OXFORD

THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW

Edited by
Kiran Klaus Patel and
Heike Schweitzer

The Historical Foundations of EU Competition Law

Edited by
KIRAN KLAUS PATEL
and
HEIKE SCHWEITZER

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2013

Impression: 1

British Library Cataloguing in Publication Data
Data available

ISBN 978–0–19–966535–8

Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Acknowledgements

We are grateful to the European University Institute (EUI) in Florence, Italy and particularly to the Robert Schuman Centre for Advanced Studies (RSCAS) and its director, Stefano Bartolini. We first developed the idea of this interdisciplinary project in the equally monastic and inspiring environment of the RSCAS' *Convento*, where we both served as professors for several years. Stefano's unfailing support for the EU Competition Law in Legal and Historical Perspective (EULAH) project, which resulted from this idea, has allowed us to host two workshops to discuss preliminary drafts of these chapters and to prepare this book for publication.

Special thanks also go to our co-authors. Reliably, they endured our ways of pressing for ever closer forms of cooperation. Their spirit, expertise, and commitment was decisive for the success of this enterprise, particularly given that circumstances made this cooperation far from easy. During the course of this project, a number of our participants changed their academic base and living quarters, in some cases several times. We the editors were by no means spared this fate of the mobile scholar (and the usual redemption for a stint as EUI professor); we started off in Florence and now work and live in Mannheim and Maastricht/Aachen respectively. Other tandem pairs experienced moves in the order of Oxford to Copenhagen, from Brussels to Berlin, or from Paris to London (among others). Despite all this movement, collaboration within and between the tandems functioned surprisingly well.

Moreover, we would like to thank Eric Bussière (University Paris-Sorbonne), Sibylle Hambloch (Siegen University), Antoine Vauchez (University Paris-Sorbonne), Stephen Wilks (University of Exeter), and Wolfgang Wurmnest (Max Planck Institute for Comparative and International Private Law, Hamburg), each of whom acted as discussants during our second workshop. Special thanks go to Mia Saugman for her administrative support at the EUI and to Mel Marquis for his enormous help in polishing the various contributions to the book. Working with Natasha Flemming at Oxford University Press was a real pleasure. In Mannheim, we would like to thank Andreas Rief and Max Göhring for editorial support, and in Maastricht the colleagues from the Politics and Culture in Europe research group and Anja Servais for secretarial support.

Kiran Klaus Patel and Heike Schweitzer

Maastricht and Mannheim
November 2012

List of Abbreviations

ACDP	Archiv für Christlich-Demokratische Politik (Archive for Christian-Democratic Policy)
ACOM	Archives of the European Commission in Brussels
AEI	Archive of European Integration
BDI	Bundesverband der Deutschen Industrie (Federation of German Industry)
BGH	Bundesgerichtshof (German Federal Court of Justice)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Decisions of the German Federal Court of Justice in Civil Matters)
BRITE	Basic Research in Industrial Technologies for Europe
BT-Drucksache	Bundestagsdrucksache (German Parliament printed paper)
CAP	Common Agricultural Policy
CHEFF	Comité pour l'Histoire Economique et Financière de la France (Committee for the Economical and Financial History of France)
CMLR	Common Market Law Review
COM	Communication from the Commission
COMETT	Community Programme for Education and Training in Technology
DC	District of Columbia
DG	Directorate-General
DG III	Directorate-General for Enterprise and Industry
DG IV	Directorate-General for Competition
DG XII	Directorate-General for Science, Research and Development
DG XIII	Directorate-General for Telecommunications, Information Market and Exploitation of Research
DGB	Deutscher Gewerkschaftsbund (German Trade Union)
DGFT	Director General of Fair Trading
Division D	Division on State Aid
DOJ	Department of Justice
EC	European Communities
ECJ	European Court of Justice
ECMR	European Community Merger Regulation
ECR	European Court Reports
ECSC	European Coal and Steel Community

EEC	European Economic Community
ENI	Ente Nazionale Idrocarburi
EP	European Parliament
EPA	European Productivity Agency
ESPRIT	European Strategic Programme for Research and Development in Information Technology
EU	European Union
EUI	European University Institute
EURAM	European Research in Advanced Materials
EURATOM	European Atomic Energy Community
FCO	German Federal Cartel Office
FIDE	Fédération internationale pour le droit européen
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
GREThA	Groupe de Recherche en Économie Théorique et Appliquée (Research Unit in theoretical and applied economics)
GWB	Gesetz gegen Wettbewerbsbeschränkungen (German Act Against Restraints on Competition)
HAEC	Historical Archives of the European Communities
IMC	Internal Market Committee
IMF	International Monetary Fund
IRI	Instituto per la Ricostruzione Industriale (Institute for Industrial Reconstruction)
ISA	International Studies Association
ITT Task Force	Task Force on Information Technologies
MEP	Elected member of the European Parliament
MLR	Master Location Register
MMC	Monopolies and Mergers Commission
NARA	National Archives and Records Administration
NCA	National Competition Authority
NJW	Neue Deutsche Wochenzeitschrift (New German Weekly Journal)
NYU	New York University
OECD	Organisation for Economic Cooperation and Development
OEEC	Organisation for European Economic Cooperation
OFT	Office of Fair Trading
OJ	Official Journal of the European Union

OPOCE	Office des Publications Officielles des Communautés Européenne (Office for Official Publications of the European Communities)
R&D	research and development
RACE	Research and Development in Advanced Communications in Europe
RGBl.	Reichsgesetzblatt (German Imperial Law Gazette)
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen (Decisions of the German Imperial Court in Civil Matters)
RIW	Recht der internationalen Wirtschaft (Law of International Economics)
RPC	Restrictive Practices Court
SABAM	Belgische Vereniging van Auteurs, Componisten en Uitgevers
SEC	Commission Staff Working Document
SJD	Doctor of Juridical Science
SME	Small and Medium Enterprises
SPD	Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany)
SPRINT	Software Platform for Integration of Engineering and Things
TFEU	Treaty on the Functioning of the European Union
UNICE	Union of Industrial and Employers' Confederation of Europe
USEC	US Mission to the European Communities
USSR	Union of Soviet Socialist Republics
WuW	Wirtschaft und Wettbewerb (Economy and Competition)

List of Contributors

Thorsten Käseberg, a lawyer and economist, is working in the German Economics Ministry's policy planning unit. He is also an official of the European Commission (on leave), where he served as a merger case-handler in DG COMP. He has also served as a lecturer at Humboldt University Berlin and published in particular on economic and regulatory issues, including the book *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US* (Oxford: Hart Publishing, 2012).

Adrian Kuenzler is Branco Weiss Fellow and member of Society in Science at Yale Law School. His research focuses on behavioural and institutional law and economics, intellectual property, antitrust and financial market regulation. His publications include *Effizienz oder Wettbewerbsfreiheit? Zur Frage nach Aufgaben des Rechts gegen private Wettbewerbsbeschränkungen* (Tübingen: Siebeck, 2008), for which he won the Issekutz Prize and the Empiris Award.

Brigitte Leucht is a postdoctoral fellow at the Saxo Institute at the University of Copenhagen. She previously held a postdoctoral fellowship at the University of Oxford and has taught at a number of institutions including the London School of Economics, the University of Westminster, and the Graduate Institute for International and Development Studies. Publications include *The History of the European Union: Origins of a Trans- and Supranational Polity, 1950–72* (London: Routledge, 2009, edited with Wolfram Kaiser and Morten Rasmussen).

Mel Marquis is Co-Director of the EU Competition Law and Policy Workshop at the European University Institute (EUI) in Florence. He is Part-time Professor of Law at the EUI, Professore a contratto at the University of Verona, and Visiting Professor at LUMSA in Rome. He has worked as a licensed lawyer in the United States and in Belgium. His most recent publications include 'Hell Freezes Over: A Climate Change for the Assessment of Exclusionary Conduct under Article 102 TFEU', in the *Journal of European Competition Law and Practice* (with Ekaterina Rousseva; article nominated for the Concurrences 2012 'Best Antitrust Writing' Award).

Ernst-Joachim Mestmäcker has served as a Professor of Civil Law, Commercial Law and Trade Regulation at the University of Saarbrücken (1959–63), the University of Münster (1963–1969), and the University of Bielefeld (1969–78). Since 1978, he has served as Director of the Max-Planck-Institute for Foreign and International Private Law in Hamburg (Emeritus since 1994). His many publications include: *Europäisches Wettbewerbsrecht* 5th edn (Munich: Beck, 2012, with Heike Schweitzer).

Lorenzo Federico Pace is Professor of EU Law at the Università del Molise and the Università europea di Roma, as well as a member of the Bar of Rome, Italy. He has published extensively on European Union law; his publications include *European Antitrust Law: Prohibitions, Merger Control and Procedures* (Cheltenham: Edward

Elgar, 2007) and edited *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar Publishing, 2011).

Kiran Klaus Patel serves as Professor of European and Global History in Maastricht, after having held a professorship at the European University Institute in Florence, Italy, and an assistant professorship at Humboldt University in Berlin. His most recent publications include *Europeanization in the Twentieth Century: Historical Approaches* (New York: Palgrave, 2010, edited with Martin Conway) and edited *The Cultural Politics of Europe: European Capitals of Culture and European Union since the 1980s* (Houndmills: Routledge, 2013).

Sigfrido M. Ramírez Pérez is research fellow of the Permanent Group for the study of the automobile industry and its employees (Ecole Normale Supérieure Cachan, France) and of the Center for the Study of Contemporary European History at the Université Catholique de Louvain-la-Neuve. His most recent publications include *Alan S. Milward and a Century of European Change* (Houndmills: Routledge, 2012, edited with Fernando Guirao and Frances M. B. Lynch). He is currently collaborating in a project on the official history of the European Commission (1973–86), among other projects.

Heike Schweitzer is Professor of Private Law, European Economic Law, and Competition Law in Mannheim, Germany, after having held the chair for European Competition Law at the European University Institute in Florence, Italy. Main publications include: *Europäisches Wettbewerbsrecht*, 5th edn (Munich: Beck, 2012, with Ernst-Joachim Mestmäcker); *Wettbewerb im Gesundheitswesen, Gutachten B zum 69. Deutschen Juristentag* (Munich: Beck, 2012, with Ulrich Becker).

Katja Seidel holds a PhD in History from the University of Portsmouth. Following a two-year stint as a postdoctoral researcher at the German Historical Institute in Paris, she is a Lecturer in History at the University of Westminster. Recent publications include: *The Process of Politics in Europe: The Rise of European Elites and Supranational Institutions* (London: IB Tauris, 2010); *Europeanisation in the 20th Century: The Historical Lens* (Brussels: Peter Lang, 2012, edited with Matthieu Osmond et al.).

Sebastian van de Scheur studied European law at Maastricht University and is about to defend his PhD thesis in competition law at the European University Institute in Florence. He is admitted to the Bar in the Netherlands and works as a lawyer ('advocaat') at De Brauw Blackstone Westbroek in Amsterdam.

Arthe Van Laer is a lecturer in the History Department at the University of Louvain-la-Neuve and in the Faculty of Economics, Social Sciences, and Business Administration at the University of Namur, as well as a teacher at the college SC of Charleroi. Her recent work includes the publication of her PhD thesis *Vers une politique industrielle commune. Les actions de la Commission européenne dans les secteurs de l'informatique et des télécommunications, 1965–1984*, and the participation in an international research project on the history of the European Commission in the period from 1973–86.

Laurent Warlouzet is presently a Marie Curie postdoctoral researcher at the London School of Economics in 2012–14. He also serves as senior lecturer at the University of Artois (Arras, France) and has been a Jean Monnet fellow at the European University Institute in Florence. His publications include *Le choix de la CEE par la France: L'Europe économique en débat de Mendès France à de Gaulle, 1955–1969* (Paris: Comité pour l'histoire economique et financière de la France, 2011) and *Quelle(s) Europe(s)? Nouvelles approches en histoire de l'intégration européenne* (Brussels: Peter Lang, 2006).

Contents

Introduction

Kiran Klaus Patel and Heike Schweitzer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This picture has only changed over the past five years, during which law has become one of the most versatile and exciting fields of European history research. Many of the most recent studies embark on an interdisciplinary dialogue and test the assumptions and models of lawyers, political scientists, and others against the evidence of primary archival sources which have finally become available. Some studies confirm existing interpretations, while others challenge conventional wisdoms; for instance, by viewing the 'constitutional' interpretation of Weiler, Eric Stein, and others[10] not as an adequate interpretation of a historical fact but rather as a legitimizing strategy promoted by the ECJ and other European institutions. In a similar vein, some scholars have challenged ideas about the autonomy and self-executing quality of law and stress the bargaining processes with which jurists have managed to empower themselves.[11]

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

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

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

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

Chronology

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

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

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

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

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

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

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

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