5 The Competition Law Provisions of the 60-Year-Old Treaty of Rome

What Has Changed, What Has Not, and What Has Been Left Out

Tihamér Tóth[*]

5.1 The Historical Importance of Competition Law in Europe

The number of experts dealing with scientific rigour in matters of competition law, and particularly European competition law, is not very large. The evolutionary arch of EU competition law can however be of interest even to those who found their vocation in other branches of legislation. As an introduction, I would like to bring forth a few examples as to why competition law has an aura of importance going beyond its strict borders.

Firstly, without competition law there would be no functional internal market: the framework of free trade and enterprise would be given, but the structure would lack life and dynamics. One of the most important goals of EU competition law has always been the support of the internal market project. The reason behind this is easy to grasp: it would be useless to tear down the state walls restricting free trade if later companies, driven by their own interests, would use different building blocks and different methods to erect similar obstacles in its way. The discontinuation of quotas was not sufficient, it was important that companies striving to maintain the status quo would be prevented from dividing the market among themselves. These cartels and anti-competitive vertical agreements would hamper the union of markets much in the same way as previous state import restrictions did. It is not enough to enable, for example, a brewery to enter the market of a neighbouring member state with their products, if it is not possible to protect local manufacturers from alleged subterfuges related to labeling or product content. A similar market blocking effect can be obtained through a network of exclusive distribution agreements or contracts containing non-competition clauses. The guarantee of free entry onto the market of another member state becomes void of meaning if a new company cannot market their beer due to the long-term contracts signed by pubs and restaurants with incumbent competitors. The interdiction of national discrimination remains merely a noble ideal if in the meantime an undertaking holding a dominant position can set its prices according to ntioanlity of its customers (even if this approach can be upheld

* Tihamér Tóth: professor of law, Pázmány Péter Catholic University, Budapest; attorney-at-law, Dentons Réczicza Europe. LLP.

with efficiency arguments). Therefore, without competition law protecting undistorted competition there never was, and there never can be a genuine EU internal market.

Another important and wide-ranging consequence of EU competition law is that in many cases it contributed to the emergence of member state competition laws and to the spontaneous harmonization of material and then procedural legislation. Around the mid-twentieth century, when the first competition rules were created first within the ECSC and then the EEC, none of the member states had a domestic framework which would make the importance of protecting competition self evident. Between the two world wars most European countries regarded cartels as a particular type of contractual agreement and market collaboration, and instead of prohibiting them, they only required them to be registered, subjecting them to ex-post control.[1]

The antitrust policies brought along by the liberating American forces had a strong influence on the states emerging after WWII and the regulations of the ECSC. The modern antitrust legislation of Germany was passed basically simultaneously with the Treaty of Rome. Even if France, or the United Kingdom,[2] already had both written and unwritten competition regulations, they mainly existed only on paper, hidden away in statute books. Even if EEC, later EC, now EU competition law did not wish to replace member state regulations (which were just beginning to emerge) and did not even prescribe a compulsory legislative harmonization,[3] EU rules began to casually mold state level competition law over time, thus bringing along both its positive and occasionally less positive consequences.[4]

EU competition policies did not only influence member state competition policies. One of the important developments of our times is the increasing application of competition law before national courts. As the traditional codes of civil procedure of member states, while not necessarily impeding this EU objective, did not actively work towards it, a directive was passed with the purpose of harmonizing some important procedural questions related to the judicial usage of EU competition provisions.[5] While this impacts only a small slice of civil procedural rules it is not unimaginable that a rolling effect will be experienced in this case as well. We can already witness such an effect with regard to the

1 Such examples were not only Germany and Austria, but the Hungarian antitrust law also had a similar approach. See more in *Versenytükör* 2016/2.

2 The United Kingdom's Monopolies and Restrictive Practices Act of 1947 followed the American example in many aspects, it did however lack actual enforcement by prescribing parliamentary approval as a prerequisite for market interventions.

3 Except in the case of the new member states joining in the 2000s. In their case, the agreements included harmonization of competition law as well.

4 For example, it could be discussed to what extent the strict approach towards territorial restrictions in distribution agreements is warranted under national laws. Also, the termination of individual exemptions in line with EU policy contributed to less legal certainty as regards co-operations between competitors.

5 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

fact that the majority of member states have adopted special procedural rules supporting plaintiffs not only for trials under EU law but also to those brought under domestic competition laws. Under the guise of EU competition law, a number of new concepts, favourable to the plaintiff, have entered and often unsettled member state legal procedures. Such examples are the pre-trial discovery, well known from US legal practice, or the judicially binding effect of competition authority decisions. Hopefully we will soon also witness the establishment in member state procedural law of an important institution of consumer compensation claims, the class-action lawsuit.

Further dissecting the extrapolating effects of EU competition law, most of the union's sectoral regulations were also reformed, or created along the principles of competition law, at least in the last 15-20 years. Energy regulations, media law, rail transport regulations, especially through putting into focus significant market power, all operate with concepts which were created by EU competition law. This process is to some extent natural, as one of the main goals of sector regulators is to provide a set of rules which substitute themselves to the lack of efficient competition and protect the rights of consumers.

Worth noting in this introduction are the EU competition law chapters targeted at member states, and in relation to these, the constitutional protection against state measures aimed at restricting economic freedoms. Specifically, the EU control of states granting special and exclusive rights has become a novel territory of competition law, which provides market actors with a widened constitutional protection. Experience shows that one can achieve better results when fighting a state monopoly by appealing to the TFEU's Article 106 than by invoking the constitutional rights protection of the concerned state.[6] The liberal provisions of EU competition law opened new dimensions for the protection of enterpreneurial freedoms. In turn, the competition law control of state subsidies and other forms of state aid restricted national industry policies, in some cases with the seemingly absurd outcome that the democratically deficient, 'bureaucratic' Commission prevented economically non-profitable spending, or spending which did not serve a clear social objective of common interest of national taxpayers.

The existence and evolution of EU competition law thus bears importance not only within its boundaries, but also from the point of view of other EU and national policies related to market regulation. These developments make it worthwhile to briefly analyze the birth of EU competition law and policies and their evolution during the past 60 years.

In this paper, following the introduction, I will outline the competition law policies and principles which have been characterized by stability in the past decades, then I will

6 The Constitutional Court practice based on the previous Constitution did not judge as anti-constitutional a state monopoly of a certain market or branch of industry, it only considered the highly unlikely situation of the state taking control of the entire economy (fundamentally bringing back the old form of Socialist planned economy). *For further details see*: Tihamér Tóth, 'Gazdasági alkotmány: a piac és a verseny védendő értékei', in: Tímea Drinóczi & András Jakab (eds.), *Alkotmányozás Magyarországon 2010-2011*, Budapest: Pázmány Press, 2013, pp. 349-371.

move on to the most significant changes and reforms and finally I will round up the areas which, albeit belonging to the scope of EU competition law, have been, for any reason, omitted from the founding documents.

5.2 That Which Has Not Changed: The Most Important Interdictions of the Treaty of Rome

As I will further explain in the next chapter, in the history of what was first known as "Community" and then "EU" competition law, although the focus has shifted, from time to time, to different infringements, different markets, different industries, but the fundamental legal principles have always remained the same.[7] It must be mentioned that the competition rules of the Treaty of Rome were not born in a void. The ECSC already handled competition law questions, which were more modern than the provisions of the EEC in that they provided for the control of mergers. It is another matter that during the period of the ECSC we could not yet talk of actual applications of competition law or of an intellectually backed competition policy, the High Authority was unable to promote common goals independently from the individual interests of member states.[8] Under pressure from the two major states, the High Authority authorized most cartels and mergers. The not overly positive experiences related to the ECSC must have been highly influential in the negotiations of the EEC treaty, which aimed at a far more comprehensive economic integration.

Paragraph (1) of Article 85 of the EEC treaty, later Article 81 of the EC treaty and now Article 101 of the TFEU prohibits all agreements between undertakings, concerted practices and decisions by associations of undertakings which may have as an effect the restriction of competition and can affect trade between member states. Paragraph (2) establishes that agreements or decisions prohibited in the article are void. Paragraph (3) establishes that should all four criteria mentioned in it be met, the prohibition of Paragraph (1) will not be applicable. For a long period, this possibility was called derogation, from 2004 it is considered to be an exemption, or a classical exception to the rule. Conditions did not change either with the passing of time. An agreement restricting competition becomes sanctioned if, primarily through the improvement of productivity, it contributes to economic progress, allows consumers a fair share of the resulting benefit, does

7 *For further details see*: Pál Szilágyi, 'A közösségi versenypolitika ötven éve', *Iustum Aequum Salutare*, Vol. III, No. 4, 2007, pp. 145-164.

8 As per Warlouzet's archive investigation, there was a continuous flow of information between the High Authority and the French government, but Erhard, the German minister of economy also lobbied intensively with his French counterpart on behalf of the German steel industry merger, so that the French minister would in turn influence the High Authority's decision. Laurent Warlouzet, 'The rise of European Competition Policy, 1950-1991'; *EUI Working Papers* RSCAS 2010/80, p. 7.

not impose unnecessary restrictions and furthermore does not eliminate competition in respect of a substantial part of the products in question.[9]

Article 86 of the EEC treaty, later Article 82 of the EC treaty and now Article 102 of the TFEU prohibits any abuse of a dominant position by one or more undertakings with the usual reasoning that this is incompatible with the common market as it affects trade between the member states.[10] There are no exemptions to this rule, provided we do not consider Article 106(2) of the TFEU, applicable to all areas of EU law which gives a limited right to undertakings operating services of general economic interest to disobey EU rules, including competition rules.

There was no significant change in the competition law provisions aimed at member states either. Article 90(1) of the EEC treaty, later Article 86 of the EC treaty and now Article 106 of the TFEU had always forbidden member states from taking measures contravening EU legislation with regard to public companies or granting special or exclusive rights to other companies. This provision, on the one hand, created a double prohibition regarding state actions which would have impacted the common market or the prohibition of discrimination, while on the other hand it restricted the ways in which a state could create legal monopolies vested with special powers. Paragraph (2) grants an exception to undertakings providing services of general economic interest, should they be unable to continue their activities otherwise. Paragraph (3) of the Article is unique in that it grants direct powers to the Commission to adopt directives or decisions to member states, without having to rely on the regular infringement procedure before the EU Court of Justice.

Similarly to Article 106, Article 37 of the EEC, later Article 31 of the EC and now again Article 37 of the TFEU provides for the liberalization of the market, but only with regards to the trade with products. While this provision is added to the chapter regulating the free movement of goods within the common market, it has always been enforced by the EU Commission's competition directorate, along competition policy principles. The essence of this article has not suffered any fundamental changes in the past sixty years: its aim is to correct actions with regards to state monopolies which control trade. According to the case law of the EU Court of Justice, this means the discontinuation of export, import and wholesale trade monopolies, and the creation of regulations which prevent discrimination based on member state of origin with regards to retail trade. The interesting aspect of this article is that it is not fully univocal whether, besides paragraph (2) of Article 106, one can also invoke the public interest exceptions mentioned in Article 36 of the TFEU.

9 As is known, these conditions granted at Council level can be further elaborated on by the Commission. Currently there are block exemption directives regarding marketing agreements, motor vehicle sale and servicing, research and development, specialization and technology transfer.

10 This article filters, with some overlapping areas, cases which belong strictly to member state competence: firstly, the dominant position needs to impact a considerable slice of the common market, secondly, it needs to be proven that there is an effect on the trade between member states.

The third codified part of EU competition law applicable to state action, the prohibition of state aid has also fundamentally weathered the storms of time. Economic crises came and went, new, seemingly more modern economic policies were introduced, the ideal role of the state in the economy has been rethought, nevertheless Article 92 of the EEC, Article 87 of the EC and now Article 107 of the TFEU remained essentially unchanged. Up to this day it is forbidden to grant aid from state resources to certain companies, industry branches or to undertakings operating in a certain region which distort competition and impact trade between member states. Paragraphs (2) and (3), describing possible exceptions from the strict prohibition have also remained fundamentally unchanged.

5.3 That Which Has Changed: Institutional Activity and Competition Policy Keynotes

5.3.1 Renumbering

Some changes which have occurred over the past decades have been mostly formal in nature. The renumbering of the provisions outlined above has caused, for a long time, considerable confusion among legal practitioners referencing them, especially as one number, namely Article 86 came to cover, over time, different competition law provisions.[11] With the advancement of integration, the Treaty of Lisbon also refined word usage. Firstly, we now refer to the EU instead of EC or Community competition law, secondly, the most frequent denominator used for the market encompassing ever more member states is now "internal", replacing the previously used terms of "common" and "single."

5.3.2 The Influence of Competition Theory Schools of Thought on Competition Policy

Throughout the years there have been changes in *theories of competition* constituting the interpretative framework of legal norms. The main goals of EU competition law have also changed over time. It is impossible to delve into the details of this topic in a study concerned with general tendencies, therefore I will only recall the most important tenets. It is worth mentioning that one cannot always clearly define which is the dominating school of thought of a certain period. Different approaches of the economists and jurists representing each school, often springing from their different personalities will inevitably blur

11 The article on monopolies of a commercial character is a pleasant exception, returning to its initial number 37 in the TFEU.

the contours. Not to mention the fact that the so-called ordoliberal school to competition had an evidently different approaches between the two world wars[12] than in the early 2000s. We can also say that the EU Commission did not only import principles from different sources, but by placing the goal of integration at the heart of its policies, it created a kind of typical Brussels school as well.

The ordoliberal school,[13] originating from the German university town of Freiburg, had played an important role in shaping the competition policy of the ECSC and later the EC. As opposed to laissez-faire liberalism, ordoliberals imagined not an economy freed from the shackles of the state, but one based on the freedom of entrepreneurship and competition. The state should not be a simple "night watchman" nor should it intervene into the natural flow of the "economic game" but should create and enforce an appropriate legal framework.[14] For the followers of the Freiburg school, competition was a process of rivalry, which inherently required a certain number of market actors challenging each other's position. It is thus not incidental that they put strong emphasis on maintaining a healthy market structure, which implied the protection of market actors, as a reduced number of competitors would often lead to weakened competition. The ordoliberal school of competition policy finds competition important because, on the one hand, it allows for the free operations of the market actors and, on the other hand, it erodes dominant market positions. This does not mean that welfare and efficiency are unimportant, but that it does not consider these values in themselves, but rather anticipate them merely as consequences.

Article 65 of the ECSC allowed for the creation of cartels only under very strict conditions, whereas, as per Article 66 defining the regulations on mergers, only those were to be allowed which did not obstruct competition. These texts were both acceptable to the

12 The birth of the ordoliberal school and the beginning of the research programme led by the economists and jurists of the Albert-Ludwigs University can be dated to 1936, when the three founders, Eucken, and the two jurists, Franz Böhm and Hans Grossmann-Doerth started their magazine called "Ordnung der Wirtschaft." After WWII, the ordoliberal principles, promoted by the social economic model of the new ruling party, the CDU, influenced both German and later European economy and society.

13 *For further details see*: Tihamér Tóth, 'Az ordoliberális iskola palackpostája – a piacgazdaság eszméje egykor és ma', *Acta Universitatis Szegediensis, Acta Iuridica et Politica* LXXIII, 58, Ruszoly József Emlékkönyve, Szeged, 2010; David J. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe' (1994), *American Journal of Comparative Law,* 42(25) p. 25; Peter Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' (Discussion Paper No. 7/15, Europa-Kolleg Hamburg 2015) p. 33.

14 It is important to emphasize this principle, as ordoliberal experts saw the world in a radically different way than the dirigiste, industry focused French thinkers and politicians. Moreover, following WWII, the state played an important role in England as well: the heavy industry was nationalized, but the shortages did not end, food rationing and textile quotas continued for years.

interests of U.S. forces having liberated Western Europe and to the Freiburg school's followers. The ordoliberal experts of the German Ministry of Economy's Scientific Board played an important role in the elaboration of the EEC treaty's competition law chapter.[15] Their success is shown by the fact that, as opposed to the French position, they did not impose a general prohibition of discrimination, limiting it to the cases involving dominant positions and that they included a state's sovereign acts into competition regulations.

The fact that, similarly to the draft of the German competition law, mergers could not be submitted to competition analysis for decades, was however considered a failure.[16] The treaty did not step up against monopolies either, it merely prohibited abuse, although proponents of the Freiburg school found the concentration of power in the market to be harmful.[17] After having studued the documents of the time, Warlouzet also concluded that the Treaty of Rome was not a clean-cut success for the ordoliberals. Anti-trust rules were formulated loosely enough to allow both the German and the French state to fit their own projects into them. Essentially, everything depended on the interpretation of the Treaty's text.[18]

When it comes to legal practice, the most obvious and influential ordoliberal principle manifested itself with regards to the abuse of power in that, if a monopoly dislodges the natural order of competition, competition law needs to force it to act as if ("*als ob*") it were in competition with others for the graces of the consumers. The maintenance of a healthy market structure is considered to be important. The principle of imposing a special responsibility onto the company in a dominant position, which serves the protection of the remaining competition and the safeguarding of consumer rights, also mirrors the Christian moral tenets which played an important role for the ordoliberal school.

Even though it is hard to retrospectively judge the exact weight of the ordoliberal school in shaping the competition provisions of the Treaty of Rome, it is clear that, in terms of *legal practice* it did strongly influence the functionaries of the Commission's competition policy department and the proceedings of the EU Court of Justice. The protection of competition prevailed over the result and effect centric approach of the Chicago school, which furthermore considered social and consumer welfare and efficiency improvement to be the only relevant outcomes. As an example, in 1973, when

15 In Akman's view, however, the ordoliberal school was not definitory to the drawing up of the competition policy chapters of the EEC treaty. The Spaak report does not mention the safeguarding of economic freedom and fair competition, but opposes behaviours contrary to competition, especially situations of dominant position, because they impact economic efficiency. P. Akman, 'Searching for the long-lost soul of Article 82', *Oxford Journal of Legal Studies*, Vol. 29, No. 2, pp. 279-280.

16 The council regulation on the control of cartels was only issued in 1989, and it did meet ordoliberal expectation in that took into account only economic, and within it, competition policy factors when it evaluated intercompany mergers.

17 It is thus strange to note that the French delegation was ready to vote for the stricter solution, and it was the German one which represented a "big business" friendly approach. Akman, p. 285.

18 Warlouzet 2010, p. 9.

the Court brought its first abuse of dominance ruling in the *Continental Can* case,[19] it denied the opinion of the Advocate General and upheld the Commission's position stating that Article 82 EEC does not cover only exploitative behaviour but also infringements curtailing competition.

The reference made to the protection of the market's structure must here be considered an imprint of the ordoliberal school. The decision is "formalist" inasmuch as it does not delve into whether the abuse has an actual or only a potential impact on consumer wellbeing. It declares as a formal proposition that the upholding of a healthy, "efficient" market structure is a task of EU competition law.[20]

It must be noted that, concomitantly with the ordoliberal school, the US saw the flourishing of the *Harvard school,* which also placed a *healthy* market structure at the core of its principles. While the ordoliberal school was concerned with more wide-ranging economic policy goals and had a strong ethical charge, the Harvard school, which elaborated the SCP paradigm,[21] was an explicitly competition policy movement. The later evolution of the SCP model had a strong influence on European competition policy as well, which had always paid particular attention to maintaining a sound market structure, and thus to prohibiting obstacles which would stop a company from entering a market and curbing state actions in the field.

Veering back to the practical implementation of competition law, the EU Commission has been issuing *annual reports on competition policy* since 1972, which reflect ordoliberal principles, such as the protection of the market's structure, the safeguarding of smaller companies and economic freedom. It is worth noting that the reports began being issued at the same time that the Commission initiated its involvement in curbing dominant enterprises. By the end of the 1970s, in its Ninth Annual Report on Competition Policy the Commission outlined three competition policy goals: the protection of market integration, the enablement of sufficient competition on each market and the fairness of this competition. Regarding the latter, the Commission found it important that each market actor should have real opportunities to enjoy the benefits of the common market, and that small and middle-sized enterprises with limited market power should be protected.[22]

The ordoliberal approach started losing terrain towards the end of the 1990s in parallel with the growing influence of the post-Chicago schools which considered consumer well-being as the most important, if not the only, goal of competition policy. This became evident in the increased number of new antitrust regulations and related Commission notices released to complement Article 101. In 1999, the Commission adopted a new block exemption regulation on vertical competition restriction which broke with the pre-

19 Judgment of 21 February 1973 in Case 6-72, *Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities*, [1973] ECR 215.

20 Decision, section 26.

21 "Structure-Conduct-Performance": the structure of the market defines the behaviour of market actors, which in turn influences the outcomes (profitability, economic growth, efficiency, technical development).

22 Ninth Annual Report on Competition Policy (1979), pp. 9-10.

vious formalist approach and provided for a more prominent role of market power. The following years saw the beginning of a legal practice reform which prepared the eastward expansion of the EC, hallmarked by a new Council regulation reforming antitrust enforcement. The competition and market structure protecting approach did however suffer a setback in 2008, at least at Commission level, with the acceptance of a set of commission guidelines[23] which had been negotiated for three years. The major supporters of the so called "*more economic approach*" were economists and U.S. backed lobby groups and law firms. The movement representing the main principles of the Chicago school (particularly the setting of welfare and efficiency as the single goals of competition policy) released a number of legal interpretation statements which, together with the new antitrust enforcement regulation of 1/2003/EC, brought about a number of changes in competition policy, at least at a Commission level. However, in opposition to the US approach, integration and market access protection remained one of the goals of EU policies. Further to this, a number of US experts favour the shifting of focus onto social welfare while European competition policy remains strongly consumer welfare oriented, and acts against the unfair distribution of welfare between producers and consumers as well.[24] Additionally, it cannot be said that the EU has espoused the self-healing market beliefs of the post-Chicago school either, which would have called for considerably less, and more careful, competition authority involvement. Quite to the contrary, the Commission has brought a number of prominent decisions finding, perhaps incidentally often U.S. companies to have committed dominance abuse.

The consumer welfare oriented approach has however not been completely embraced by the EU Court of Justice, as it still often deliberates on precedents dating back to the 1970s. Merely a year after the above mentioned Commission guidelines on abuses of dominant position the Court deliberated in the *Glaxo SmithKline* case, finding the Tribunal's decision void and reminding that, as per Article 101, it is not only an action impacting consumer welfare that can be found to be damaging to competition.[25] As per the conception rooted in the ordoliberal school the rules of competition do not protect merely the interests of the consumers but also the structure of the market and the nature of competition itself.

23 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings; OJ 2009/C 45/2.

24 Roger D. Blair & D. Daniel Sokol, 'Welfare Standards in U.S. and E.U. Antitrust Enforcement', *Fordham L. Rev,* Vol. 81, 2013, p. 2497.

25 Judgment of 6 October 2009 in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P., *GlaxoSmithKline Services Unlimited v. Commission of the European Communities* (C-501/06 P) and *Commission of the European Communities v. GlaxoSmithKline Services Unlimited* (C-513/06 P) and *European Association of Euro Pharmaceutical Companies (EAEPC) v. Commission of the European Communities* (C-515/06 P) and *Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v. Commission of the European Communities* (C-519/06 P), [2009] ECR 9291, p. 63.

5.3.3 Institutions and Individuals Who Shaped Competition Policy

The presentation of the *institutional driving forces* which have shaped competition policy also requires a lengthier analysis. While EU competition policy is primarily shaped by the EU Commission, the decisions of the EU Court of Justice have also played an important role, at times with a progressive (see for example the competition law *effet utile* rule presented in chapter three), at others with a regressive (see the goals of competition law) role. Certain larger direction changes involved the consent of member states, for example, there were considerable council debates over the antitrust or merger control directives, or prior to the acceptance of the new law enforcement regulation. The role of the EU Parliament cannot be considered fundamental, its involvement was restricted to small cosmetic changes.[26]

The role of important *individuals* should not be underestimated. Even though the European competition law machinery is complicated enough for "one swallow not to make a summer", history has shown that a commission member with a vision, and in particular the competition director-generals can considerably influence the manner of and, in particular, the intensity of competition law application. The figures influencing the nascent world of EU competition policy in the 1960s were the German ordoliberally minded competition commissioner Hans von der Groeben, Ernst Albrecht (Groeben's cabinet chief). Hermann Schumacher (head of the cartel department of the competition directorate-general, at that time known as the DG IV) and the Dutch Socialist Pietr Verloren van Themaat (the competition director-general).[27] Competition commissioner Albert Borschette played an important role in the increasingly active competition policies of the 1970s. His ambitious attitude was manifested through frequent press conferences, the issuing of yearly reports (from 1972 onwards), the charging of more considerable fines, industry branch investigations or even the elaboration of the first merger control proposal.[28] The Commission brought its first decisions that also included a fine in 1973 and then 1974: the first was a cartel case from the sugar market,[29] and the second a particular case regarding an overpriced GM vehicle certification.[30] His successor Raymond Vouel was far less ambitious, and he did not continue the fight against member state representatives with regards to the merger control regulation.

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26 Its role was mostly destructive in connection with the negotiation of the latest damage compensation directive, at least with regards to the introduction of class action as a legal institution (it has to be said that a number of member states did not support this institution either.)

27 Warlouzet 2010, p. 9.

28 Warlouzet 2010, p. 14.

29 In the case of the sugar cartel, the Commission extended a 9 million ECU fine to 16 enterprises.

30 The American car manufacturer had to pay a 100 000 ECU fine. 75/75/EEC: Commission Decision of 19 December 1974 relating to a proceeding under Art. 86 of the EEC Treaty (IV/28.851 – General Motors Continental).

During the ten years of Jacques Delors (president of the Commission between 1985-1995), the common market integration project entered another dynamic phase supported by the favourable international economic climate and the liberal economic policies that gained ground in ever more member states.[31] It is interesting to note that the Cockfield report, which served as the basis of the Single European Act did not waste too much time on competition policy with regards to the fulfillment of the internal market, on the contrary, it placed emphasis on the importance of co-operations between undertakings.[32] The merger control regulation was finally passed in 1989 ushering in a period of heightened focus on the fight against state monopolies and competition curbing state subsidies. The competition commissioners of this period were strong personalities: Irishman Peter Sutherland (1985-1989) and Englishman Leon Brittan (1989-1993) represented Anglo-Saxon leadership models and liberal economic policies. The two remarkable commissioners of the 1990s were Karel van Miert and from 1999, Italian Mario Monti (who had previously been the internal market commissioner), who was connected to some high-profile cases such as the record fine imposed on *Microsoft* or the *Michelin II* abusive conduct case, and who also played an important role in the enactment of the procedural reform of European antitrust rules.

5.3.4 Changing Competition Policy Goals

European competition policy has always followed several goals. The protection of the internal market, as required by the Treaty of Rome, and the opening of national markets have always been its particularities, as opposed to member state competition laws which did not have to serve this goal directly. Further to this, it frequently referenced fair competition, fought inflation when required by the global economic situation, helped cooperation to overcome crises and supported research and development. From the end of the 1990s the protection of competition gradually gave way to focus on the outcomes of competition (welfare, efficiency), at least when it comes to the members of the Commission's Competition Directorate-General.

The Treaty of Lisbon which came to replace the Treaty of Rome has, we can now say, brought about some seeming changes with regards to the direction and weight of the Union's competition policies. The Treaty of Rome made "constitutional" level reference to competition protection in three articles outlining the *purpose of the community*. In accordance with this, a system has to be put in place and maintained which allows the common market to function seamlessly and without distortions. This principle became, over time, more than a simple political declaration. It played an important role both when interpreting loosely formulated competition law restrictions and in the judicial

31 Ernő Várnay & Mónika Papp, *Az Európai Unió joga*, Complex, third edition, 2015.

32 Warlouzet 2010, p. 18, referencing pages 34-38. of the report.

case law referring to member state competition restrictions. This leads one to thinking that there is a clear message in the fact that, with French-German cooperation this goal was removed, or better said "hidden away" in the protocols of the TFEU.[33] This has however not lead to the weakening of the Union's competition policies, not even within the framework of the consequent economic crisis which shook the faith of those believing in the freedom of the market and the omnipotence of competition.[34]

It is however important to note that even if the undistorted competition provisions were only included as protocols, the TFEU, the Treaty of Maastricht and the European Charter of Fundamental Rights all reference the importance of the freedom of enterprise and competition on several occasions. The undiminished, "constitutional" importance of competition is exemplified by Article 119 of the TFEU as well, as per which member states are "to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition." It is relevant that the EU Court of Justice did not consider the modified placement of the competition protection goal as decisive. In a sentence on the recoveryof state aid it emphasized that Protocol 27 is still unaltered part of primary EU law.[35]

With regards to the Commission's *competition policy goals published in official documents*, in the most recent version of the competition policy report, that of 2016, Commissioner Vestager marked the 60th anniversary of the Treaty of Rome, which provided the basis for the common work which lead to the creation of a free and prosperous community based on human rights and the rule of law, today uniting more that 500 million people across the continent:

> "My role as Commissioner for Competition is to help enable that this Single Market is working fairly and efficiently so that it creates the conditions for keeping prices competitive, for offering customers a wider choice of quality goods and services, and for maintaining good incentives for businesses to innovate."

In the competition commissioner's opinion, their actions in the year 2016 have again shown how:

> "competition policy contributes to shaping a fairer society, where all economic players – large and small – abide by the same rules. We took action to protect and restore fair competition in a number of key sectors, such as the digital economy, the energy market, the transport sector and the financial market.

33 Protocol 27 is formulated exactly like Art. 3 point g) of the EEC Treaty.

34 Szilágyi 2007, p. 145.

35 Order of the Court (Third Chamber) of 11 July 2013 in Case C-496/09, *Italian Republic v. European Commission*, ECLI:EU:C:2013:461, section 61.

> We made sure that Member States do not grant undue benefits to selected companies, including through taxation tools."

Finally, the commissioner summarizes the report's introduction remarking that:

> "Effective competition enforcement helps Europeans get all the benefits of competition. As competition enforcers, we are well aware that competition policy decisions and initiatives matter in the real world. They affect the daily lives of businesses and consumers. They address key obstacles to growth and innovation. They allow all companies, including small and medium-sized enterprises, to compete on their merits. Ultimately, they maintain a level playing field within an open Single Market that creates the jobs we need."

These quotes also show that the Union's competition policy takes into account fairly wide-ranging economic and societal goals. Vestager underlined in a conference speech delivered in January 2018 that competition should not be protected for itself, but because it provides for a more livable society and fair market circumstances for consumers.[36]

Another aspect which makes creating a general image about EU competition policy more difficult is the fact that after the procedural reform of 2004 there began a process of *decentralization with regards to the application of legislation*. As a result, European competition rules are nowadays often applied not only in Brussels, but at member state level (with the exception of the EU wide merger and state aid control which remains strictly in the hands of the Brussels authority).[37] Occasionally, member state competition authorities or even courts provide building blocks for European competition policy. The decentralization which followed the Eastern expansion is therefore an important development of EU competition policy. It can be thus said that currently the Commission itself focuses on more substantial, global cartels and dominant position abuses, whereas the competition authorities of member states apply Articles 101 and 102 of the TFEU more frequently (for example, the fight against vertical integration has been fundamentally moved to a member state level).

36 Margharete Vestager, *Fairness and competition*, GCLC Annual Conference, Brussels, January 25, 2018. Available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition_en.

37 As per the ECN statistics, in 2017 there were 22 Commission level and 122 member state competition authority level proceedings. http://ec.europa.eu/competition/ecn/statistics.html.

5.3.5 Changing Priorities

Even though primary competition rules remained the same, the focus of the Commission's and the European Court's activities has shifted over time to varying competition related issues.

The first years were clearly dominated by procedures related to distribution agreements.[38] The first prominent decision finding an infringement was delivered in the *Consten and Grundig* case[39] in 1964, that is two years after the passing of the first enforcement Regulation No. 17. The Court's *Consten and Grundig* judgment of 1966 concerned classical vertical competition policy issues and the principles laid down are influential up to now. The Court declared that the prohibition of competition restricting agreements applies not only to competitors, but also to distribution agreements, that member state trademarks cannot be used as grounds for restricting distribution and that any internal measures banning export on territorial protection grounds contravene common market competition principles. We must remember that this was still in the early phases of integration, when the transitional period was not yet over, and there were still national quotas restricting free trade between member states.

The first Commission decision was actually not the one presented above, but one delivered half a year earlier. In that case, the Commission informed the parties that it did not wish to start proceedings with regards to the agreement concerned. Namely, the agreement between plastic home appliance producer *Grosfillex* and its Swiss distributor did not impact trade between member states.[40] This decision is worth mentioning because in the first years the Commission found very few cases to be in breach of competition rules (in the *Consten* case no fine was imposed), in contrast, many cases involved individual exceptions or negative clearences. In the first years the number of exemption notifications arriving to the Commission was still manageable, as there were uncertainties surrounding the nature of agreements which needed to be declared. With time, however, the machinery sprang into action: while in 1962 there were only 800 notifications, in the next year the number rose to 36 000.[41]

The Competition Directorate-General, at the time working with 64 level A functionaries with limited experience in competition law enforcement was overwhelmed by this influx. While the need for antitrust block exemption regulations had long been discussed in the background, the Commission did not get this power from the member states. As it

38 An important role in this was played by the fact that the French competition law considered this area of paramount importance and was aiming to keep inflation in check by regulating distribution agreements and modernizing sales. See: Warlouzet 2010, p. 11.

39 Judgment of 13 July 1966 in Joined Cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community*, [1966] ECR 429.

40 Commission decision 64/233/EEC of March 11, 1964. OJ 58, 9.4.1964, p. 915/64.

41 Warlouzet 2010, p. 12. referencing document number SGCI 1979.0791/262. of the French archives, on the September 18, 1963 discussion of competition policy experts.

is known, following the 2003 law enforcement reform, the Commission does not issue individual exemption decisions anymore.[42] The banning of parallel trade and the vertical limitations fixing retail prices remained among the more important priorities, but the Commission withdrew from taking decisions on other vertical restrictions through. At the beginning of the 21st century these types of cases were more or less extinct in Brussels,[43] there were but a couple of Commission cases dealing with vertical price fixing at the beginning of the 2000s. Interestingly, in the past few years, with the emergence of online sales, the Commission has again handled a number of cases concerned with vertical issues.[44]

The currently dominant cartel control direction was not one of the priorities of EU competition policy in its early stages. The first cartel decisions were taken five years after Grundig, two in a same month no less. The better-known *dyestuff cartel*[45] case was followed by one week by a decision on the *international quinine cartel*,[46] in which case the Commission issued a fine as well. The six French, Dutch and German quinine producers were fined to a total of 510 000 ECUs, the highest among these being of 200 000 ECU. In the *dyestuff cartel* case, which became known as a reference with regards to extraterritorial legal applicability and concerted practices, nine companies received 50 000 ECU fines, and one received a 40 000 ECU fine (amounting to a total of 490 000 ECU). These round numbers show the fact that at the time the Commission did not yet operate with fine calculating equations. Both cases also reached the Court of Justice, but the court in Luxemburg had already deliberated on a cartel case earlier in 1969, although that case had primarily touched on the relationship between EU and member state legislation, and not classical cartel control themes (proof of infringement, financial penalty). This *Walt Wilhelm* judgment was delivered on request of a German court.[47] It is interesting to note that the base of the case was the same dyestuff cartel on which the Commission deliberated in the same year: the German competition authority preceded the community authority by deciding on the cartel's German effects, which prompted the review court to query the relationship of the community and national competition laws and various legal issues arising from the parallel proceedings of the Commission and the Bundeskartellamt.

42 The possibility of negative deliberations, that is, declaring that there is no infringement of Art. 101 is still open, but has not happened in the past years. The only exemption decision stated that the analyzed agreement does restrict competition, but, due to its positive effects, based on paragraph 3 of the article its activity is approved for a certain period of time, and under certain conditions.

43 With this, the vertical use of Art. 101 has been switched to member state level.

44 See the most recent Commission press release reporting about Guess's illegal online restrictions which led to a fine of € 40 million (17 December, 2018); http://europa.eu/rapid/press-release_IP-18-6844_en.htm.

45 Commission decision 69/234/EEC of July 14, 1969. OJ 1969, 191/11.

46 Commission decision 69/240/EEC of July 16, 1969. OJ 1969, 191/5.

47 Judgment of the Court of 13 February 1969 in Case 14-68, *Walt Wilhelm and others v. Bundeskartellamt,* [1969] ECR p. 1.

Not counting these two cartel decisions, the 1980s were dominated by the Commission's exemptions and negative cases.[48] In the first more significant case it was again concerted practices and extraterritorial legal applicability which took centre stage. The Court eventually overruled, three years later, the decision of 1985 on the celluloid cartel.[49] Over the years there has been an increase in Commission decisions, but a clear tendency is hard to point out. The number of decisions has however fallen again as of 2005, which is not surprising, as that year marks the end of the previous exemption regime. More recent cases involve larger cartels, whereas the relatively high number of decisions during the 1980s was made up mostly by negative clearances and individual exemptions. The record number of the 1970s was 19 cases (in 1977), in the 1980s it was 24 cases (1988), in the 1990s 43 cases (1998) – this included a rather large number of dismissed complaints – in the 2000s 26 cases (2001) and in the last decade 23 cases (2014). If we regard cartel decisions only, the number has risen considerably in the 21st century, which is due mostly to the launch of the leniency policy in 1996. I In the 1990s there were approximately ten cases per Commission cycle, whereas in the 2000s this rose to about 30 cases, that is, the numbers tripled.[50] In the period between 1996 and 2002 the number of wrongdoers appealing for leniency was still relatively low,[51] a major wave began after the leniency notice's reform in 2002. The amounts of the fines rose after the passing of the fining guidelines in 1998.

With regards to Hungarian involvement, we can only mention one case: MOL, the Hungarian oil commpany's involvement in the European *candle wax cartel* brought them a fine in October 2008, which was a record amount for a Hungarian company ever imposed by infringing competition rules.[52]

No Hungarian company has been fined so far by the Commission for abuse of a dominant position. The first Commission decision establishing an abuse of dominant position was taken only in 1971, when the Commission had to deliberate in the *GEMA* case on a subject which is currently in focus as well, that of collective rights manage-

48 For example, in 1965 all three decisions were exemptions, in 1968, there were eight negative decisions and exemptions, and no decision found infringements. See: http://ec.europa.eu/competition/antitrust/closed/en/1965.html#6 and http://ec.europa.eu/competition/antitrust/closed/en/1968.html#10.

49 Judgment of the Court of 27 September 1988 in Case C-89/85, *A. Ahlström Osakeyhtiö and others v. Commission of the European Communities*, [1988] ECR p. 5193.

50 *See*: Commission cartel statistics, http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

51 Companies appealed to the 1996 leniency notice in a total of sixteen cases, most of which were fine reduction requests. Total leniency was approved for only three cases in a period of six years (1996 to 2000): the *vitamin cartel* case, Commission decision of November 21, 2001. 2003/2/EC: (Case COMP/E-1/37.512.). OJ L 6, 10.1.2003, 1–89; the *Luxemburgish breweries* case: Commission decision of December 5, 2001. 2002/759/EC, (Case COMP/37.800/F3) OJ L 253, 21.9.2002. 21–41. and the carbon free paper case Commission decision of December 20, 2001. 2004/337/EC (Case COMP/E-1/36.212) OJ L 115, 2004, 1-88.

52 October 1, 2008 decision Case COMP/C.39181 – *Candle Waxes*, summary of the decision: OJ 2009/C 295/13. Fines imposed by the Hungarian Competition Authority on any other company have never reached that amount that was imposed by the Commission on MOL.

ment.[53] In the 1970s a number of decisions were taken in cases which shaped case law such as the *Continental Can, Commercial Solvents, United Brands, Hoffman LaRoche* and *Hugin* cases. This is the time when the Commission, besides tackling vertical competition restrictions, also tried to steer its attention to merger cases. Its second dominant position abuse decision, the *Continental Can* case essentially found an acquisition to be an abuse of dominant position. Two years later, in 1973, the Court sided with the Commission that an anti-competitive acquisition may amount to an abuse of dominance.

When it comes to the rules impacting member state conduct, Article 37 of the EEC, regulating commercial state monopolies began to be applied after the end of the transition period which lead to the creation of the internal market. Between 1969 and 1970, the Commission issued recommendations on the dismantling of 12 member state monopolies.[54] After this period the article was only invoked during expansions, as newly joined member states had to alter their existing economic regulations (for example, the Spanish petroleum trade or the Swedish alcohol monopoly).

The new Article 106 of the TFEU, which also has liberalizing overtones, took on an important role in the competition policies of the Commission from the second half of the 1980s.

First, a directive created the framework for the financial transparency of member states and their state enterprises, then, between 1988 and 1996 the legal monopoly of member states in the communications sector was also curbed. The usage of this article is infrequent in the 21st century, its last application dates back to 2008, when the Commission invoked it once in its ruling over Greek lignite mining rights and once with relation to the changing of the Slovak postal service law.[55]

The consistent usage of TFEU Article 107 prohibiting state aid also took some time to begin in earnest. The Commission started to take more intensive action on the matter from the end of the 1980s onwards, in parallel with the gains of liberalism and the intensification of activities aimed at strengthening the common market. I In its decisions it draws the attention of member states to the obligations of clawing back illegal aid and the number of soft laws also grows exponentially. As a response to the eastward expansion of the 2000s and to the growing influence of the "more economic approach", the Commission passes a modernizing package, introducing the concept of block exemptions, so that it can fully concentrate on state aids which are damaging to the functioning of the common market. The Commission could thus quickly respond to the sudden increase in state aid which came about as a result of the financial and then economic crisis of 2009.

53 IV/26760 GEMA I., 1971 OJ L 134, p. 15.

54 Tihamér Tóth, *Az EU versenyjoga*, Complex, 2nd edition, p. 513.

55 I should add that there are a view Court cases involving Article 106 TFEU in the form of preliminary rulings.

5.4 That Which Has Been Left Out: Merger Control and State Supported Competition Restrictions

As already outlined in the previous pages, as opposed to the Treaty of Paris which set up the ECSC, the Treaty of Rome did not contain merger control rules. This comes do demonstrate the ECSC precedents did not provide the concerned member states with positive experiences. The Commission began work on a merger control regulation in 1972, and it sent the Council a proposition one year later.[56] However, member states could not be easily convinced, and although a Commission work group was founded in 1974 to negotiate on the topic, the passing of the merger control regulation had to wait until 1989. One of the most significant stumbling blocks at a Commission level was the ambiguity surrounding the relationship between the new community competition policy and the already existing industrial, regional and social policies.[57] The oil crisis of the early 1970s had a negative impact on the unity of member states and the solutions sought by the energy sector were not based on interstate solidarity. The public interest merger control test which was included in the first draft also came under fire, as it was felt that, in essence, it would enable the Commission to control important sectors of member states' economies.[58]

In the end, the EU Court of Justice decisions confirming the Commission's jurisdiction to decide retroactively, based on Articles 101 and 102 on whether an acquisition was legal or not played an important role, alongside several other factors, in the eventual acceptance of the 1989 regulation proposition. The first Commission "coup" occurred in October 1991, when it prohibited the merger of an Italian and a French aviation manufacturer, causing a serious outcry among the supporters of active industrial policies.[59] Besides state aid, the other bulk of Commission competition decisions is constituted by mergers and acquisitions. Given the importance and frequency of the subject, it is difficult to fathom why none of the more important provisions of the area, such as the by now widely accepted and functional merger control test, made it to any of the subsequent revisions of the Treaty of Rome.

It is hard to clearly assess the impact merger control had on the development of EU competition policy. It can however be stated with confidence that this is an area where the more economic approach of the nineties was rooted.

Besides the basic rules of merger control, there is another competition policy area which the member states did not wish to codify at a primary law level. This approach is somewhat understandable as member states do not enjoy having their economic jurisdic-

56 Doc. of July 18, 1973 COM (73) 120 final; EU Archives, BAC 71/1988/6/18-65.
57 EU Archives, BAC 71/1988/8/102, note DG IV-A2 PMS, July 30, 1974.
58 Warlouzet 2010, p. 16.
59 Case No. IV/M053 – Aerospatiale-Alenia/de Havilland, available: http://ec.europa.eu/competition/mergers/cases/decisions/m53_en.pdf.

tion diminished by community law unless it is absolutely necessary. The Court and later the Commission drew the attention of member states to the existence of a *competition law's effet utile rule*, according to which they cannot encourage or aid any behaviour which can be objectively judged as restricting competition.[60] The first such ruling against a member state occurred in 1987.[61] It is interesting to note that the content and scope of legislation was defined by the Court upon request from member state courts, so we cannot really talk about a conscious Commission competition policy at this level.[62]

5.5 Summary

The maintenance and creation of undistorted the competition needed to fuel the common market project has always been of key importance for the EU, and prior to that, the EEC and the EC. The wide space of maneuver offered by the fundamentally unchanged legislative provisions was used differently by each period's competition policy. There have been more active and lazier periods as well. Many factors contributed to these variations: the balance of power among EU institutions, the domestic political situation of larger member states, the state of the global economy, the power of corporate lobbies, the personalities of influential leaders or the dominant economic thinking of a period, and in some cases the development of accurate mathematical and statistical market analytics methods. The focus of law enforcement, given the stable legislative environment, shifted under the influence of these factors at both European and member state levels. Finally, it is worth noting that as a result of the decentralizing wave started in 2004 European competition rules are much more widely used by national competition authorities and courts, with the EU Commission trying to keep its hand on the development of a coherent European competition policy.

60 Judgment of 16 November 1977 in Case 13-77, *SA G.B.-INNO-B.M. v. Association des détaillants en tabac (ATAB)*, [1977] ECR 2115.

61 Judgment of 1 October 1987 in *Case 311/85, ASBL Vereniging van Vlaamse Reisbureaus v. ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, [1987] ECR 3801.

62 The Commission started only one proceeding against a member stated under this header: Commission decision 93/438/EEC with regards to Italian customs agents condemned first the union itself (OJ L 203, 1993. 08. 13, p. 27.), and in a separate case. the Italian state: Decision of June 18, 1998, C-35/96 *CNSD*, ECLI: EU:C:1998:303.