EEC Competition Policy in the Early Phase of European Integration

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Besides the Common Agricultural Policy (CAP), competition policy was an area of major importance for the European Economic Community (EEC) as it was there that first successes in the European integration process were achieved. With the creation of the EEC in 1958, the Directorate General for Competition (DG IV)[1] was not only put in charge of competition policy in a narrower sense, i.e. restrictive practices and monopoly policy, but it was also responsible for state aids and the ensuing discrimination between states, and the harmonisation of laws and taxation (EEC Treaty, articles 85-99).

In the 1960s the EEC's first Commissioner for competition policy, Hans von der Groeben, drafted a firmly focused conception. This was crucial as it enabled the supranational authorities to agree on common regulations, or at least approaches, at a high level despite the differences in national competition policies. Cartel and tax harmonisation policies in particular are examples of successful competition policy integration.

The aim of this paper is to analyse the circumstances under which EEC competition policy was successful, success being measured by whether common European laws, i.e. regulations and directives,[2] were passed. For this purpose we will use the hypothesis that law was passed at a high level if the following requirements were met: (i) a clear conception of competition policy had been established by the DG in charge within the European Commission; (ii) the supranational actors – the European Commission and the European Parliament – in general and the European Commission as the process leader in particular used their influence in the decision-making process; (iii) the opinions of different stakeholders in the European industry and trade unions as well as (iv) the recommendations of technical experts with a mostly academic or administrative background were included into the decision-making process; and (v) a compromise between different legislative and economic conceptions (legislative eclecticism) and ideas could be reached.

1. After 1968 the EC was restructured and new directorates general were formed such as the DG for Regional Policy (DG XVI). Issues relating to taxes, the *Societas Europaea* and intellectual property rights were integrated into the Directorate General XIV for Internal Market and Legal Harmonisation. Von der Groeben was commissioner for competition policy – DG IV – (1958-1967), DG XIV and DG XVI (1967-1970).
2. Regulative policies are to be understood as "those which enable a political organization to exert a continuous and specific control on activities generally considered beneficial for the society as a whole". C. LEQUESNE, *The European Commission: A Balancing Act between Autonomy and Dependence*, in: K. NEUNREITHER, A. WIENER, *European Integration After Amsterdam. Institutional Dynamics and Prospects for Democracy*, Oxford University Press, Oxford, 2000, pp.36-51, here p.43.

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It should be noted that this article makes a conscious effort to include both case studies of examples which resulted in a common legislative act during the period under consideration, and those which did not. An example for a successful outcome was EEC Regulation 17/62 enforcing European cartel law. A case study where a legislative act failed to materialise was European company law: the attempt of creating a *Societas Europaea*.

These case studies are also relevant because they can be differentiated by their respective agenda-setting. While cartel law had explicitly been put on the political agenda by the EEC Treaty, the European Commission, although not specifically charged with drafting a European company law, was keen to bring the issue of a *Societas Europaea* onto its agenda and to find solutions on a supranational level.

In the last years a number of publications have focused on European Coal and Steel Community (ECSC) and EEC competition policies.[3] This is partly due to the fact that the archival materials from the early phase of the European integration were recently made accessible. This article is largely based on the author's postdoctoral thesis.[4]

The philosophy of a "practical workable competition" in the DG IV

What was the decisive factor for the conception of the Directorate General for Competition in the early years of the EEC?[5] The theoretical basis of a practical workable competition was established by Hans von der Groeben in his capacity as Commissioner for competition policy and by Walter Hallstein, the European Commission's first President. Von der Groeben, a former senior civil servant in Ludwig Erhard's Ministry of Economics, was influenced by the framework of this German ministry: it was built on the principles of social market economy, a term shaped by Erhard's secretary of state Alfred Müller-Armack, and the ordoliberalism of the Freiburg

3. See among others L. WARLOUZET, *La France et la mise en place de la politique de la concurrence communautaire (1957-1964)*, in: E. BUSSIÈRE, M. DUMOULIN, S. SCHIRMANN (eds.), *European Integration After Amsterdam. Institutional Dynamics and Prospects for Democracy*, Oxford University Press, Oxford/Bruxelles et al. 2006, pp.175-201; T. WITSCKE, *Gefahr für den Wettbewerb? Die Fusionskontrolle der Europäischen Gemeinschaft für Kohle und Stahl und die „Rekonzentration" der Ruhrstahlindustrie 1950-1963*, Oldenbourg, Berlin, 2009; F. PITZER, *Interessen im Wettbewerb: Grundlagen und frühe Entwicklung der europäischen Wettbewerbspolitik 1955-66*, Franz Steiner Verlag, Stuttgart, 2009; K.SEIDEL, *The Process of Politics in Europe. The Rise of European Elites and Supranational Institutions*, Tauris Academic Studies, London, 2010; COLLECTIF, *La politique de la concurrence communautaire: origines et développements (années 1930-années 1990)*, n° spécial de la revue *Histoire, Economie & Société*, 1(2008).
4. S. HAMBLOCH, *Europäische Wettbewerbspolitik. Die Frühphase der EWG*, Nomos, Baden-Baden, 2009.
5. For this chapter see ibid., pp.62 f.

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School,[6] in particular by the theory of Walter Eucken. The same applied to the Commission's external advisor, Professor Ernst-Joachim Mestmäcker, an expert for economic and competition matters.

The Freiburg School was founded by academics at the German University of Freiburg in the early 1930s, and after the Second World War it aimed at creating a new society. Competition was considered as the basis for economic prosperity and political stability. When von der Groeben was appointed Commissioner for competition policy, he represented this "German" school of economic thinking and transferred it to the DG IV. Consequently, while collaborating in the DG IV, civil servants, colleagues in von der Groeben's personal cabinet and special advisors of the European Commission became familiar with these ideas. Most of them even supported this particular German conception of competition policy, which was in general entirely different from the more intervening character of the French economic policy and in particular from the more dirigiste French competition law in the case of monopolies at that time.[7]

What were the special characteristics of the DG IV's conception? Built upon the experiences of the ECSC, it focused on an ordoliberal approach. In contrast to American antitrust law with its sole emphasis on cartels,[8] the European approach intended the development of regulating principles. These principles were seen as the basis for the economic and legal policy as a whole. Alongside the provisions of the EEC Treaty, fair and effective competition was considered as a key requirement for the creation and maintenance of a common market with a single-market character. Von der Groeben shared the neoliberal scholars' view of the EEC Treaty's provisions regarding the free movement of industrial goods and competition policy. For them, they represented a binding legal framework

6. W. MUSSLER, *Die Wirtschaftsverfassung der Europäischen Gemeinschaft im Wandel. Von Rom nach Maastricht*, Nomos, Baden-Baden, 1998, p.39.
7. L. WARLOUZET, op.cit., pp.183 f.; idem: *Europe de la concurrence et politique industrielle communautaire. La naissance d'une opposition au sein de la CEE dans les années 1960*, in: *La politique de la concurrence communautaire: origines et développements (années 1930-années 1990)*, n° spécial de la revue *Histoire, Économie et Société*, 1(2008), pp.47-62, 57 f.
8. The ECSC failed to implement an effective competition policy. Nevertheless this experience shaped competition policy in the EEC as there was a continuity of some of the key actors: Hans von der Groeben was head of the department for the Schuman-Plan within the German Ministry of Economics, or Ernst Albrecht, the head of von der Groeben's cabinet in the EEC, was the German attaché in the ECSC. Many key actors of European competition policy were influenced by US antitrust law and policy such as Walter Hallstein who had been a prisoner of war in the US after the Second World War and later cultivated his contacts to American universities. B. LEUCHT, K. SEIDEL, *Du Traité de Paris au règlement 17/1962*, in: *La politique de la concurrence communautaire: origines et développements (années 1930-années 1990)*, in: *Histoire, Economie & Société*, 1(2008), op.cit., pp.35-46, here p.43 f.).

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> "in which single economical plannings are coordinated by the markets, prices are determined by supply and demand and the freedom of profession and the free access to the markets are guaranteed".[9]

Thus, it was von der Groeben's aim to create a holistic European competition regime ("*Wettbewerbsordnung*") or economic constitution ("*Wirtschaftsordnung*") in accordance with the relevant ordoliberal concepts. At the time, jurisprudential circles also supported the view that the constitution of the EEC should be founded on market and competition economy.[10] Provisions were intended to prevent the restriction or distortion of competition because the abolition of trade barriers only had a short-term horizon.

For the European Commission, competition was not an end in itself, but an instrument which could be used to achieve specific goals: faster growth, better use of the factors of production and faster progress towards the national economies' integration in the EEC. Competition would provide the basis for "a distribution of incomes and assets, to be amended by an effective social and income policy which matches the requirements of social justice".[11] In addition to these economic and social reasons, the political meaning of competition as a guarantor for a high degree of personal freedom for all market participants was a major motif.

The aim of the EEC Commission's competition policy was not to put a certain economic model into practice – for example one of "perfect competition" – but to achieve a pragmatically-oriented workable competition.[12] Hans von der Groeben defined the term "practical workable competition" in line with the Commission's conception as the possibility to reflect changes of supply and demand by means of price changes. Workable competition on an individual basis also implied the opportunity of free market access. Members of von der Groeben's cabinet argued that the EEC Treaty largely complied with neoliberal thoughts, in particular articles 85 and 86 which contained the antitrust provisions and the prohibition of the misuse of a market dominating position. The ambition of the common competition policy was not to

9. English translation by S. HAMBLOCH, H.v.d. GROEBEN, *Deutschland und Europa in einem unruhigen Jahrhundert. Erlebnisse und Betrachtungen von Hans von der Groeben*, Nomos, Baden-Baden, 1995, p.343.
10. The question has yet to be answered whether the assumption that the EEC was based on a market economy order had the effect of a quiet constitutional change, i.e. competition and market economy as an order system gradually became constitutional law. M. SEIDEL, *Die Europäische Union und Wettbewerb,* in: N. HORN, J.F. BAUR, K. STERN (eds.), *40 Jahre Römische Verträge – Von der Europäischen Wirtschaftsgemeinschaft zur Europäischen Union*, Gruyter-Verlag, Berlin, 1998, pp. 287-305, here pp.289 f.
11. English translation by S. HAMBLOCH, H.v.d. GROEBEN, *Die Wettbewerbspolitik als Teil der Wirtschaftspolitik im Gemeinsamen Markt*, in: Idem., *Europa. Plan und Wirklichkeit. Reden – Berichte – Aufsätze zur europäischen Politik*, Nomos, Baden-Baden, 1967, pp.193-213, here p.210.
12. At a conference of the List Gesellschaft on 7th June 1963, Hans Constantin Boden stated that "ideal competition" only existed in theory which since has become known by the term "workable competition". A monistic market economy system and complete freedom of trade had never existed. E. SALIN, *I. Einführung. Planung – Der Begriff, seine Bedeutung, seine Geschichte*, in: A. PLITZKO (ed.), *Planung ohne Planwirtschaft. Frankfurter Gespräch der List Gesellschaft. 7.-9. Juni 1963*, Kyklos Verlag, Tübingen, 1964, pp.2-11, here p.9.

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unleash a "*bellum omnium contra omnes*" but to set legal norms and put them into practice, thus allowing a workable competition and establishing preventative measures against unfair competition. Conceived as an option and freedom of choice, competition ensured – dialectically, as it were – the principle of equal opportunity. Consequently, it had a societal and socially integrative effect because these rules and regulations on competition ensured both an economic and a social order.[13]

In summary, the DG IV based its decisions on an elaborate theoretical conception. The European "*Wettbewerbsordnung*" served as a *leitmotif* for von der Groeben's staff at the DG IV and his personal cabinet. On this basis, the DG IV developed a distinct administrative culture and elite within the EEC bureaucracy.[14] This was a stark contrast to the High Authority of the ECSC, which was oriented towards Germany and France's national interests. These interests virtually served as the High Authority's informal mandate, and no attempt was made to fix and follow a conception with defined rules and criteria designed to execute its antitrust competences.[15] Moreover, until the creation of the EEC most European countries lacked experience with competition legislation.

EEC competition policy – decisions during the 1960s

1. Cartel law

Based on the aforementioned theoretical conception and on the provisions of the EEC Treaty (articles 85-89), the DG IV sought to shape cartel law in accordance with article 87. It put the Council of Ministers in charge of enacting rules concerning the misuse of cartels and market dominating positions.[16] Articles 85 and 86 of the Treaty forbade all agreements between companies as well as mergers affecting the trade between member states, which aimed at or would lead to a hindrance, constraint or falsification of competition within the common market.[17]

Until the Council of Ministers passed a regulation, the national cartel offices were responsible for policing the application of the EEC Treaty's anti-cartel clauses by the member states. In the late 1950s, there were considerable differences between national cartel laws and institutions. At the time Italy, Belgium and Luxembourg did not even have national cartel offices. In France, competition policy was only of secondary importance within a whole array of economic instruments. The French au-

13. H.v.d. GROEBEN, *Die Europäische Wirtschaftsgemeinschaft als Motor der gesellschaftlichen und politischen Integration*, Kyklos Verlag, Tübingen, 1970, p.12.
14. For the emergence of European elites using the example of competition and agricultural policy within the EEC see: *The Process of Politics in Europe …*, op.cit., pp.162 f.
15. T. WITSCHKE, op.cit., pp.339 f.
16. For this chapter see S. HAMBLOCH, *Europäische Wettbewerbspolitik …*, op.cit., pp.79 f.
17. See Article 85 and 86, *Treaty establishing the European Economic Community and connected documents*, Publishing Services of the European Communities, Luxembourg, 1957.

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thorities entrusted with the execution of anti-cartel clauses were lacking staff resources and competences. In the Netherlands, cartels were seen as having the benefit of creating a certain order. They had to be applied for, but were only forbidden in case of a misuse of market power (principle of misuse). By contrast, in Germany the activities of the Federal Cartel Office were regulated by the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen GWB*) since 1958.

From the outset, the DG IV assumed the leadership role envisaged by the Treaties of Rome in elaborating an EEC competition policy, and involved technical and professional experts in the decision-making process. To optimise the process, the DG IV collaborated closely with the competent officials in the member states' authorities. As early as October 1958, the Commission wrote to the governments of Belgium, Italy and Luxembourg to put the issue on the member states' agenda, with the intention to accelerate the enactment of procedural provisions and the creation of competent authorities. The EEC countries with existing cartel authorities invoked the principles of equal treatment and reciprocity in imposing bans. They were reluctant to take action against cartels and market dominating positions in accordance with articles 85 and 86 as long as there was no guarantee all other EEC member states would follow suit.

While drafting a proposal for the Council of Ministers, the Commission discussed the relevant issues with representatives of the national administrations, academic institutions, trade unions and employer associations. As early as 1958 the European Commission established cartel conferences to ensure all member states pursued a consistent cartel policy. These conferences were attended by cartel experts sent by the member states' governments, with Hans von der Groeben as their president. Additionally, specific subject areas were covered by work groups. These measures were important as they provided a forum for both national cartel experts and European institutions to communicate and coordinate their activities. They were supposed to help prevent unequal treatment of cartels and market dominating positions which covered several member states. The German representatives in particular, namely the President of the Federal Cartel Office, advocated the use of standardised administrative procedures by all national competition bodies in accordance with articles 85 and 86 as well as the harmonisation of national competition laws. He also called for the reconciliation of competition policies in the broader sense, i.e. fiscal and social policies, trade and company law and economic stabilisation policies. During the policy formulation process the cartel conferences also played a crucial role in helping the Commission and the member states' cartel experts elaborate Regulation 17/62. Fundamentally different opinions became apparent, resulting primarily from the member states' different national legislations and traditions.

The following questions were controversial: did the articles 85 and 86 of the EEC Treaty have the character of a program, of authorisation norms or immediately applicable legal provisions? Should the cartel ban be applied by legal exemption, i.e. companies could act at their own risk without prior authorisation, or by a centralised authorisation system which would have to grant exemption from the general cartel

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ban in advance via an agency? Should the European Commission have the monopoly of granting exceptions from the general cartel ban?

The Commission proposed a centralised monitoring system which provided that, in order to qualify for an exemption of the general cartel ban, any agreement liable to restrict and affect trade between member states would have to be notified to the European Commission. This concept was supported by the President of the German Federal Cartel Office and the European Parliament's Internal Market Committee with its German *rapporteur* Arved Deringer who actively tried to win over the reluctant governments. However, France was not willing to give up the power to authorise exemptions from the general cartel ban to a European supranational institution. The two positions reflected different national traditions and systems: even though both Germany and France's cartel policies were based on the "general cartel ban" model, there were major differences in their respective legal provisions and their execution. In Germany, exemptions from the cartel ban had to be authorised by the *Bundeskartellamt* (prior authorisation for exemption system). In France, only certain types of mergers had to be notified (legal exemption system). The *Bundeskartellamt*'s decisions were legally binding, whereas the "*bilan économique*" of the French *Commission Technique des Ententes* served as a recommendation for the Minister of Economic Affairs. The decisive factor for the French government's reluctance to accept the German concept was the fear to irrevocably lose national sovereignty to a supranational institution.

The European Commission intended to complete the draft provisions relating to articles 85 and 86 by 1st January 1961, the deadline by which a unanimous vote in the Council of Ministers was required in accordance with article 87 of the EEC Treaty. A unanimous vote promised to gain wider acceptance for the European competition order in the member states. If the provisions were not adopted within this time, a qualified majority vote would be sufficient.

In the early days of the EEC, no routines had yet been established for agenda-setting in the Council of Ministers, the European Parliament and the Economic and Social Committee. Instead, the EEC Treaty's theoretical conception had to be put into practice first. The proposal was forwarded to the Council of Ministers on 31st October 1960 by Walter Hallstein, the Commission's President. It included the explicit request to be presented to the European Parliament for consultation before the Council of Ministers formed its own opinion. The President of the Economic and Social Committee had also asked to be consulted by the Council before a decision was made, although the Treaty did not explicitly require the committee's opinion in matters of competition policy.

However, during the Council of Ministers' first exchange of views on 29th November 1960, the members did not only debate the contents of Regulation 17/62. They also argued whether the Council should draft its own opinion on the matter before the European Parliament and the Economic and Social Committee were consulted. In early December the Commission prevailed, and the proposal was sent directly to the European Parliament without the Council's opinion. For von der

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Groeben, this was a "significant success for the development of the integration"[18] as the Parliament and the Economic and Social Committee's opinions were supposed to contribute to the opinion-making process in the Council of Ministers. Had the procedure preferred by the Council been followed, it would have significantly impaired the Commission's role as the Parliament's partner.

The policy formulation process took place in the European Parliament's Internal Market Committee. The committee took the lead in debating the regulation proposal during eight sessions between 8th February and 11th July 1961.[19] The differences of opinion within the Council and amongst the member states' experts were known to the European Parliament before the consultation began. Therefore the Internal Market Committee's *rapporteur* for competition regulation was asked to contact the competent bodies of the six member states and establish their opinions to enable the committee to compare them and find a compromise. The committee's baseline was to establish the Commission's competence and procedural rules. The first regulation was never intended to be a "final polished solution", but "initial principles or initial rules". It was supposed to get competition law "off the ground" as the common market increasingly opened up, cartel law in the six member states evolved in different directions and the legal uncertainty negatively impacted the attractiveness of the common market.[20] The Internal Market Committee's report on the First Implementing Regulation of Articles 85 and 86 of the Treaty was debated on 19th October 1961 and the regulation was passed by the European Parliament.

The decisive sessions of the Council of Ministers took place in November and December 1961. In the end, France was ready to make concessions, after some of the French requirements for Regulation 17/62, for the common market regulations and the funding of the CAP had been met. Council Regulation 17/62 established that the Commission and the European Court of Justice had the final and binding authority on interpreting the regulation. An advisory committee of national experts for cartel and monopoly issues was established. This committee had to be consulted prior to each decision of the European Commission and was a concession to the French who wished to implement an intergovernmental voice within the supranational system. In addition, block exemptions for certain groups of contracts were introduced in order to help process the large number of applications for negative clearance, a certificate stating that a contract was compatible with article 85 paragraph 3 of the EEC Treaty. In the Council of Ministers' meetings on 29th and 30th December 1961 and on 6th February 1962 the implementing regulation in accordance with article 87 of the EEC Treaty (the so-called "cartel regulation" or Regulation 17)[21] was passed unanimously, although a qualified majority would have been sufficient. The regulation was a com-

18. H.v.d. GROEBEN, *Aufbaujahre der Europäischen Gemeinschaft. Das Ringen um den Gemeinsamen Markt und die Politische Union (1958-1966)*, Nomos, Baden-Baden, 1982, p.158.
19. The Committees for Energy Policy, Transport and Agriculture as well as the Social Committee provided their opinions.
20. R. SCHULZE, T. HOEREN (Hrsg.), *Dokumente zum Europäischen Recht*, Bd.3: *Kartellrecht (bis 1957)*, Springer, Berlin/Heidelberg, 2000, p.499.
21. Amtsblatt 13, 21.02.1962, p.204.

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promise between different legal and economic concepts which paved the way for the transition to the second phase of the common market at the end of 1961.

The result of this decision-making process largely represented the ideas of the German Commissioner for competition policy and was supported by the legislation of the European Court of Justice in the following years. Based on some precedents, the Court's decisions confirmed the Commission's previous interpretations and thus created secondary community law. An example is the Court's judgment in the Continental Can case (case 6-72) in 1972, which confirmed the Commission's opinion that a company holding a market dominating position may unduly confine the consumer's choice.[22] Thus the Court created the basis for merger control, laid down by an EC regulation in 1989.[23] In the Walt Wilhelm case (case 14-68),[24] the European Court of Justice gave community law precedence over national legislation, i.e. national law was inapplicable if it contravened community law. The decision in this competition case set a precedent for the general supremacy of community law over national law.

The provisions of the EEC Treaty on common transport policy did not include explicit regulations on the application of competition rules. This led to differences of opinion between the European Commission on the one hand and the representatives of the national transport ministries and administrations on the other hand.[25] In article 75 of the EEC Treaty the Council was charged with laying down all appropriate rules for the implementation of a common transport policy. In 1962, the Council declared that, on the basis of article 87, Regulation 17/62 was not applicable to transport companies until 30th June 1968.[26] Although several regulations had been passed to ensure the application of EEC competition rules to the agricultural and transport sectors, they did not cover all areas and, in the case of agriculture, allowed for extensive exceptions.

In summary, Regulation 17/62 represented a regulation at a high level on the basis of the DG IV's "*Wettbewerbsordnung*". It could only be established because the European Commission assumed a leadership role and the European Parliament had a strong impact on the decision-making process. Through the cartel conferences, experts in national and supranational cartels were involved, as were different stakeholders. The process resulted in a compromise consisting of a European supranational cartel law in accordance with the German paradigm (legislative eclecticism) and the

22. European Court, Case 6-72, Continental Can (Euroemballage Corporation und Continental Can Company Inc. *versus* European Commission), Judgement dated 21st February 1973, European Court Reports 1973, p.215.
23. Regulation 4064/89, 21.12.1989, in: Amtsblatt L 395, 30.12.1989, p.13.
24. European Court, Case 14-68, (Walt Wilhelm *versus* inter alia Bundeskartellamt), Judgement dated 13th February 1969, European Court Reports 1969, p1.
25. G. AMBROSIUS, C. HENRICH-FRANKE, *Alte Pfade und neue Wege der Integration – das Beispiel der Infrastrukturen in Europa*, in: *Historische Sozialforschung*, 4(2007), pp.275-304, here p. 295 f.
26. Amtsblatt 124, 28.11.1962, p.2751, supplemented by: Regulation 165/65, 9.12.1965, Amtsblatt 210, 11.12.1965, p.3141 and Regulation 1002/67, 14.12.1967, Amtsblatt 306, 16.12.1967, p.1.

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French request for an intergovernmental consultation procedure among the member states (advisory committee of national experts for cartel and monopoly issues). Hence the initial hypothesis of this article has been verified. However, it is open to speculation whether the same result would have been possible without the successful prior implementation of the CAP.

2. European Company Law (Societas Europaea)

The EEC Treaty intended to achieve freedom of establishment for companies and to create an internal market by means of a uniform company law in all member states.[27] The elimination of the barriers and distortions of competition caused by different national protection clauses was not sufficient in the case of a merger between companies from different member states. Such a merger was only possible in the form of a national company, and in practice it was often infeasible. At the time, there were no mergers, participations and subsidiaries under international or European law, but only under national law. The EEC Treaty did not explicitly make provisions for a European company law superposing national law and the creation of a *Societas Europaea* (SE). Therefore it was necessary to harmonise national law and/or to create intergovernmental conventions.

After the inception of the EEC a discussion arose, in particular in jurisprudential circles, about the benefits of a European company, following the creation of several multinational companies in Europe such as the Scandinavian Airline System (SAS) in 1951. The six EEC member states had established different and some very complex national stock corporation laws, which were used as the starting point for developing the concept of a *Societas Europaea*. The member states' national legislation and their reform projects in the 1960s had many parallels. In all of the countries, public companies were capital companies, with their capital divided into shares. They had a different status if national legislation made a distinction between commercial companies and non-commercial partnerships which impacted jurisdiction, material law and the legitimacy of bankruptcy. Besides, the specific provisions of the national laws differed, e.g. in terms of company establishment and entities, invoicing and group law. However, a *Societas Europaea* would have to meet the economic requirements at a European level if a European company was to be a viable alternative to the different national legal statuses. The regulations regarding the *Societas Europaea* were therefore not supposed to be a compromise or a list of all the solutions available in the national legislations, but a new *sui generis* legal status.

It was the French government who submitted the proposal to the Council of Ministers to establish a European company law by an intergovernmental convention between the EEC member states. In 1965, an intergovernmental study group put in charge by the Council of Ministers and a group of academics appointed by the Euro-

27. For this chapter see S. HAMBLOCH, *Europäische Wettbewerbspolitik* ..., op.cit., pp.272 f.

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pean Commission started to discuss the pertinent issues. The following questions were controversial: is there a need for an SE at all, and what would be the benefits? Should the decision-making process have a supranational (EEC regulation or directive) or an intergovernmental character (intergovernmental convention)? How would specifics such as employee representation and participation or tax treatment be organised?

In the first years, the negotiations focused on the question who should be in charge of the SE statute's technical preparation. During the problem definition phase, it was not clear what the European Commission's competences were in drafting an agreement between the EEC member states. In 1965, the Commission used its right of initiative and addressed a proposal to the Council to prepare a draft statute for a SE. This draft was designed to be used as a basis for the negotiation with the governments. The DG IV was to coordinate between the services and experts involved. Thus the issue appeared on the European Commission's agenda.

Based on the study groups' research, the Commission and the experts came to the following conclusion: the instruments provided in the EEC Treaty were not sufficient to eliminate the artificial barriers to international mergers caused by the territorial limitations of national company law. The Commission recognised that both governmental and industrial entities in the six member states had a need for a European partnership. The transformation into European partnerships and their re-establishment were to promote the freedom of establishment for companies and thus free trade, and to facilitate access to capital markets. The aim was

> "to contribute to a better use and distribution of the factors of production in the common market and to improve the competitiveness of European industry".[28]

Based on this information, the DG IV tried to convince supranational and national industry associations such as the *Union des Industries de la Communauté Européenne* (UNICE) and the German *Bundesverband der Deutschen Industrie e.V.* (BDI), and thus individual companies, that a European company would be beneficial.

The negotiations at the time also focused on the question whether the Commission or the member states should be responsible for elaborating a statute. Ultimately, the question was whether the decision-making process should be supranational or intergovernmental. The answer to this question would anticipate the form of the statute: either community law in the form of a regulation or directive, or an intergovernmental convention in the form of an agreement. As early as 1965, the DG IV developed the idea of drafting a statute for a *Societas Europaea* based on directly applicable community law. Their aim in doing so was for the European Parliament and the Economic and Social Committee to be consulted, and to establish a direct remit for the Commission and the European Court of Justice. The Directorate General for Competition

28. I. SCHWARTZ, *Die europäische Handelsgesellschaft* (unpublished manuscript), January 1967, p. 5.

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based its line of argument on article 235 of the EEC Treaty.[29] The idea originated from Ivo Schwartz, a member of von der Groeben's cabinet at the time, and became the Commissioner's prevalent opinion. In April 1966, the Commission forwarded a memorandum to the Council, and a year later a draft statute of a SE followed, including 200 articles forming the basis for discussion and information. All member states were to be bound by a treaty to incorporate a uniform law ("loi uniforme") regarding the *Societas Europaea* in their domestic legislation. The Commission's preferred type of SE was modelled on the legal status of a public company which was known in all EEC member states. Among others it had the following benefits: (i) it was likely to be chosen by companies with an international scope; (ii) it was well-suited to safeguard the interest of third parties, and (iii) the disclosure requirement in national stock corporation laws had evolved furthest.

As the discussions about which work group should be in charge of drafting the statute had come to a halt in the Council of Ministers' Permanent Representatives Committee, the Commissioner in charge, Hans von der Groeben, chose to contact the competent Ministers in the member states in person. He asked for support in the Council, in order to put the Commission officially in charge of drafting a statute for a *Societas Europaea*. Germany and Luxembourg assured him of their support, and Italy promised further collaboration on technical matters, but expressed reservations regarding several unresolved preliminary questions primarily relating to the Italian regulation on issuing registered shares. France, Belgium and the Netherlands shifted the discussion to the national level.

Employee representation within an SE was among the most controversial items, and the different treatment of this matter in the national legislations was the primary reason for the lengthy negotiation process. In the hearings of employers' associations and trade unions only a small number of people voted against the Commission's proposal of establishing a central European Works Council. The controversy arose because in Germany and France different employment law cultures were already in place, while Belgium, Italy, Luxembourg and the Netherlands did not have any legislation. Workers' representation was nevertheless a contentious issue in these countries. The German regime was the most sophisticated: most of the limited companies had been subject to legislation since the 1950s, containing a strong employee representation in particular for mining, iron and steel processing companies. There were efforts towards establishing employee participation regimes in French companies, converging on the German legislation, and also in the Netherlands and Belgium.

However, the Permanent Representatives Committee failed to come to an agreement. This was primarily due to the obstructive stance of the Netherlands which wanted to involve the countries willing to join the EEC in equal measure in the in-

29. Article 235, EEC Treaty (1957): If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions. See: *Treaty establishing the European Economic Community* ..., op.cit.

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tergovernmental work on a European partnership outside of the EEC-Treaty. As a result, in 1969 the Commission decided to draft a statute itself. Some member states tried to delay a supranational solution by their continuing opposition.

In 1970 the new DG for Internal Market and Legal Harmonisation (DG XIV), led by Commissioner Hans von der Groeben, submitted a proposal including a complete SE statute in accordance with article 235 of the EEC Treaty and an expert opinion to the Council of Ministers. It provided a European Works Council for all employees of the SE as an immediate representation of their interests. The Economic and Social Committee responded favourably to the proposal in principle, while the European Parliament's Legal Committee thought the regulation not attractive enough for companies to opt for a *Societas Europaea*. The proposal included the dualistic German system, separating the management into a board of managers and a supervisory board led by a European Works Council. Directly elected by all employees of the SE, the latter was to have tiered rights with regard to involvement in economic and social matters relating to employees, while the works councils elected in accordance with national legislations were to remain in place.[30]

The legislation concerning employee representation in an SE caused heated debates both among the employees and employers' associations. All trade unions responded positively to the Commission's proposal of establishing a European Works Council, including the *Confédération Générale du Travail* (CGT) in France and the *Confederazione Generale Italiana del Lavoro* (CGIL) in Italy. Employee participation in the supervisory board was discussed controversially: the CGIL was against any form of employee participation in the corporate bodies because it disapproved of joint responsibility. It was feared that if the trade unions assumed joint responsibility with the management of a company it would neglect its original remit to improve employees' living and working conditions. The European Trade Union Confederation and the Christian Trade Unions in the European countries generally advocated employee participation in the supervisory board. The Christian Trade Unions voted for participation in equal parts, and the European Trade Union Confederation for a tripartite division into representatives of shareholders, employees and "representatives of general interest", because the activities of an SE would have a strong impact on the whole economy.

By contrast, the employers fought against employee participation in the management, as they feared for their autonomy in decision-making. They argued that employee participation would lead to dispossession and was not compatible with a liberal economy. It would distort the policy of negotiated wages and entrust individuals with competences they were not qualified for. The employers feared the interference of the trade unions. On this account the employers' interest groups did not want to link social issues with the SE statute. The relationship between employers and employees was not an issue of company law but of employment law. The Union of Industrial and Employers' Confederations of Europe and the International Chamber of Com-

30. Vorschlag einer Verordnung (EWG) des Rates über das Statut für europäische Aktiengesellschaften (Schriftstück KOM (70) 150 endg.), in: Amtsblatt C 124/1, 10.10.1970, pp.1 f.

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merce concluded that the employees' interests had to be subject to special provisions and should not be included in the SE statute, with the option to adopt them simultaneously. The German and Dutch employers rejected any employee participation beyond one third.

The ambitions of the European Commission to harmonise company law in accordance with the sophisticated German prototype failed in the period under consideration. Due to a large number of comments and modification proposals by the different interest groups, in 1975 the Commission submitted a completely revised proposal to the Council of Ministers, who nevertheless failed to come to a decision on the unresolved items.[31]

A regulation at a high level was not achieved since only four of the five abovementioned preconditions were met: (i) a clear competition conception by the DG IV existed and was applied to European company law; (ii) the supranational actors (European Commission and European Parliament) in general and the European Commission as a process leader in particular used their influence on the decision-making process. The latter proactively assumed leadership without an official mandate from the EEC Treaty and tried to influence the decision-making process in favour of a supranational conception. However, its efforts remained unsuccessful in terms of a supranational regulation and/or directive in the period under consideration. (iii) The recommendations of different stakeholders within the European industry and trade unions as well as (iv) expert opinions were integrated into the decision-making process. European company law failed because the member states were not willing to accept employee participation in accordance with the German model. The differences between the stakeholders, trade unions and employers' associations could not be reconciled. Therefore (v) a compromise between different legislative and economic conceptions (legislative eclecticism) and ideas could not be reached. This case illustrates that national and international pressure groups had a considerable influence. Once involved in the debate about the SE, they were ambitious not only to retain their power on a national level, but also to increase their influence on the European level. Thus in the period under consideration the Commission did not succeed in reaching a compromise on the basis of national legislations and traditions. Finally, the idea of establishing a European company law based on the "general authorisation article of the EEC" (235), was not enforced until a regulation was passed thirty years later on 8th October 2004.[32]

31. Bulletin der Europäischen Gemeinschaft, Nr. 4, Brüssel 1975; Kommission der Europäischen Gemeinschaften, Mitbestimmung der Arbeitnehmer und Struktur der Gesellschaften, in: Bulletin der Europäischen Gemeinschaft, Nr. 8, Brüssel 1975, also in: ACDP, 1-659, 020.
32. Regulation 2157/2001 for the statute of a *Societas Europaea*, and Directive 2001/86 EG as a supplement to the statute of a *Societas Europaea*, in: Amtsblatt L 294, 10.11.2001, pp.1 and 22; G. MANZ, B. MAYER, A. SCHRÖDER (ed.), *Europäische Aktiengesellschaft SE*, Nomos, Baden-Baden, 2005, pp.23 f.

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EEC competition policy – an example of successful European integration?

In summary, Regulation 17/62 and the decision in the Continental Can case, by way of which the Commission, supported by the European Court of Justice, applied article 86 of the EEC Treaty to companies in a market dominating position, were regulations at a high level. With Regulation 17, principles of the primary European community law were applied and implemented.

The list of reasons for the success or failure of regulations at a high level given in this paper is far from exhaustive, all reasons having the character of theses relating to the two cases discussed. The decisions were based on multiple factors, and the decision procedures are therefore nondeterministic. First a concept was developed of how the European competition order should operate and then political decisions were made. Regulation 17/62 was passed because the supranational actors, i.e. the European Commission and the European Parliament, used their influence on decision-making procedures. The European Commission in particular strategically deployed its leadership in the policy formulation process in order to enforce regulations on a European level. Interpreting article 86 as merger control, the European Court of Justice supported the Commission in advancing a centralised control of mergers in the EC. Organised stakeholder groups such as representatives of the European industry and trade unions were involved in the formulation process, and the elaboration of proposals was monitored and shaped by academic advisors and experts. Finally, Regulation 17/62 embodied a compromise of different legislative and economic conceptions. The approaches and philosophies of different member states could be integrated (legislative eclecticism).[33]

The European Commission did not complete or even pass legislative acts in the area of European company law. A successful outcome in the period of consideration was prevented by different governmental traditions and opinions, various stakeholder groups and the Council of Ministers. Nevertheless the Commission's efforts to create European law in these areas in the 1960s paved the way towards a deeper integration in the decades to follow. As for competition policy, the Commission made use of its right of initiative, powers of draft legislation and arbitration in the legislative process – and yet, the final decisions were made during the Council of Ministers' intergovernmental meetings.[34]

33. In order to achieve valid test results on the probability of a regulation being passed on a high level, a large number of cases should be reviewed on the basis of hypotheses correlating the dependent with the independent variables. For further determinants of a regulation see: V. EICHENER, *Das Entscheidungssystem der Europäischen Union. Institutionelle Analyse und demokratietheoretische Bewertung*, Leske & Budrich, Opladen, 2000, pp.323 f.
34. Analysing EEC competition policy and the genesis of Regulation 17/62 from an intergovernmental perspective, Frank Pitzer came to a similar conclusion. F. PITZER, op.cit., 2009, pp.444 f.

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