt would probably add much to the analysis.

⁹ I assume here that the archives of Spierenburg could only add little more to what was already published in Spierenburg and Poidevin (1993).

Part II: Europe and German competition policy (1950 - 1957)

II.A. Convergences and divergences on the road to the Treaty of Paris

Unlike a common misperception has it, the road to the Treaty of Paris was not hard because of grand political disagreements, but because of more economic and technocratic issues. More specifically, the issue of the new Community's antitrust policy seriously jeopardised the whole endeavour. Part II.A. argues that European countries had no competition tradition before 1945 (Part II.A.a); and that Articles 65 and 66 ECSC were proposed and sponsored by France and that German resistance did not attenuate throughout the talks (Part II.A.b).

II.A.a. National market-preserving norms and policies before 1950

None of the six signatories of the ECSC treaty had a competition culture before 1950. What follows centres upon the two most important countries, France and Germany. The other four (Benelux and Italy) did not differ much.

France

France had an old arsenal of legal provisions that could have been used to protect competition.¹⁰ However, enforcement activities had stopped for a long time. By 1930, French delegates to the London Conference of the Inter-Parliamentary Union were unaware of any French laws regulating competition. France had moved towards more anti-competitive industrial structures, developing a rather dirigiste and cartelised system, especially in coal and steel. Despite much talk about the Ruhr coal and steel 'barons', the French system did not differ much, except in that it had closer links with the state. The creation of the International Steel Cartel in 1926, wanted by the French (and some German businessmen such as steel magnate H. Stinnes), reinforced that tendency. French business and politicians sought to control domestic and international conditions through various means in order to control German exports. Thus, it can be safely argued that before WWII, France had no competition tradition.¹¹

¹⁰ In particular, the Law of 2-17 March 1791 abolished the corporatist industrial organisation of the Ancien régime and established legally protected freedom of trade and industry (i.e. freedom of entry into markets). The Law of May 4, 1793 'on maximum prices' fixed the maximum price of a long series of goods, against the eventuality of abusive, monopolistic pricing. The Law of July 26, 1793 'contre les accapareurs' even went as far as to threaten offenders with the penalties of death. With less severe penalties, that law went on to become Articles 419 and 420 of the Code Pénal of 1810, which outlawed price-fixing agreements. These provisions were meant to be enforced by the courts, as no specific bureaucratic organ was created for these purposes. They were officially effective for more than one century.

¹¹ Between 1929 and 1945 the average level of concentration of French industry decreased, and small and medium size enterprises dominated the French industrial landscape. However, that is not attributable to competition policy measures, but to chronic lack of modernisation. Realising that, all the governments of that period decided to act on industrial structures. Those years were thus marked by the rise of 'planisme', the rationalisation (i.e. centralisation) of economic decision-making, and the spectacular growth of administrative personnel in charge of controlling private economic decisions. The Vichy government was no exception to that rule, despite Pétain's famous dreams of a pastoralised society, and in spite of the presence of numerous neo-liberals at the DGEN. Rather, the occupation years marked for France the beginning of its subsequent planning and industrial policy system. For example, the 'Plan d'aménagement de la production' of December 1941 made provisions for the compulsory merger of certain firms. Vichy also created the 'Ministère de l'industrie'.

After 1945, all governments favoured a new social policy that would guarantee working class welfare, and operate in the context of extensive nationalisations. The primary goals of economic policy were production and modernisation. That meant new powers for the state. Although, in theory, an active competition policy might have been implemented within that context, the route chosen was more associationalist. Ordonnance 45-1483 of June 30, 1945 did outlaw cartels and concerted practices, but only in view of allowing the state to better control wages and prices. In addition, there were no provisions regulating mergers. Rather than antitrust, the focal aspect of post-WWII French economic policy was the indicative 'Plan', headed by J. Monnet. The first Plan (1947-51) privileged investment in transport, energy (read coal) and iron and steel. It enhanced cartelisation, concentration and/or national monopolies. Modernisation commissions were made up mainly of civil servants and representatives of big business. Most of them believed in cartels as means of fostering international competitiveness. In addition, the modernisation effort meant that big firms benefited from a large share of subsidised investments. Nationalisations did not change much in terms of promoting competition, either.

In the winter of 1949-1950, under US pressure, the possibility of national antitrust legislation was discussed. A distinction was made between 'good' and 'bad' cartels. The former would be either the successors of the pre-war 'ententes', or completely new entities. In any case, they would be distinguished from bad cartels because they would contribute to increase productivity, and promote specialisation and standardisation. Legally, they would be officially recognised and exempted. Politically, however, such proposals met with the fierce opposition of the Conseil National du Patronat Français ('CNPF'). The passage of the law was thus much debated but indefinitely postponed.

After 1947, France had entered a new political era, marked by the personalities of a number of pro-European politicians, such as R. Schuman, E. Faure, R. Mayer, R. Plevin and G. Bidault, and later P. Mendès France and G. Mollet.¹² Nevertheless, France delayed all efforts at German reconstruction, for political and economic reasons. On the economic front, the French steel industry depended on German metallurgical coke, but that was owned largely by German steel-makers and was distributed mainly through a sole selling agency. That combined with politics to increase French fears of a reconstruction of German industry. The goal was to prevent the Ruhr industrialists from expanding steel production to the point of absorbing an ever-greater share of German coking coal production and of out-performing French steel. The calculus was indeed as simple as that: less German steel meant less direct competition for French steel-makers, and presented the considerable indirect advantage of allowing more German coal to be exported to France. That goal became increasingly pressing as French reconstruction progressed and domestic demand for coking coal increased.

In time, the top French business association, the CNPF, created a high-profile 'Commission for German Affairs.' The 'CGA' organised numerous meetings with

¹² Doubts persist on the exact preferences of Bidault, who stood between traditional Christian-Democracy, atlanticism and nationalism. See Soutou, 1991. Among these men, Mayer was probably the most liberal. Plevin was a personal friend of Monnet. Concerning Schuman, note that, like A. de Gasperi of Italy, he was a fervent Catholic. That meant that his initial preferences could not have possibly been in favour of a competitive order. There is ample evidence to support that view.

German industrialists and lobbied the government in favour of old-style franco-german economic co-ordination based on private cartel agreements. On the occasion of the foundation of the 'Association Française pour les Relations Economiques avec l'Allemagne' ('AFREA'), the CNPF invited R. Schuman and renewed its call for closer franco-german cooperation and a 'network of private arrangements.' Following the creation of the AFREA, close contacts were established with the 'Deutsche Vereinigung zur Förderung der Wirtschaftsbeziehungen mit Frankreich' ('DEFRA'), and specific agreements were adopted for the watch-making and ceramics markets.¹³ In general, by 1950, the mood of French big industry was identical to the French tradition: conservative rather than liberal, and 'rhenisch' rather than 'atlantic'. Yet France had a distinctive interest in controlling the structure of numerous German industries, including coal and steel.

Germany

The foremost German concerns between 1945 and 1950 were sovereignty, rapid reconstruction and dignity on an equal footing ('Gleichberechtigung'). The new institutional organisation of power in Germany rested on four military governments with quasi-sovereign powers. Unlike the Japanese, the Germans were not docile. Thus, conflict between the occupying powers was often seconded by conflict between one or two occupiers and German leaders. After 1949, the Western Allies' persistence in keeping control of the International Ruhr Authority and in enforcing a de-concentration and de-cartelisation policy created tensions with the new German elite. But, unlike France, West Germany had no negotiating power.

In terms of the dominant economic model and culture, Germany had not been a champion of a liberal competitive order either. Following the introduction of the 'Bismarck tariff' of 1879 and an important late 19th century court ruling which effectively legalised cartels,¹⁴ the German economy soon became highly concentrated and cartelised. At the end of the 19th century, German industrialists had created the first heavy-industrial integrated system on the continent, the so-called Verbundwirtschaft. Steel production was based on iron ore from Lorraine and coke from the Ruhr. That helped German iron and steel industries take considerable advantage over, for example, their French counterparts.¹⁵ However, following the defeat in WWI and the recession of 1922-23, concentration of economic power was feared to lead to excessive inflation. Retailers organised under the Reichsverband Deutscher Konsumerverein and pressed for legislation against the abuses of cartels and trusts. The newly elected Stresemann government had close links with those cartels and trusts, but nevertheless gave in to pressure. In November 1923, the new Ordinance Against the Misuse of Economic Power established a system for the control of abusive pricing. However, that Ordinance proved very hard to implement and can hardly be considered as the origin of any kind of competition policy tradition. Concerning coal and steel, both sectors were highly cartelised and protected, and they

¹³ Schuman had been in close contact with the CNPF's chief official for German affairs, A. François-Poncet, a fervent supporter of the pre-war cartel system. Thanks to Schuman's support, François-Poncet became the French High Commissioner for Germany in 1949. It seems that G. Villiers, the president of the CNPF, was not much less 'associationalist' than François-Poncet.

¹⁴ The famous 'Sächsischer Holzstoff-Fabrikanten-Verband' (Association of Saxonian Woodpulp Producers) decision of the Reichsgericht (Imperial Court) in 1897. It is interesting to note that the German law moved to protect cartels, but not necessarily all other forms of anti-competitive behaviour.

¹⁵ The German coal industry was also heavily cartelised, despite centrifugal (individualistic) tendencies and the lack of government support until after WWI.

provided the model for numerous other cartels. In 1926, the year of the creation of the International Steel Cartel, were created in Dusseldorf two new entrepreneurial giants, the Vereinigte Stahlwerke (steel) and I.G. Farben (organic chemicals). By 1929, German steel production almost doubled French production. Thus, the discordant operations of the International Steel Cartel, which often aimed at controlling such destabilising tendencies, did not substantially damage German steel. Memories of industrial leadership and comparatively efficient cartels were thus present in German minds even after 1945.

American occupation put an end to the German system, most notably with the policy of 3Ds: de-nazification, de-certalisation, and de-concentration. Most segments of the German population became uninterested in, or avoided expressing their opinion on such 'political' matters. Big business and political parties were nevertheless strong opponents of US-led policies. That situation changed only slowly, presumably after the general elections of 1949. In September 1949 Germany regained nominal sovereignty. The first general elections gave Christian-Democrats 31% of the vote, Social-Democrats 29,2%, Free Democrats 11,9% and the Communists 5,7%. Adenauer became Chancellor, and the ordo-liberal Erhard became his Minister of Economics. These results consolidated the dominance of the US, while allowing it to devolve ever more power to the hands of the federal government. Perhaps paradoxically, however, they broadened and intensified German opposition to the 3Ds.

The majority of German élites and the wider population did not support a liberal competitive order. Like in France, the general trend was towards support either for nationalisations or for private control ('self-regulation') of markets. Support for the Allies' de-cartelisation and de-concentration efforts was minimal, not least because it was associated with Occupation and, subsequently, with the operations of the foreign-controlled and vilified International Ruhr Authority. Germany felt like being in a straightjacket, which she had to get rid of as soon as the winners of the war could accept it. Thus, one of the first acts of the newly elected Adenauer government in 1949 was to forcefully advocate the end of the dismantling of German factories. Adenauer himself refused to seat at the IRA unless dismantling stopped and unless the mandate of that authority was widened to include the French and Benelux industries as well. That proved quite successful: by mid-November, dismantling virtually stopped, and Germany joined the IRA.

Slightly before the creation of the IRA, the desire to gain a more equal footing (combined with allied production quotas, uncertain economic conditions, fears about the US- and OECE-sponsored liberalisation programme, and a strong pro-cartel tradition) led German heavy industry to accept the calls of French businessmen for new cartel-like agreements. It was only due to the allegedly excessively low ceiling imposed by the allies on German steel production that the immediate implementation of these agreements was postponed. Clearly, however, the BDI followed the French CNPF and CSSF's and Adenauer's idea that German and French industry should cooperate and abide by similar rules.

Progressively, the 3Ds lost momentum. The final legal outcomes regarding US de-cartelisation and de-concentration policy resembled what we would today call a 'European model'. However, that was entirely due to internal US conflicts and to the

opposition of the British Labour government to radical de-concentration, not to German influence. Erhard and Adenauer did attempt to take responsibility for matters pertaining to industrial structure, but the Allies – particularly the US and France – refused, fearing that that would lead to re-concentration. According to Warner,

“There could be no better indication that the Allies were not prepared to relinquish the opportunity of reorganising the German steel industry in accordance with their own views. Nor were they prepared to let the Germans decide the divisive issue of ownership before actual deconcentration plans had been drafted and approved, thus ensuring the continuity of Allied policy. Yet, the federal government for its part was going to have difficulties elaborating deconcentration proposals for quite some time.”
(1989: 162)

In the meanwhile, an important group of German scholars, most of whom had gathered around the University of Freiburg since 1933, had developed a political and legal theory which aimed at revising German liberalism and which emphasised the central role of free and competitive markets. Although there was no important liberal party to support them in the immediate post-war era, these thinkers were to gain influence and, eventually, power. Significantly, following German capitulation, most ordo-liberals were assigned important administrative posts;¹⁶ they also founded the influential *Frankfurter Allgemeine Zeitung* and, in 1948, the journal ‘Ordo’. Nevertheless, it can be argued that the ordo-liberals’ post-war influence was not immediate. For example, their ‘social market economy’ was initially neither very social nor very market-based. Erhard himself later described himself as ‘an American invention’ whose career owed much to this American patronage. German industrialists were not influenced by ordo-liberal ideas.

Even as late as in 1950, i.e. two years after Erhard’s nomination as Minister of Economics, ‘The Economist’ reported that the federal government “leans heavily on the support of the industrial and business circles.” It continued its annual prospective review of Germany by estimating that one of Bonn’s main goals was the end of restrictions on, inter alia, steel production as well as the devolution of powers from the International Ruhr Authority to the federal government. It added:

“[The government] will ask to take over the reorganisation of the Ruhr steel trusts, which German experts are at present being required to carry out under Military Government Law 75; in this way it will make certain that no drastic structural changes in the Ruhr combines are made, and that the old shareholders are enabled to become owners of the reorganised trusts. [...] As for relations with the world outside, the Bonn Government will ... object to demands for anti-cartel legislation, or for an end to the so-called discriminatory trade practices.”

In that, Germany did not differ much from cases such as France, The Netherlands and Italy, where US pressures had led to the proposal of antitrust legislation in 1947-1950, but where the change of US priorities after the outbreak of the Korean war made the actual voting and implementation of such laws more problematic. Where Germany differed was in only one crucial point: US occupation and French interest in de-concentrating and de-cartelising the Ruhr had led to a series of legal acts which combined to create an effective antitrust policy independently of domestic support.

¹⁶ Most importantly, following the liberation of the Ruhr in April 1945, the US nominated L. Erhard as director of the economic administration [Wirtschaftsamt] there. Five months later, he was recommended by the US to the new (SPD) premier of Bavaria, Wilhelm Hoegner, for the post of Economics Minister. Similarly, Böhm was later an advisor of the US Military Government on antitrust legislation.

II.A.b. The French proposal, the negotiations, and German resistance

The IRA, which had been created upon French demands at the London Conference of November-December 1948 proved too ephemeral a solution. Merely some months after its creation, the Americans proposed its dissolution. For broader reasons relating to international politics, the US had come much closer to German aspirations, be those of German politicians, or indeed those of steel and coal producers. Increasingly, the French had to accept the fact that, under US leadership, a strong capitalist Germany was going to re-emerge and that its industries, particularly its heavy industries, would probably once again out-perform French ones.

Interestingly, it was that reversal of the situation that is the most probable cause of the Schuman Plan of May 1950. The French had already thought a lot about European integration, including in the coal and steel industries. Now, France was asked by Acheson to finally propose a constructive solution to the German problem. Although many in the French Foreign Ministry did not welcome any such solution, Monnet's Commissariat du Plan thought otherwise.

The French proposal needed to be in tune with US efforts to create a liberal economic order, not only at the level of international commerce, but more specifically in Europe, and Germany in particular. The final plan proposed by Schuman but drafted, like the first draft treaty, by Monnet, Hirsch, Reuter and Uri, specifically declared that the proposed organisation would be unlike past cartels. The pro-cartel members of the CNPF and the Bundesverband der Deutschen Industrie, especially those in the steel industry, welcomed the plan with great suspicion.¹⁷ However, the seat of the negotiations had not been randomly chosen: it was going to be the business-friendly environment of the Commissariat Général au Plan, rue de Martignac. The president of the economic group was going to be E. Hirsch, who fitted well with other European experts, industrialists, trade unionist and civil servants.

Negotiations started a few weeks after the Schuman declaration of March 25, 1950. Monnet insisted that the representatives of the other five governments should not be industrialists or 'technocrats', but people able and willing to consider the wider picture. In June Monnet turned down Adenauer's proposal to nominate as German negotiator an acute businessman who would represent the Ruhr industry, L. Kastl.¹⁸ Instead, Adenauer nominated W. Hallstein, a noted legal scholar. Throughout the summer of 1950 Monnet clarified his ideas, and made it increasingly clear that antitrust was not going to be window-dressing.

The French negotiated with three things in mind: (a) the power of the recently revived German coal sales agency Rheinisch-Westfälische Kohlensyndikat under the name of Deutscher Kohlenverkauf ('DKV'); (b) the vertical integration of German steel and mining firms, and (c) the financial needs of the French steel industry, which was still largely subsidised by the state. French negotiators perceived the DKV's control over German coal distribution as a potential threat to their most vital economic interests. Its history, its present and its future were so lengthily debated that "by the end of the

¹⁷ Note, however, that the CNPF's president Villiers was rather sympathetic to the plan.

¹⁸ The proposed nomination of Kastl as the German chief negotiator is indicative of the lack of direct ordo-liberal influence upon German policy in those years. See Berghahn, 1986: 120-121. Berghahn also documents the non-liberal composition of the German delegation to Paris and its links with German heavy industry. (121-122)

Schuman negotiations the history of German industrial organization had become very familiar to the delegates in Paris even if they had been ignorant of it before.” (Lovett, 1996: 437) Regarding problems of vertical integration, the main issue was that such structures could foreclose Loraine steel mills’ access to Ruhr coke. Combined with an acknowledgement of US policy against German cartels, that led to Monnet’s negotiating position being that the unfinished re-organisation of German heavy industry should be completed.

However, Monnet was backed neither by French industry nor by many parliamentarians. Parliament felt bitter about not having control over the development of the talks – that was indeed very uncommon under the 4th French Republic. A branch of the CNPF led by the CSSF strongly resented the abandonment of the International Steel Cartel, which they had attempted to reinvigorate already in the summer of 1948. They also resented their exclusion from the negotiations.¹⁹ What they had hoped for was action against German vertical restraints only; i.e. not against horizontal restraints. Thus, they soon sought to organise an international issue network against the substitution of economic government via private agreements by a new ‘undemocratic’ supranational authority. By that time (September 1950), Monnet had clarified the pro-competition nature of the Treaty, and hence the SCCF could paradoxically count on the support of the Bundesverband der Deutscher Industrie (‘BDI’). On January 17, the Council of Industrial Federations of Europe (‘CIFE’), which grouped among others all steel-making industries, issued a resolution against the projected antitrust Articles (still numbered 60 and 61). The resolution, written by the French members of CIFE, attacked the draft Treaty on both economic and ‘constitutional’ grounds. Its purpose was clearly to protect the European tradition of national and international cartels.

The Germans were the main addressees of Schuman’s declaration, and their initial reaction was motivated by broader political reasons. In addition, they saw there the solution they were seeking against the IRA. Significantly, the new institution would control not only German, but also French and any other member state’s industries. It was therefore fully in line with Adenauer’s proposals of October 1949. The official response was thus rather positive. Nevertheless, two important facts should be noted here. First, unlike R. Meyer’s French Socialists, K. Schumacher’s Social Democrats immediately shouted their opposition to the plan. For Schumacher, accepting the plan was part of Adenauer’s more general policy of promoting the 4 evil ‘K’s’: Kapitalismus, Klerikalismus, Konservatismus and Kartels. The debate was soon polarised, and Adenauer simply replied that he who was against the plan was a bad German. As he emphasised during his June 13 speech at the Bundestag, the reasons

¹⁹ It is important to note here that the first draft treaty of August 1950 had been drafted by Reuter and Uri under the direction of Monnet. Business or the Parliament had been given no opportunity to contribute at all. In addition, although Monnet and Schuman had opted for the exclusion of the CSSF from direct presence at rue de Martignac, the delegations of all other negotiating countries, including Germany, included representatives of big business. That was particularly embarrassing for French business, since rue de Martignac was its natural home ground, the headquarters of the Commissariat Général au Plan. However, Monnet’s choice is easily accounted for by his desire to combine French preferences for anti-DKV measures with US preferences for across-the-board antitrust. Having said that, it seems that the authors of the Schuman plan had not given any serious thought to the effects of the scheme upon their national steel industry, at least not until just before the summer recess of August 1950.

for supporting the initiative were much more political than anything else. Second, initial support was due to a fundamental misunderstanding (one due to, or perhaps even wanted by, Schuman and Monnet), i.e. to the widespread view that the Treaty would re-establish cartels. The main question was therefore whether the form that the project would take was going to be that of a Socialist super-state, or an association of private industries, with interlocking capital structures and operating marketing agreements. The Adenauer Government started working for the latter solution, while the SPD hoped for the former.

The time of Schuman's declaration coincided with the rise of a vigorous movement against Allied Law 27, a strict antitrust instrument which was programmed to replace Bizonal de-cartelisation and de-concentration Law no.75. Indeed, the outcome of the negotiations of the Schuman Plan was intimately linked to the on-going negotiations in Bonn between the federal government and the AHC regarding Law 27, which were particularly sensitive to the issue of supranational antitrust policy. In August 1950, the German government finally understood that the new Treaty would promote free competition. For the Germans, France was attempting to counter-weight the effects of US-led reconstruction by unduly imposing contractual obligations on German industry. Hallstein was thus summoned to negotiate the modification of the relevant draft Articles. In October 1950, the new Minister of the Interior, R. Lehr, openly defended the interests of the Ruhr and proposed to abandon the plan once and for all. Less than two months later, amidst growing business and social unrest, Adenauer was obliged to ask for the suspension of the negotiations until the antitrust elements of Law 27 could be implemented in an acceptable way. As late as January 1951, Erhard and Adenauer still backed the Ruhr industrialists in Bonn and proposed to first abolish the IRA and steel-producing quotas and then consider signing the Schuman Plan. The French and the Dutch, backed by the US, proposed to first sign the Schuman Plan and then negotiate the future of the Ruhr, but only on the basis of the plan drawn by the AHC. On January 27, 1951, *The Economist* reported:

"In Paris, the discussions on the Schuman Plan have rapidly moved forward to a crisis. After months of wearisome negotiation, the German delegates have made reservations on the cartel question which are totally unacceptable to the French. From the outset M. Monnet, the French architect of the project, was determined that it should not be simply a whitewashed version of an international cartel. But most of the industrialists – particularly the Germans – have all along cynically assumed that this piece of window dressing could be managed without hard words, the cartel being for them a highly desirable form of industrial organisation. Now M. Monnet's insistence that the German central coal-selling agency [the DKV] be disbanded has forced a showdown. ... The Germans claim that the selling agency is the only body in the industry with the experience to handle the distribution and marketing of coal, the individual producers having long ago given up those functions."

At that crucial point of the negotiations, everything seemed to depend on German acceptance of draft Articles 60 and 61. The contribution of US High Commissioner McCloy and his assistant Bruce was crucial. At the beginning of March 1951, they finally persuaded France to not insist further on the crucial questions of the Saar and the level of concentration of German industry. Similarly, they persuaded Adenauer to acknowledge the additional French offers, and in return to accept the competition Articles. Following the Chancellor's acceptance to mediate in favour of the Treaty, the latter was signed in Paris on April 18, 1951. As a February 1953 report in 'The

Economist' put it, "by signing and ratifying the Treaty, each government has automatically turned every one of its clauses into the law of the land."

II.B. The politics of an incomplete contract: Antitrust in the ECSC (1951-1957)

Despite strong initial support by the French and strong initial opposition by the Germans, ECSC antitrust policy did not correspond exactly to either country's expectations. The Treaty's Articles provided a positive, if somewhat ambiguous basis for policy (Part II.B.a.). That ambiguity led the HA to showing greater cautiousness than was expected by the French, and thus to sharp critiques (Part II.B.b.). But the whole enterprise had not failed: reinvigorated by its own critics, and assuming an increasingly central role in the business world, the HA was able to take some decisive steps forward and at the same time to persuade German business that it could gain from competition (Part II.B.c).

II.B.a. Articles 65 and 66: long, but how clear?

In August 1952, Jean Monnet, now President of the High Authority ('HA'), declared that the Treaty of Paris was the first European antitrust law. According to him, that fundamental piece of legislation gave the HA an unambiguous mandate to dissolve cartels, forbid other restrictive practices, and impede unjustified concentrations of economic power. True, Monnet could display two long Treaty Articles (Article 66 was the longest of the whole ECSC Treaty) specifically dedicated to competition. However, Monnet's excessive optimism was unjustified, and that for mainly three reasons. First, although Articles 65 and 66 ECSC provided a potentially solid basis for antitrust, they were interpreted differently, and numerous other Articles contributed to blurring the mission of the HA. Second, incomplete and generally-phrased 'contracts' allow more scope for politics at the implementation stage. Finally, the structure of the HA was such as to not allow the Division des Ententes et Concentrations (Cartels and Mergers Division – or 'DEC') much room for independent action.

Articles 65 and 66 ECSC dealt with anti-competitive agreements, dominant positions, and mergers of firms regulated under the Treaty. Article 65(1) prohibited anti-competitive agreements; 65(2) made an exception for specialisation, joint-buying and joint-selling agreements, subject to an inquiry by the High Authority ('HA'). 65(4) declared all agreements prohibited under 65(1) automatically void, and gave the HA sole jurisdiction. Article 66(1) conditioned mergers to prior HA authorisation and foresaw the establishment of specific evaluating criteria to be established by the HA subject to consultation with the Council. 66(2) subjected authorisation of mergers to the absence of anti-competitive effects and possibly specific conditions defined by the HA. 66(4) provided for the control of regroupings of rights or assets only. 66(5) regulated consumed mergers, and established the possibility of taking interim measures. 66(7) gave the HA the power to control dominant firms and, in consultation with the national government concerned, to act appropriately, e.g. by directly regulating prices.

Neither of the two Articles provided a clear-cut mandate for a specific policy. For example, Article 65 could have been used immediately to attack all cartels, but it did not provide guidance as to how to do so. In addition, the exemption of Article 65(2) made the whole enterprise a complicated business. Worse, the specific interpretation of Article 66 created a conflict between France and Germany: Paris thought that it

was the guarantee offered by the Treaty against the re-concentration of the Ruhr industries; Bonn thought the opposite, i.e. that Article 66 specifically authorised re-concentration. In that context, it is not surprising that the First Report of the HA to the Assembly emphasised that, regarding competition and antitrust, the HA had decided to introduce them only progressively, “in view of the delicate and novel nature of the question.”

Finally, the ambiguity of the mandate of the HA was highlighted by its administrative structure. Under Monnet worked less than 300 ‘eurocrats’ and most senior posts were occupied by Germans and French. Monnet presided a collegial commission which was made up of another 8 members. Among them, some cared very little about competition policy (e.g. the Italian anti-fascist hero E. Giacchero, the Belgian trade unionist P. Finet, and the German trade unionist H. Potthoff), and some were rather hostile to it (e.g. the Belgian pro-business politician A. Coppé and the French steel-industrialist L. Daum). Monnet, F. Etzel²⁰, and the Luxemburgian A. Wehrer had a more ambiguous stance. Nevertheless, none was a fervent advocate of a strict antitrust regime and all had close contacts with their respective countries’ industrialists. In the end, only the Dutch member D. Spierenburg too a resolutely liberal pro-antitrust stance. The 9 formed a commission which soon decided to create six ‘groupes de travail.’²¹ Competition policy fell under the group ‘Market’, presided by Etzel. Daum, Spierenburg and Coppé were members. The administrative service in charge of DEC was headed by Dutch economist R. Hamburger.²² It follows that not only was Hamburger accountable to a rather divided ‘groupe de travail’, but that groupe de travail was itself not independent, either from the other members of the HA, or from national influences.

II.B.b. 1952-1954: symbols and disappointments

Quite characteristically, the story of ECSC competition policy begins in 1953-54 with three major controversies, regarding (a) the application of antitrust or direct price regulation in the coal sector, (b) the scope of Article 66, and (c) the steel-producers’ export cartel. Following the failure of the EDC treaty in August 1954, these issues were all marked by the more inter-governmental swing taken by the integrationist pendulum.

As far as the application of competition law or more direct regulation is concerned, the root of the problem was the deeply-entrenched cartelised nature of the coal industry all over Europe. The three biggest coal-producing countries offered the most impressive examples: Belgium had the COBECHAR, France (whose industry was nationalised) had the import cartel ATIC, and Germany had such notorious sales agencies as OKU and GEORG. At the end of 1953, the latter’s pan-European influence on pricing and distribution made it the natural target of the HA. The ECSC Authority had to decide whether to renew the January 1953 maximum-price regulations, or to liberalise the market. Renewing maximum prices made no economic or political sense. On the other hand, liberalising the market would necessitate

²⁰ For more information regarding Etzel, see below.

²¹ These were the following: (1) Market, (2) Investment, Finance, and Production, (3) Labour, (4) Foreign Affairs, (5) General objectives, long-term policy, and cyclical policy, and (6) Administrative affairs.

²² Hamburger’s services, like the rest of the HA, were staffed with an eye on national equilibria. Many in his staff had previously served at the International Ruhr Authority.

vigorous anti-cartel measures. Economic and political rationality were thus confronted to German interests.²³ Towards the end of January 1954, Germany received the support of France (whose PM P. Mendès France exhibited a similar refusal to negotiate with the HA on the future of ATIC, but which nevertheless advocated slightly lower maximum prices), and the regulationist side won the battle. But Spierenburg, Coppé and Giacchero, who for different reasons advocated the liberalisation of the market, did not resign. Thus, following Spierenburg's advice, the Dutch government soon informed the HA that it would seek a ruling of the Court of Justice which would oblige the HA to finally enforce Articles 65 and 66. Under such pressure, the HA finally decided in May 1954 to step up its efforts against cartels. Nevertheless, the Ruhr maintained a firm position and received the quasi-unconditional support both of the Federal government and of the trade unions.

Regarding Article 66, the HA had to publish a series of implementing regulations. Nevertheless, despite the efforts of the director of DEC R. Hamburger, the HA refused to take any active steps. By 1954 the reason behind these delays became obvious: taken between France (who desired to allow further rationalisation of its own industries while blocking the re-constitution of the German pre-war Konzerns) and Germany (whose big firms wished to re-concentrate both horizontally and vertically), Monnet and Etzel preferred to wait. Waiting, however, meant allowing French mergers while counting on Allied occupation laws to block German ones. In the ensuing intense diplomatic activity between the two national capitals, the Germans hesitated between lobbying the HA to block French mergers, or allowing the French mergers in order to set a useful precedent for the post-occupation laws period. The problem was further complicated by the need to define thresholds for (i) vertical mergers, and (ii) notifications of mergers to the HA. Although all governments actively participated in the debate, the main opponents were those who finally agreed on a solution: France and Germany. In the end, it was agreed that specific German firms would be de-stigmatised and that the threshold for notifications would be doubled.

Regarding the export cartel, the HA took the view that such a cartel contravened the Treaty. According to the cartelists, however, the HA had no authority to act against non-purely domestic cartels. In November 1953, the HA finally moved to ban the cartel (but not under Article 65). That move was backed by the US and the steel-importers who would suffer from the cartel prices. Despite the HA's final success a year later, the fight helped consuming much of its political capital. It also obliged it to intervene in a very regulatory fashion, itself fixing maximum prices. Following that battle, the HA was weakened. Officially, it remained vigilant against domestic cartels, but delayed any moves in order to act more decisively in the future.²⁴ In reality, by May 1954 it was clear to all in Luxembourg that an outright attack on cartels would be a public relations' suicide. After the failure of the European Defence Community

²³ Erhard, whose liberal credentials should have led him towards favouring liberalisation, took the opposite stance: his main goal being to limit inflationary pressures, he sided with GEORG to boycott ECSC negotiations. Similarly, Adenauer intervened in the debate and threatened that liberalisation would be so unpopular in Germany as to discourage pro-Europeans, and even jeopardise the chances of new steps towards integration (EDC).

²⁴ Note that the situation in the coal market was much less conflictual: competition had been introduced successfully.

project, the swing of the pendulum of integration towards more nationalistic solutions narrowed the margins of ECSC antitrust policy even more.

II.B.c. 1955-1956: Towards a convergence of views

Despite the initial failures of ECSC competition policy, things were not hopeless for its advocates. By 1955, two important things had started to change. First, the point of reference of all industries concerned increasingly became the HA. In spite of efforts by the Council to limit supra-nationalism, the HA appeared as a credible interlocutor. Thus, to take an example outside the immediate field of antitrust, at the beginning of 1955 the German coal-mine owners requested a price increase directly to the HA. Erhard, whose main concern was to fight against inflation, immediately stepped in to “strongly recommend” that the HA does not oblige. As “The Economist” reported on February 12:

“It is a measure of the change that two years of the common market have brought, that both sides to a dispute which would formerly have been a matter for internal national decision now appeal to the High Authority.”

Second, the inability of the HA to finally set in motion Articles 65 and 66 was noticed and criticised. Starting with the ECSC’s own Common Assembly in May 1954, many European politicians and technocrats started objecting to the HA’s slowness.

By the time R. Mayer took over the presidency of the HA from J. Monnet (mid-1955), GEORG and other cartelising coal-selling arrangements in the Ruhr were still flourishing. Mayer and Etzel continued the latter’s sustained efforts to negotiate a deal to reform GEORG so that its anti-competitive practices could fall under Article 65(2). They were backed by the Common Assembly, and by the Dutch government. However, GEORG did not give in. On the contrary, its alliance with the rest of the Ruhr, German trade unions and the German federal government persisted; it was thus able to keep the issue unsettled for more than one year. But, after that year, in 1956, the organisation was finally split into 3 separate agencies. Although that fell short of initial plans to create 6 agencies, it also meant that Germany could not continue ignoring the pleas of the European institutions.

In the Federal Republic, the workings of the HA had been perceived for most of the period from 1952 to 1955 as obscure dealings of an unaccountable and illegitimate international organisation. However, that general statement encompasses many very different stances. For the ordo-liberals, the HA remained too political, which meant that it was captured by the very interests that it was meant to regulate. For Erhard, whose view was relatively close to, but much more opportunistic, than that of the ordo-liberals, the whole project was too dirigiste. The BDI thought that the HA was too supranational, too dirigiste, and too much oriented towards acting against German business for the sake of competition. In 1955 the BDI still compared the ECSC to the OECE, clearly favouring the latter’s liberal and inter-governmental structure, and thus backing Erhard. Quite significantly, the OECE was preferred both because it did not lead to europeification, and because its recommendations did not have a clear impact upon national policies, i.e. did not impose europeanisation. As for the Ruhr industries, they were openly hostile to ECSC policies, both in the area of pricing and in the area of industrial organisation. Already in 1953 many advocated the re-establishment of the old cartels. In that, they did not meet any opposition from the trade unions, whose main concern was with co-decision. As far as political parties are concerned, the most likely supporter of the ECSC, the CDU, was still too economically nationalistic to

fully endorse the ECSC. The SPD took a stance that oddly enough had not been taken by the trade unions: despite its overall opposition to the ECSC, it supported its competition policy because it would free miners' wages from the constraints placed upon them by the vertically-integrated steel-coal companies. Clearly, the Social-Democrats now thought that Europe may be useful, and much more so than Schumacher had thought in 1950.

After 1955, these views progressively changed. The final settlement with GEORG and the relaxed stance of the HA towards re-concentration convinced German industry that the Authority was no doctrinaire trust-buster. The hands-off stance of Mayer and Etzel regarding the re-constitution of the Mannesmann Werke konzern played a crucial role, too. At the same time, however, the failure of ECSC antitrust meant that various French markets were foreclosed, too. That in turn meant that there was less room for competition within the coal and steel pool, and thus less room for internal expansion of German big business. The interests of the nationalised monopoly of coal in France naturally came head-to-head not only with the mandate of the HA, but also with the interests of German producers. Finally, many increasingly argued that the tendency of the HA to impose quasi-price-cap regulation rather than competition penalised both German coal- and steel-producers, and the German consumer.

Thus, by early 1957, things had considerably evolved compared to 1950-51 and even 1955. Concerning France, although it is commonly argued that the French now opposed antitrust, reality seems to have been more complex. True, some industries feared the Common Market, and argued that France was not yet ready to enter the European sea. But, in general, the CNPF had progressively moved away from opposing, and towards fully participating in the affairs of the ECSC. Its president (still Villiers) frankly endorsed further moves towards European integration, and accepted the principle of free competition. In Germany, things had changed even more. As mentioned above, the "failure" of ECSC antitrust policy had allowed the re-concentration of some of the biggest Ruhr firms. German big business did not fear the HA as much as before 1955. The BDI, and in particular its president, Berg, were now able to fully endorse the HA and even the projected Treaty of Rome.²⁵ Trade unions did not focus directly on questions of competition law, but they took an increasing interest in European affairs. Integration represented for them a convergence of German standards with higher French and Belgian ones. At the level of government, however, the project of a European Common Market deeply divided the CDU. Adenauer, who privileged as close an alliance with France as possible, was openly challenged by Erhard, who thought of the EEC as a mistake. According to the federal minister of economics, the EEC was like the ECSC: too dirigiste and protectionist, and so an unwelcome step away from full liberalisation of trade. However, as Part II.C. below shows, it was precisely these attributes of the ECSC that made Germans more comfortable with the idea of a domestic competition law.

²⁵ Note, however, that the BDI's politics were still slightly ambiguous, favouring both the Common Market and participation in what was to become the European Free Trade Association.

II.C. The German Law against Restrictions of Competition (GWB) (1948-1957)

Parts II.A. and II.B. above have shown that, although Germany had no antitrust culture before WWII, the post-war era saw the development of two antitrust policies with a direct impact on German structures, one national (but US-imposed) and one supranational. In what follows, Part II.C.a. shows that there are good reasons to assume that German industrial organisation was europeanised, to the exclusion of the 'globalisation/Americanisation' and the 'domestic factors' hypotheses. Part II.C.b. builds on the results of part II.B. above to emphasise the triple process of convergence that started in 1955-56.

II.C.a. A priori reasons in favour of the europeanisation hypothesis

Importantly, despite the huge initial divergence between German industrial organisation on the one hand, and the models underlying Occupation policy and Articles 65 and 66, on the other, that did not translate into a deep crisis for German industry. Rather, increasing convergence helped avoid too strong a shock. Significantly, however, convergence between German structures and Occupational policy differed substantially from that between German structures and ECSC policy. In the former case, it was unilateral: neither did these policies achieve impressive results, nor did German industry convert to the new orthodoxy they represented. In other words, convergence occurred only because the Allies abandoned their initial plans. The case of convergence with ECSC policy was entirely different: here, antitrust plans were not abandoned. On the contrary, they persisted, and they were even projected to the broader and deeper general Common Market. The triad consisting of Germany, France and the HA did not start from similar positions, but was able to work and negotiate its way through difficulties and disagreements. At the end of the period, most German politicians, the BDI, and even the Ruhr industry had been reconciled with the idea of regulated competition. It now remains to be seen whether these developments at the European level can help explain developments at the purely domestic level.

There are a few good a priori reasons to assume that it was the experience of the ECSC that rendered the passage of the GWB possible.

First, the 'globalisation' hypothesis can be readily excluded. Although it remains true that the USA were pushing for an international competition regime (based on the so-called Havana Charter), and although Erhard was an enthusiastic supporter of the OECE method and principles, the GWB differed substantially from US-inspired concepts of antitrust law. It differed equally from US domestic policy. For example, the 1950s was the time of the rise of the structuralist antitrust ideology in the USA, and that meant that mergers and acquisitions, or vertical restraints, were to be strictly controlled (the Celler-Kefauver Act which strengthened the Clayton Act of 1914 was finally passed in 1950). By contrast, the German competition law did not contain any provisions regarding the regulation of mergers. It thus came closer to the ECSC model, which had evolved to automatically allow most mergers. Although Erhard and/or the ordo-liberals might have been under the more or less direct influence of American ideas, that was not the case of the German law, nor indeed of German industrialists and most CDU politicians.

Second, a crucial step in offering an explanation for the passage of the GWB is the acknowledgement that domestic factors could not have done the job on their own. Although many authors emphasise the role played by the ordo-liberals and other pro-competition advocates (e.g. Gerber, 1994b, 1998; Haley, 2001), these arguments cannot explain why the law was finally passed in 1957 and not in 1949 or 1951, or in any other year between the first draft and 1957, or why it was passed at all. They are unable to distinguish between what the perceived intellectual merits of the ordo-liberal theory of competition and the political weight and influence of these ideas. Yet, despite having been proposed and ardently discussed for 8 years, the German antitrust bill had been consistently opposed and successfully blocked by big industry and its political allies. When the law was finally adopted, it was rather dissimilar to the very activist Josten drafts of 1949.²⁶ Even the 1952 bill of the Adenauer government, which was a watered-down version of the Josten drafts, had been defeated in the Bundestag.²⁷ Similarly, in 1953-54, when the CDU had won the general elections and the appointment of the immensely popular Erhard had been automatically renewed, the bill was not passed. Nevertheless, three years later, another, version became law.

Third, there was without doubt a heavy pressure on German business to accept a competitive market order. As mentioned above, the ECSC itself (the HA and the Council) was under intense pressure to persist in its antitrust efforts towards German heavy industry. The many compromises of 1953-55 had unsettled the proponents of a decentralised German economic system. True, such compromises concerned French industry, too. But memories (imagined or not) of wrong-doing kartells and konzerns stigmatised the Germans, and more particularly the Ruhr, not the French. After all, the French could always argue that they had insisted for including Articles 65 and 66 in the Treaty, and that that alone could suffice to prove their good pro-competitive faith. Many French and Dutch politicians therefore pressed the HA to act more forcefully against German business. For example, the 1957 intervention of Michel Debré for a tougher antitrust policy of the ECSC towards the Ruhr industries was amply covered by the German press. In contrast, very few German voices were heard for a more vigorous application of the Treaty on French or other non-German firms. Independently of whether other firms entered more restrictive agreements or agreed to bigger mergers, the pressure remained on German firms.

A fourth, and related, point is that there was a strong logical link between the course of European integration and the form of German industrial organisation: the former made changes in the latter urgent. The German government and the BDI strongly supported further European integration; they could therefore not ignore the

²⁶ These drafts had been disregarded even by Erhard. They consisted of two separate statutes, one “for the protection of competition”, and the other one “for a Monopoly office”. The driving principles were close to ordo-liberal ideas: a powerful independent authority would control all restrictive practices dominant positions and mergers, and the burden of proof would be placed on business. Criminal as well as civil law would apply. However, the authority would be able to exempt those acts which it found to not hinder competition.

²⁷ Like the 1957 bill, the 1952 bill was introduced towards the end of the legislature (although not as late as the 1957 one), and only some months before crucial European negotiations on ECSC and EEC competition policy.

The 1952 bill did not include provisions against concerted actions not constituting ‘agreements’. Similarly, it provided for a series of statutory exemptions

aforementioned pressures of the HA and France.²⁸ After all, the driving principle of post-war foreign policy was rapprochement with western countries in general and France in particular. In 1951 Adenauer had accepted to make Articles 65 and 66 ECSC the law of the land, and had allowed France and the HA to supervise its enforcement and implementation. If new steps were taken down the integrationist road, a project which German industry strongly supported, it would be important to avoid the same errors and to not create the same battles as those of the ECSC in 1950-51 and 1953-55.

Finally, the existence of the ECSC excluded the possibility for Germany to unilaterally scrap antitrust. The Ruhr industrialists had initially hoped that, with their departure, the Allies would be given their 'punitive' antitrust as a souvenir to take in their luggage. But Germany was not in the same position as Japan. There, the defeated country was not integrated into a regional trading block with strong supranational institutions, and there was no-one to replace the Americans when they left. More specifically, Japan had been relatively docile (perhaps sometimes even welcoming) towards US-imposed antitrust. Despite having no antitrust tradition, the Japanese seemed willing to abandon the zaibatsu system in favour of more modern methods of competition. But, as soon as the Americans turned their attention elsewhere, they dully, promptly and simply got rid of the policy. The same strategy was not possible in Germany, for it had found itself subject to the antitrust regulatory powers of a supranational authority, the HA, which was here to stay for at least 50 years. Worse, the French made it explicit that they expected the HA to continue on the path traced by the first intentions of the Allies. Nevertheless, it is important to acknowledge that the impossibility of full-scale re-concentration and re-cartelisation was one thing, and the passage of a domestic antitrust statute another.

II.C.b. The triple process of convergence between Europe and Germany

It is important to emphasise here that convergence and europeanisation should not be seen as static, unilateral process leading from a fixed, hierarchically superior level towards deterministic outcomes at lower levels. (Bennett, 1991) Rather, convergence and europeanisation should be assessed as dynamic processes, and hence the analysis should incorporate the possibility of feedback loops and multi-lateral processes. Yet, that is precisely what the events analysed in part II.B. above show: the HA came closer to German demands, the German government came closer to ECSC policy, and the German industrialists started founding some common ground with both national and supranational authorities.

A crucial step in the explanation of the passage of the GWB in 1957 is the openness of the HA to all kinds of arguments, and the cautious and reconciliatory attitude of Monnet and Etzel, and then Mayer and Etzel. Contrary to Hamburger's requests, the HA allowed Germany to produce feedback loops into ECSC law and policy, and thus to really make Articles 65 and 66 "the law of the land". Although this theme was extensively developed above, it should be added here that many officials in the Economics Ministry who had participated at the elaboration of the Josten drafts and the 1952 bill were also involved in ECSC policy-making. Many of them did not take

²⁸ Note here that the most visible advocate of a domestic antitrust law, Erhard, did not totally share the integrationist views of Adenauer. For Erhard, the ECSC had been too dirigiste, and 'Little Europe' too small. The Minister of Economics thus favoured looser, and more liberal schemes of economic integration. He frequently referred to the qualities of the OECE.

the same stance in domestic and in ECSC-level debates, but their presence on both fronts means that some kind of learning must have taken place. The constant attention paid to ECSC rules by senior civil servants (Risse, von der Groeben) and Erhard shows a clear link between the ECSC and the national policy arenas. The same holds, of course, for the nomination of Etzel as head of the HA 'Market' working group. German officials were thus able to not only 'learn' from the ECSC, but also to 'teach' to it. Thus, although the effort of convergence was clearly to be sustained by Germany rather than the ECSC, participation in European policy-making allowed the Germans to influence the HA's policy.

Despite not being successful, the 1952 bill is interesting for two crucial reasons: (a) its resemblance with Articles 65 and 66 ECSC, and (b) the revised positions of the pro-competition coalition which it embodied. Regarding Articles 65 and 66, Germany had fiercely opposed them only 18 months before. Now, the bill aimed at regulating horizontal agreements, vertical agreements, abuses of dominant positions and discriminatory practices, and mergers and acquisitions. Just like Article 65, the treatment of agreements was founded on a general principle of prohibition, but remained open to exemptions, particularly for crisis and rationalisation cartels, and for otherwise uneconomic joint-consumption or -production agreements. Similarly, like the ECSC Treaty, the bill subjected the application of competition law to broader socio-economic concerns. Like Articles 65 and 66, it concentrated on the regulation of internal commerce and did not regulate agreements affecting external commerce. Again, like the ECSC system, it rested on administrative, but not criminal, fines and a civil damage remedy. Simply put, there was significant convergence of the proposed German with the European system. No other country in Europe, not even The Netherlands, came so close to the ECSC model. France, for example, had taken a completely different course, despite its own domestic cartels.

Regarding the revised views of the pro-competition coalition (some CDU MPs, including the influential ordo-liberal F. Böhm, and the SPD), it is fair to say that the 1952 bill offered was based on a much more ECSC-like approach than on one similar to that underlying the 1949 Josten drafts. These drafts had been written with exclusively ordo-liberal ideas in mind. Now, not only Erhard, but many ordo-liberals as well, were willing to accept a number of exemptions and a de-criminalisation of antitrust law. Nevertheless, the supporters of the bill were still far from representing the opinion of most German politicians and industrialists, and that is why the bill failed. Although the government had learned from the example of the ECSC, the BDI had not yet done so. On that front, Erhard clearly remained in a minority: industry was very well represented in the new Bundestag.²⁹ (the same which is going to pass the law in 1957). Despite US pressures, the Bundestag seems unwilling to pass such a law. According to a November 1953 report in 'The Economist', "in Western Germany decartelisation is a thing of the past; recartelisation is now the order of the day." Crucially, at that point the most vigorous voice, and the most credible threat, against cartels came from Etzel, the German representative on the HA. The same report of 'The Economist' noted:

"Indeed, some provisions of the coal-steel Treaty were designed expressly to ensure that the spirit of Law 27 would be carried out when the occupation

²⁹ Note that the composition of the Bundestag between 1953 and 1957 did not change. It was that very same chamber that finally passed the German antitrust law in 1957.

authorities had withdrawn. Had this very issue not been clarified during negotiations, the French would never have signed the treat.”

1953 was also the year of the first case of ‘Europe hitting home’. OKU, a coal-selling cartel controlling sales in South Germany, was legally attacked by several big coal consumers under Article 65 ECSC. Importantly, the complaint was filed at the Regional Tribunal of Stuttgart. Thus, although the subsequent intervention of the HA in favour of the plaintiffs did not change OKU’s practices for at least 4 years, it became clear that the direct applicability of the Treaty was a real possibility. In other words, Germany had really made Articles 65 and 66 “the law of the land”. Even more importantly, that case showed that, even if the legislative or executive branches of government did not do much in terms of enforcing competition, private persons and the judiciary could combine to enforce a rather strict regime.

Within the ranks of German industry many started taking their distances from F. Berg’s intransigent position. Some thought that straight resistance to all governmental efforts to introduce a competition bill might harm the cause of a liberal economic order. The CDU’s 1949 election campaign had been organised around the slogan ‘Markt oder Plan’, and the possibility of additional moves towards planification, direct price regulation and nationalisations did not seem unlikely at all. After all, the example of the ECSC had shown that, faced with the impossibility of breaking up cartels, the authorities could become much more dirigiste. According to those sharing that view, a competition law could play the useful role of alleviating dirigiste pressures. Others, mostly SMEs, came to appreciate the immediate advantages that a competition law could bring to them. For example, many industrialists producing consumer goods financed the *Gemeinschaft zur Förderung des sozialen Ausgleich* (the Society for the Promotion of Social Compromise, also known as ‘Die Waage’, the weigh scales), which in turn strongly supported the endeavours of Erhard. As already mentioned, there were even cases of coal consumers seeking action against cartels under Article 65 ECSC before national tribunals.

Arguments made during European debates were increasingly heard in parliamentary debates on the GWB. For example, although the traditional concept of competition policy in Germany centred around the concept of ‘unfair trade’, that notion was replaced by the more ECSC-like concept of ‘Kartellrecht’. For another example, in the 1953-56 GEORG controversy, the Ruhr, GEORG, the trade unions and the Federal government had all argued that the exemption procedure under Article 65 should be valid for cases that did not involve crisis cartels. According to them, a strict application of Article 65 to GEORG was not warranted because (a) good management was important during booms, too, and (b) no governmental authority could possibly know a sector better than that sector itself. Exactly the same argument was made by the BDI for most of the domestic law battle. Similarly, from the other side, although during the period from 1950 to 1953 Erhard had sponsored the idea of competition as a way of fighting inflation, he was now advocating competition as a pro-consumer policy in its own sake.

Perhaps equally crucial as all the other factors was the signing of the Treaty of Rome in March 1957. Articles 85 and 86 of the new Treaty were roughly similar to Articles 65 and 66 ECSC – albeit Article 86 did not regulate mergers. Evidently, the European level had made an important step towards the average German point of view. True,

the new EEC antitrust articles were still seen in Germany as particularly strict, especially Article 85(3) on the conditions for exempting anti-competitive agreements. True, too, the BDI continued arguing that it was the French (and particularly the SFIO leader G. Mollet) who wanted a European antitrust law. But, notwithstanding these complaints, it was now time for Germany to modernise its own system. Europe was now so present that a new debate arose over the necessity of creating an independent ministry for European Affairs.

Whether the anchoring of the interdiction principle was due to the French alone (as the BDI argued), or not, Germany was now subject to a supranational competition policy covering the vast majority of economic sectors. It therefore differed from Japan in one important respect: it was tied to Europe. Although both saw antitrust legislation imposed on them following their 1945 defeat, Japan was able to progressively relax the law, and ultimately completely abandon its application. Germany, on the contrary, could not do the same. By accepting the French proposals to integrate their economies, it introduced antitrust at home.

In July 1957, the same Minister of Economics that had buried the Josten drafts, and the same Bundestag majority that had turned down the 1952 bill, managed to finally pass the GWB, against a coalition that resembled a lot to that which had successfully resisted the law. The new domestic act replaced the occupation laws. Despite being a watered-down version compared to original ordo-liberal views and SPD hopes, the law instituted a real competition regime. It placed a broad prohibition upon restrictive agreements, although subject to various absolute or discretionary exemptions. Individual resale price maintenance was permitted, subject to confidential registration. Exclusive dealing was a priori permitted, unless too harmful on competition and one of participants. Similarly, agreements on fair trading rules were allowed, subject to registration. Coercion and discrimination by dominant firms or cartels was forbidden.

Conclusion

It was shown that the 1957 German competition law was probably the result of a relatively sharp and short process of europeanisation, albeit one with feedback loops from Germany to the ECSC level, too. Had it been only a case of US-imposed post-WWII international convergence, it would probably have been scrapped or progressively abandoned, as it was done in Japan. Had it been due only to domestic factors, such as the influence of the Ordo-liberals, it could have been passed earlier and it would have resembled more to their core project. Had the main actors been absorbed by exclusively domestic debates and compromises, they would not have paid so much attention to ECSC policies. The fact that these long-standing proposals became law in July 1957, i.e. some years after France obliged Germany to accept Articles 65 and 66 in the Treaty of Paris, and a few months after the signing of the Treaty of Rome, hints at the presence of a europeanisation mechanism.

It seems that that mechanism did not take the form of official pressures by France or the High Authority of the ECSC. Rather, it took the form of a progressive convergence between the antitrust policy of the ECSC and the relevant beliefs of an increasingly large proportion of interested Germans. In time, both some business organisations and parts of the CDU were able to join the SPD and the Free Democrats

in the struggle for a less centralised form of economic organisation. 'Europe' was more than just a benchmark, but less than a 'hard law' enforcer.

Although France and the High Authority did not directly press the German government, they were more often than not on the pro-competition side. Within France, Mollet and Debré were particularly active on that front, while Mendès France was more sympathetic to ATIC, GEORG and thus German views. However, by 1956 Mollet was much more influential than the Radical Socialist leader. At the HA, the pro-competition coalition could count both on the Dutch (Harberger and Spierenburg) and on the experience of Etzel, Giaccherio and a number of ex-IRA officials. Finally, the Dutch and the Belgian governments exercised pressure on Germany, too.

The negotiating stance of Mayer and Etzel played a particularly enhancing role, too. Until 1955 there had been few instances of learning, let alone loyalty transfers at the supranational level. Apart from the negative example of transnational anti-antitrust interests, there were very few instances of supranational mobilisation. Similarly, interests and negotiating positions were defined purely nationally. For example, Risse, one of the men behind the Josten drafts, consistently advocated anti-competitive German views in Luxembourg. Erhard and von der Groeben did the same. Etzel himself had trouble with communicating his views unambiguously to the Ruhr industrialists. After 1954, however, time and tactics paid off. Many started viewing the 'realist' ECSC policies as a sign of success, not of failure. For example, it cannot be a coincidence that some of the most known signatories of the July 1954 letter which challenged the uncompromising stance of BDI president Berg were Janssen, of Krupp, and Winkhaus, of Mannesmann.

Unfortunately, it can hardly be said that ECSC policy was unambiguous or stable. Thus, any assessment of europeanisation effects must first report the great difficulty of measuring exactly what real ECSC policy was and how exactly it evolved. With that qualification, it seems that we can confidently point here to a case of europeanisation. Europeification can therefore occur even without the force of law.

On the other hand, it seems that the existence of a European level of government alone does not lead to a transfer of loyalties to that level. Even a process of accumulation of identities is not easy to describe. Nevertheless, it remains true that the ECSC level of government did empower some actors more than others.

Finally, our case does not support the view that adaptational pressures are inversely related to 'goodness of fit.' Germany, which already had a competition regime (albeit an occupation one), was nevertheless under much greater pressure to adapt than France or Italy were. France had an equally anti-competitive economic organisation, and nationalisations helped placing it at least as far from the ECSC ideal as Germany stood. Similarly, Italy's economy was cartel- and state-controlled, but the first national competition law dates from 1990. It therefore seems more accurate to conclude that the intensity of adaptational pressures may depend not so much on legal and other automatic mechanisms, as on specific deals struck between Member States during critical junctures. It is those deals that generate the logic of appropriateness and the more or less direct outside interventions which we described here as adaptational pressures.

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