EU COMPETITION RULES AND THE EUROPEAN INTEGRATION PROJECT

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Introduction

Competition rules set the scope of economic freedom, affect the degree of economic concentration, and mark the distinction between the public and private realm. The US had competition rules on its books as early as 1890 with the famous Sherman Antitrust Act. In Europe, such rules only emerged at a later stage. A number of European governments introduced rules on cartels in the 1920s and 1930s, but the foundations for the regulation of competition were mainly laid after the Second World War, most notably in Germany, France, and the UK. Concurrent to national developments, competition rules became an integral part of the European integration project. The 1951 Treaty establishing European Coal and Steel Community (ECSC) included detailed supranational competition provisions and in the subsequent Rome Treaty in 1957, which established the European Economic Community (EEC), competition received a strong constitutional basis. The establishment of “a system ensuring that competition in the internal market is not distorted” (Article 3(f)) became one of the Treaty’s central objectives. The actual competition provisions were stipulated in Articles 85 to 94, which were later renumbered by the consolidated Treaty on the Functioning of the European Union as Articles 101 to 109. These provisions target cartels and other restrictive business practices, the abuse of dominant market positions, state aid, and public enterprises. In 1989, the domain of supranational competition rules was extended with the Merger Regulation. This regulation was subsequently overhauled in 2004 in the context of a broader “modernization” of competition regulation.

Competition rules are at the heart of the integration process, most notably by reconfiguring national markets into European single market. Ever since their enactment, the primary rationale has been to break down public and private market barriers and to open up markets. The central position of competition rules is also reflected institutionally. The European Commission’s Directorate General for Competition is the supranational competition authority in charge of enforcing the rules. To date, there is no comparable area in which such wide-ranging executive, judicial, and legislative competences have been fused into an unelected and democratically unaccountable European Union (EU) body. The Council of the EU and the European Parliament have very little to say in this policy area. For more than forty years, Regulation 17/62 entrusted the European Commission with the authority to act as investigator, prosecutor, judge, jury, and executioner in the enforcement of competition rules. In the early twenty-first
century these powers were strengthened even further when Regulation 17/62 was replaced
with Regulation 1/2003.

Although the Rome Treaty’s competition rules remained virtually unchanged over time, the
culture of their implementation underwent a major transformation after the mid-1980s. This trans-
formation was related to the end of the postwar era of “embedded liberalism” and the shift toward
a neoliberal type of capitalism. The present chapter first sketches the historical development of
competition rules in the context of European integration. The next section provides an overview
of the academic literature on EU competition policy. The conclusions reflect on whether major
changes are to be expected in this policy area in the near future.

The evolution of EC/EU competition rules

Against the backdrop of a longstanding cartel tradition in Europe, not least in Germany
(Schröter, 1996), the Schuman Declaration leading to the ECSC Treaty only vaguely hinted at
the need to include anti-cartel rules (Schuman, 1950). The French negotiators, supported by
the Italian delegation, initially envisaged that national governments and producer associations
would fix prices for coal and steel. The prospect of high prices and supranational price controls
raised fears among US industrialists and politicians alike that ECSC was “a clever cover for a
gigantic European cartel for coal and steel producers” (Acheson, 1969, pp. 383–4). Coal and
steel were key production factors at that time, indispensable for the economic recovery of war-
torn Europe. France was the world’s largest coal importer, and its ailing steel industry could
not recover without access to new energy resources (Lynch, 1984, pp. 229–30). Germany in
contrast, was not only Europe’s chief coal producer; its steel industry also enjoyed privileged
access to coal by controlling more than half of Europe’s coal resources overall (Berghahn,
1986, p. 110). Access to German coal and steel was also considered crucial for US expansion
across the Atlantic. When US demand for raw materials rapidly increased during the Korean
War, US industrialists and political decision-makers sought to counteract the influence of
cartel-minded Europe and transferred antitrust experts to Paris to assist in drafting competition
rules for the nascent treaties. The US government also promoted antitrust laws alongside the
Marshall Plan. The French delegation eventually favored the inclusion of competition rules
as part of the broader geopolitical goal of weakening the German coal and steel industry and
ensuring market access for French industries to these sectors. Although the differences in subst-
ance with US rules turned out to be negligible, there was no wholesale “Americanization.”
ECSC competition rules were written “in a European idiom” (Gerber, 1998, pp. 338–9), and
the discretionary powers entrusted upon the High Authority – the European Commission’s
predecessor – as well as the eventual enforcement mechanisms looked very different from that
of the US Federal antitrust agencies (Buch-Hansen and Wigger, 2011, Chapter 3).

Because ECSC competition rules had barely been enforced, there was no significant indus-
try opposition to the inclusion of competition rules into the subsequent Treaty of Rome.
The German government emerged as a strong proponent of competition rules, seeing them
as an instrument to ensure market access for the German export-oriented industry in manu-
factured goods. Yet the Treaty’s eventual competition rules did not reflect a wholehearted
commitment to fierce competition: merger control rules were absent, and dominant mar-
ket positions (including monopolies) were not prohibited as long as they were not “abused”
(Article 102), while the rules prohibiting cartels also made it possible for the Commission
to exempt anti-competitive practices (Article 101(3)). Moreover, Regulation 17/62, which
stipulated how the rules on anti-competitive agreements and abuse of dominant posi-
tions were to be enforced, provided the Commission with extensive discretionary powers.
As part of a centralized administrative *ex ante* notification regime for (cross-border) commercial inter-company agreements (other than mergers), the Commission could allow or prohibit such deals, ask for amendments or grant exemptions either on a case-by-case basis, or from the mid-1960s onwards by issuing block exemption directives which, *de jure*, did not require Council approval (or at the time, the European Parliament).

The first decades of enforcing the Community’s competition rules mirror the rise and fall of the postwar hegemonic order of “embedded liberalism” (Ruggie, 1982). This order stretched from the 1950s to the early 1970s – the years of exceptional postwar economic boom. Against the backdrop of Pax Americana and a broad-based commitment to an open and competitive world economy, the era was characterized by national Fordist accumulation structures and Keynesian welfare states (Cox, 1987). Primacy was given to mixed economies and active state interventions through strong industrial policies, especially in Northwestern Europe. Politically, the system was supported by a compromise between organized labor and national industrial capital mediated by the state. The enforcement of Community competition rules was in line with industrial policies and had a strong neo-mercantilist and protectionist outlook, allowing for significant distortions of competition whenever justified for general reasons of “public interest.” Not all of the Treaty’s competition rules were implemented. The Commission did not intervene in the preferential treatment of state-owned companies, neither did it issue directives demanding the privatization of national monopolies. Nor did it tackle state aid granted to companies or entire industrial sectors, even though it could have done so on the basis of Articles 106 and 107. Competition rules rather served to bolster the competitiveness of European corporations against the harsh competition from the larger and technologically more advanced US counterparts in the market for high-value goods (Servan-Schreiber, 1968, p. 139). Whereas US corporations profited from economies of scale in a large homogenous home market, supported by a single currency, one language and a rather business-friendly antitrust regime, European corporations were generally smaller in size, while the European marketplace continued to be highly fragmented along national lines. Through the *ex ante* notification, the Commission permitted commercial cross-border cooperation agreements and the creation of European champions, while at times also taking into account employment concerns. Moreover, it took a lenient approach toward economic concentration, which was not only due to the absence of EC level merger control, but also a deliberate choice not to enforce the Treaty provisions prohibiting the abuse of economic dominance. In short, competition rules were enforced to support (the emergence of) large corporations that, by means of Fordist techniques, produced inexpensive consumer goods in the emerging common market.

The Great Stagflation crisis of the 1970s, which lasted well into the next decade, constituted a turning point. Markets in the advanced economies were saturated, and production grew faster than demand, leading to overcapacity in manufacturing sectors and eventually a major profit squeeze and sharp decreases in output and exports. In a political climate of “new protectionism,” the Commission initially allowed various forms of state aid and so-called crisis cartels to address disparities in production capacities and actual demand in industries in despair. Once Keynesian state interventions and redistributive welfare and industrialist policies proved unsuccessful in restoring the conditions for Fordist growth, political and corporate elites in the Western industrialized world gradually came to embrace neoliberal policies. The ascendency of neoliberalism was closely related to the profound restructuring of capitalism along transnational lines and the disruption of the class compromise between organized labor and industrial capital, which increasingly empowered transnational industrial and financial capital. The accelerated pace of the common market project along neoliberal lines, re-launched by the 1986 Single European Act and the creation of the EU in the early 1990s, enabled many European companies to grow in size, mobilize capital more easily, and henceforth invest in production on a global scale.
At the DG Competition, a sequence of neoliberal hardliners took office as Competition Commissioners, adopting a more stringent enforcement philosophy, which gradually narrowed the scope for protectionist measures. Committed to the view that rigorous competition constituted a catalyzing force for the allocation of production factors in the most efficient and profitable way, the Commission began to challenge national governments before the Court for acts of direct and indirect state aid, to prosecute cartels and to impose ever higher fines on companies breaching competition rules (the Commission may impose fines of up to 10 percent of a company’s turnover). The imperatives of unfettered competition were expanded to previously exempted public utility sectors and networked industries such as telecommunications, energy, postal services, water, sewerage systems, and transport through the adoption of privatization directives under the Treaty’s Article 106(3), a hitherto unused provision that allowed the Commission to tackle public enterprises and monopolies without the approval of the Council or the European Parliament. Moreover, in 1989, the Merger Regulation 4064/89 was adopted with a purely neoliberal text. As Commissioner Brittan (2000, p. 3) noted, the regulation gave “clear primacy to the competition criterion, with only the smallest nod in the direction of anything else.” The importance of a competition-only focus was justified by a particular notion of market justice, according to which anti-competitive practices were considered an assault on consumers. Primacy was given to efficiency and consumer welfare gains in the form of lower prices, measured by sophisticated econometric price modelling, which left no room for broader macroeconomic visions, industrial or social policy considerations (Budzinski, 2008).

The neoliberal orientation was consolidated throughout the 1990s and the early twenty-first century. In 2003, the longstanding enforcement regime was modernized by Regulation 1/2003, which abolished the pre-notification system for commercial inter-company agreements and all sorts of strategic alliances. Instead, it introduced a system of private enforcement, laying the emphasis on market actors litigating breaches of Article 101 before EU and national courts with the prospect of damage compensation. As such, the new regime constitutes an artifact of the various forms of corporate self-regulation promoted on the basis of neoliberal logics. In 2004, the merger regulation was reformed, which further institutionalized neoliberal practices (Buch-Hansen and Wigger, 2011). As regards mergers and acquisitions, an important contradiction can be observed: whereas cartels and state aid were rigorously prosecuted, and public enterprises privatized, economic concentration has rarely been prevented at the EC/EU level. The 1989 Merger Regulation was adopted to facilitate rather than prohibit economic concentration, most notably by avoiding the involvement of multiple national authorities. Since the inception of EC merger control, less than 1 percent of the notified mergers have been prohibited, while nine out of ten have been cleared without conditions (European Commission, 2016; Thatcher, 2014).

The neoliberalization of competition rule enforcement was supported by the managers and owners of transnational capital, such as the European Roundtable of Industrialists (ERT), consisting of top executives of some of Europe’s largest industrial companies. The ERT (1983) urged the Commission to facilitate “the emergence of transnational industrial structures that allow them to compete on a worldwide scale.” Especially after the early 1990s, when the ideological outlook of the ERT became overtly neoliberal (van Apeldoorn, 2002), the Roundtable emerged as a strong proponent of policies that preserve and bring about vigorous competition.

An overview of scholarship on EU competition rules

The bulk of the literature on EU competition rules stems from legal scholars and economists. Legal scholars generally address questions of interpretation of existing competition
EU competition rules and case law, legal consistency, and procedural equity, as well as predictability and transparency – concerns generally also shared by the wider business community (e.g., Faull and Nikpay, 2007). Economists in turn tend to be preoccupied with sophisticated econometric tools for assessing market shares, market efficiencies, consumer welfare, as well as price modeling or the detection of competition-distorting conduct (e.g., Bishop and Walker, 2010). The contributions by legal scholars and economists often aspire to prescribe more efficient assessment practices or inaugurate new legal avenues, which tend to feed back into the actual enforcement practices of competition authorities, including the European Commission. Although these studies provide astute and detailed insights into the technical legalities and the underpinning logics of econometric modelling that informs decision-making in competition cases, they also provide a somewhat narrow perspective on competition rules and their enforcement. Adopting a mono-disciplinary approach, the domain of competition rules is frequently treated as if it were an atomistic policy field cut off from broader societal developments and untainted by political and social forces. Most of these studies are moreover entrenched in the belief that capitalist competition benefits everyone in society. Exemplary of this tendency is Neumann (2001, p. 5) who, with reference to Adam Smith, opines that “[t]o provide scope for the invisible hand to accomplish its task, competition policy must aim at securing undistorted competition.” The political dimension often receives mentioning in passing only (e.g., Motta, 2004, p. 27).

To be sure, scholars from other academic disciplines than law and economics have also taken an interest in the EU competition system. A range of political scientists and public policy scholars have analyzed the politics of supranational competition rules, particularly since the renewed momentum of the European integration project (Cini and McGowan, 2009; McGowan and Wilks, 1995). Still, compared to the abundance of literature in other fields within the area of European integration, the competition domain suffers from a chronic shortage of contributions from political scientists and public policy scholars. Although not all contributions are explicitly theoretically informed, EU-level supranational competition rules have been analyzed from theoretical perspectives such as intergovernmentalism (Schwartz, 1993), neofunctionalism (McGowan, 2007), principal-agent theories (Schmidt, 1998; Wilks and Bartle, 2002; Damro, 2006), and sociological as well as historical institutionalism (Armstrong and Bulmer, 1998; Bulmer, 1994). Most political scientists and public policy scholars have focused on historically delimited but crucial developments, such as the adoption of new treaties, key regulations, or court rulings. Such contributions commonly (and correctly) emphasize that EU competition rules, despite occasional setbacks, have turned into an increasingly efficient and sophisticated regulatory tool, which has been vital for the successful management of parts of the European integration project. Political scientists and public policy scholars have greatly advanced knowledge of EU competition policy, but similarly to scholarly work from law and economics, they often downplay or obscure the profoundly political nature of competition rules by remaining at the descriptive surface of political processes, reducing politics to mere policy-making or analyzing merely the polities involved. The positive pro-competition sentiments of reports issued by the DG Competition and speeches by Competition Commissioners, are frequently faithfully echoed in such research.

EU competition rules have also been analyzed from a critical political economy perspective (Buch-Hansen and Wigger, 2011). Such a perspective does “not take institutions and social power relations for granted” but calls “them into question by concerning itself with their origin and how and whether they might be in the process of changing” (Cox, 1996, p. 89). A critical political economy approach addresses the historical dynamics of capitalism, the way capitalism is regulated and the underlying social power relations. The capitalist accumulation process is seen as replete with contradictions. As a result, it depends on various forms of state
Intervention and regulation that can temporarily stabilize it (Boyer, 1990). One of these contradictions arises from the dynamics of competition: competition creates incentives for companies to innovate, improve the quality, and keep down the price of products and services, but it may also prompt them to evade competitive pressures by means of economic concentration in the form of mergers and acquisitions, or intercompany agreements, such as cartels and other restrictive business practices. These measures can lead to oligopolistic clusters that threaten to reduce, and ultimately undermine the very process of competition. The enforcement of competition rules potentially constitutes an element in the wider state apparatus that contributes to temporarily reducing friction in capitalist markets. Hence, competition rules and their enforcement are analyzed in the context of the broader regulatory architecture that is designed to stabilize the continued accumulation of capital. Critical political economists highlight the importance of competing ideas about (competition) rules and their enforcement, and stress how such ideas relate to the general discourses and power balances between social forces that prevail at a given juncture. Seen from this perspective, the neoliberal transformation of EU competition policy from the 1980s onwards is not a story of evolutionary progress, but rather the result of a major shift in underlying social power relations paired with the transnationalization of production (Buch-Hansen and Wigger, 2011).

Other disciplines have also focused on the economic ideas underpinning the EU competition rules and their enforcement. Historians have also studied the origins and development of the EU competition rules and their implementation. Important contributions from such scholars include Freyer (2006), Patel and Schweitzer (2013), and Warlouzet (2015). A number of studies have also taken an interest in how/whether ordoliberalism and Chicago School economics have impacted this policy area (Gerber, 1998; Akman and Kassim, 2009; Bartalevich, 2016). While both critical political economists and historians are interested in the evolution of the competition policy area, the perspectives differ considerably nonetheless: whereas critical political economists are interested in profound institutional changes and their wider socio-economic causes, historians have tended to emphasize continuity and incremental institutional change (Warlouzet, 2015).

The past, present, and future of EU competition rules

Competition rules and their implementation are at the core of economic governance in contemporary Europe. While the foundations date back to the 1950s, implementation of competition rules has changed dramatically over time. In the era of embedded liberalism, competition rules served a neo-mercantilist purpose and were oriented toward fostering national or European champions, while allowing for certain distortions of competition. In the era of neoliberalism, the implementation of the rules served to intensify competition, inter alia by exposing previously protected domains and companies to the need to compete.

When the economic and financial crisis hit Europe in 2008, individual EU member state governments acted resolutely and adopted far-reaching state aid packages for financial institutions considered too big to fail. These packages ranged from massive loans or liquidity guarantees, to government-sponsored mergers, tax exemptions, or (partial) nationalization of banks by the procurement of “toxic” assets and state acquisitions of preferential shares, as well as government guarantees for deposits. Member state governments initially adopted such packages without the prior approval of the European Commission, despite its status as the supranational competition authority in charge of supervising state aid ex ante. Government spending to bail out the financial sector not only exhausted national budgets, eventually leading to the European sovereign debt crisis, but also went against the Commission’s strong commitment of the past
three decades to prohibit state aid schemes and government-sponsored mergers. The massive bailouts and nationalizations hence clearly posed a challenge to the longstanding neoliberal paradigm that gave primacy to competition. EU scholars began to wonder whether “a redesign of the competition policy regimes at the national and European levels” was about to materialize (Wilks, 2009, p. 269). So far, however, there is no evidence that the current crisis led to a paradigm shift: state aid was tolerated only temporarily and largely confined to rescuing the financial sector, while the regulation of mergers and cartels has continued unaltered.

The EU crisis responses are very much premised on the assumption that not too much, but too little competition constitutes the root cause of the crisis. This is also reflected in the Commission’s Communication “For a European Industrial Renaissance” (2014) in which the competitive performance of the EU economy as a whole, as well as of specific industries, has become a mainstay for the envisaged economic recovery – alongside the imposition of fiscal austerity. A cursory inspection of the new agenda may give the impression of a resurgence of an active Keynesian-type of industrial policy. However, appearances can be deceiving. The envisaged industrial renaissance essentially comprises a three-tier strategy of internal devaluation, in which a stringent enforcement of competition rules takes center stage. As external devaluation through inflationary nominal exchange rate devaluation is no longer an option within the confines of the Economic and Monetary Union, an internal devaluation strategy is currently being followed. Stringent enforcement of competition rules leading to lower prices for goods and services is considered to be a main lever for export-led growth – alongside strategies to depreciate real wages reform labor markets and lower corporate taxes. Competitiveness is primarily understood as “price and cost” competitiveness. Lower prices through more intense competition are seen as a key parameter for more industrial investment to eventually improve the EU’s external trade balance. After all, the expectation of European industries is that 90 percent of global economic growth will be generated outside Europe. Thus transnational business organizations, such as the ERT (2013), push for competition rules that “enhance EU companies’ ability to be competitive internationally.” Keeping pace with emerging world economies such as China, India, or Brazil, and emulating their comparative advantage of cheap labor receives all the emphasis.

It is important to understand that intensified inter-company competition has a depreciating effect on labor. At some point, prices of competitors can only be undercut by reducing variable production costs, such as wages. Thus, internal devaluation through competition rules will only calibrate the neoliberal structural adjustment programs in the future. Overall, the resilience of the neoliberal ideas informing the implementation of the EU competition rules since the outbreak of the economic crisis in 2008 suggests that major changes in this policy area are not in the cards anytime soon.

References
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