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Phases of Competition Policy in Europe

by

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Abstract

In the process of globalization, international convergence of competition legislation has steadily gained importance. Yet, specific aspects of European history gave capital markets, corporate governance and competition policies a special flavor. Historically grown peculiarities have to be taken into account when it comes to evaluate actual policy decisions.

In this paper the focus is on four phases of European competition policy. Prior to World War I banks gained a strong position thanks to block holdings, proxy votes, and a high degree of capital intermediation. Closed market structures prevail to our days. The interwar period was characterized by attempts to overcome the economic disintegration by international cartels. This experience influenced post World War II institutions like the European Community for Coal and Steel. After 1945, attempts by the U.S. to provide for a strict antitrust regime in Western Europe had very limited success. Yet, from the late 1950s on, the EEC saw strict competition policy as a vehicle for market integration. While during the 1970s and 1980s in the U.S. antitrust was counterbalanced by efficiency considerations, in Europe a policy aiming for competitive structures gained weight.

Those who plead for convergence between European and U.S. competition policies should, however, be aware of the fact that due to closed markets and regional protectionism in Europe antitrust laws need to play a more important role to provide for an efficient economic system.

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Phases of Competition Policy in Europe

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Introduction

The history of industry cartels and competition policy can be traced back to the late 19th century. Modern antitrust legislation began in 1890 with the Sherman Act, which was the first federal law in the United States of America against trade-restraining conspiracies and monopolisation. In 1914 the Clayton act followed. It was the first American law to cover merger control. The Webb-Pomerance act exempted export-cartels from the antitrust laws, but only if the American domestic market was not affected.¹

The emergence of modern industry, cartelisation, and the state of the competition legislation in Europe before 1914

In Europe, hand in hand with industrial growth and the integration of local markets, various practices of collusive behaviour among firms emerged in the second half of the 19th century. From the 1880s on a revival of protective duties and barriers to trade was conducive to monopolistic tendencies on a national level.

While in the United States the Sherman Act provided for a special antitrust law, no specific legislation was passed in Europe before World War I.

As a rule, constraints of trade in Great Britain were inhibited by Common Law which caused an uncertain situation for cartels. In France Art. 419 of the Code pénal threatened profiteering but it was hardly ever applied. (Isay, 1955, p. 25). So in practice it was allowed to organise cartels but the treaties could not be enforced in courts. In Austria-Hungary a similar legal situation prevailed.

In Germany it was generally assumed that cartels were an instrument to control the instability created by cut-throat competition and price warfare. In addition, freedom of contracting constituted one of the governing principles of competition laws. This implied that price agreements were not only permitted, but also enforceable in courts. Anti-cartel action was taken only in certain extreme cases, for instance when the cartel could lead to a complete monopoly, or to extreme exploitation of consumers. (Scherer, 1994, p. 24, Fezer, 1985, p. 51-68).

¹ For a concise overview see Posner, 2001, pp. 33-48, Rubinfeld, 2001, Motta, 2004, pp. 1-9.

British policies of free trade were an obstacle to the development of stable industrial cartels. In France one of the earliest collusive agreements was the Marseille cartel in soda, concluded in 1838. Beginning in the 1840s cartels in the iron and coal industry appeared. Later on also the chemical industry, glass and porcelain, sugar, salt, soap, petroleum, paper, textiles and other sectors were cartelised. (Liefmann, 1930, p. 48). Around 1900 Germany was the centre of the cartel movement. By 1905 there were 385 cartels involving 12,000 firms. Until 1910 the number of cartels increased to 700. (Schröter, 1996, p. 132).

In the Austro-Hungarian Empire the cartel movement spread in a similar way as in Germany. Experts estimated the number of Austrian cartels before World War I to have reached approximately 200. The most powerful organisation regulated the iron and steel industry. (Resch, 2002, pp. 107-132).

International cartelisation developed in line with agreements on a national level. In 1879 the federation of Luxembourg-Lorraine crude iron works came into existence. The year 1884 saw the creation of the first International Rail Manufacturers' Association. (Wurm 1994, p. 258). In 1897, there existed 40 international cartels with German participation. Great Britain was involved in 22 of them, Austria in 13, Belgium in 10 and France in 9. (Liefmann, 1930, p. 182).

In contemporary public opinion, this development was indicative of the emergence of what was termed "monopolistic capitalism" or "organised capitalism".² The phenomenon appeared in Germany, but in other countries of continental Europe as well. Networks of interlocking directorates and supervisory boards, collusive agreements among firms, interlocking structures of politics and business were seen as crucial aspects of organised capitalism. A strong position of banks was a feature of this institutional environment. Banks acted as shareholders, financial intermediaries, and voters by proxy. Yet, their controlling power seems to have been widely overestimated by contemporaries. (Wellhöner, 1989, Ziegler, 1997, pp. 131 ff, Wixforth, 1995, pp. 29 ff). Recent research has shown that banks participated in business networks, but usually failed to dominate them. Also, in spite of the great number of cartels, their capacity to effectively restrain market competition was very limited. National cartels in general faced foreign competition because of the limited restrictions on foreign trade. Furthermore, in most cases they were not able to build

² As a famous contemporary study see Hilferding, 1910.

reliable barriers against actual and potential competition in their own countries.³ But in spite of the limited power of cartels, a specific continental or German blend of corporate governance emerged, thanks to the joint effect of their collusive practices, the strong position of banks as shareholders and financiers, and the prevailing structures of interlocking directorates.

In a system with open capital markets and labour markets for managers, as it has emerged in the U.S., the market forces are the most important factors for corporate governance. In the German or continental European system however, closed market structures prevailed. Consequently, market forces were hindered to provide for effective corporate governance. This role was taken over by block shareholders, being either the founding families of stock corporations or the banks. This system survived all economic and political upheavals of the 20th century. In a historical and comparative perspective it appears⁴ that the formation of bank-industry networks was particularly marked in countries with strong cartelisation, like Germany, France, or the late Habsburg Empire.

Cartels during the inter-war era

The inter-war period became the most cartel-intensive era in economic history. It can be divided in two sub-phases, each providing different conditions for the development of cartels. In the first phase after 1918 Europe had to cope with the consequences of the war. It achieved a fragile economic reconstruction until 1929. The new European order of Versailles provided the institutional framework for the political and economic relations on the continent. During the 1920s many attempts were aimed at mending the broken world. At the Conference of Genoa a new international currency system was established, and from the mid 1920s a network of trade agreements provided for fairly liberalised international economic relations. The great depression ended this first phase. Consequently, the international currency system broke down and the national economies were building new trade barriers. During the slump most international cartels dissolved. They re-emerged during the 1930s, within the framework of a disintegrated world economy.

³ As a case study for Austria before 1914 see Resch, 2002.

In Europe competition legislation made little progress during the 1920s. Most countries still failed to create specific laws dealing with cartels and restraint of trade. In certain cases, notably in Great Britain, France, or Austria, cartels were threatened by new laws against the forcing up of prices. In Germany influential economic and political leaders such as Walther Rathenau prepared plans for “Gemeinwirtschaft” (social economy) after the experience of war economy. (Nörr, 1994, p. 33). Among the relevant results of this era were the Kali syndicate⁵ and the coal syndicate. In 1923 Germany suffered from political turmoil (Hitler’s coup in Bavaria, crisis in Saxony and the occupied Ruhr area) and hyperinflation. The legislative conceded the Enabling Act providing the government with far reaching power. Based on this power a cartel act was passed, which can be seen as the beginning of modern cartel legislation in Europe. The new law declared cartels in general as legal and at the same time aimed at controlling the abuse of market power. (Neumann, 1998, p. 44, Liefmann, 1930, p. 207, Isay, 1955, p. 40).

On an international level under the difficult economic circumstances after World War I plans were made to overcome economic disintegration by means of private agreements. French economic politicians like Etienne Clémentel, Louis Loucheur and the young Jean Monnet⁶, cognizant of their country’s strong political position following World War I, favoured Franco-German economic integration. Monnet joined the secretariat of the League of Nations. In his new function he also promoted international economic ententes. (Gillingham, 1991, p. 5).

In 1925, the Assembly of the League of Nations, following a proposal by the French, initiated a World Economic Conference to be held in Geneva in 1927.⁷ One of the main points of the Conference was to be the economic reintegration by means of international cartels and agreements. Leading experts submitted studies on cartels to the Preparatory Committee for the Conference. The discussions in the Committee and the studies soon disclosed the antagonistic positions of the participants. At the beginning of the preparatory talks Louis Loucheur expressed in cautious words what he hoped to achieve: “I would not like that somebody imagines that the

⁴ Hopt, 1998, p. 235.

⁵ The first potassium convention in Germany was formed in 1876 under massive state intervention. Schröter, 1993, 76.

⁶ Bussière, 1994, p. 274, Bussière, 1992, pp. 257-263.

⁷ League of Nations (LON), C. 356. M. 129, Report and Proceedings of the World Economic Conference held at Geneva, May 4th to 23rd, 1927.

conference had to reach real international conventions The conference has to achieve statements to a certain number of principles.”⁸

The French Professor of Economics, William Oualid suggested in his study submitted to the Preparatory Committee more explicitly an international approach. He recommended conveying a Draft Convention to the member states of the League of Nations which aimed at safeguarding a “normal equilibrium between production and consumption, stable prices and supplies, and regular employment” by international industrial agreements. (Oualid, 1926, p. 32). To ensure economic control over the organisations he intended “... to entrust to a special administration, technical or juridical institutions, the duty of supervising or tracking down injurious combinations and compelling them to supply all necessary information on their working, and to empower these institutions to order or instigate their regularisation, prosecution, repression, or prohibition. The widest publicity is given to their decisions with a view to the deterrent, disciplinary, and moral effect on the economic education of the public.” (Oualid, 1926, p. 34) The institutional framework should be created by “a programme of making national laws on industrial and commercial agreements uniform by means of a Convention ...; of publicity for agreements by way of declaration to the League of Nations and presumption that those not declared are unlawful; of attaching these institutions to an international institution; of establishing national and international procedure and sanctions.” (Oualid, 1926, p. 35)

The German experts in general shared a positive attitude towards cartelisation, but they did not recommend steps to establish control on an international level. The former German Minister of the Reich, Professor Julius Hirsch stated somewhat vaguely in his paper submitted to the Preparatory Committee: “In so far as agreements in the nature of cartels are effected between the nations, their greatest use lies in the fact that they bring together economic groups that are still divided into hostile camps under the influence of the world war. ... In so far as international monopolies and kindred agreements represent a rationalisation in world trade and industry as well, the favourable effects of this function should be intensified as much as possible. ... The League of Nations might establish a general observation post from which the formation of monopolies ... can be observed.” (Hirsch, 1926, pp.22-24)

⁸ Quoted after Hara, 1994, p. 269.

The British member of the Preparatory Committee, Sir Arthur Balfour noticed that in his country the constitution of each kind of cartel would face great difficulties. In general British experts held the opinion that only a return to the liberal international economic system of the pre-war era could provide for a normalisation and stabilisation of the economy. The Swedish economist Gustav Cassel warned that the weak development of the international economy in the 1920s would not be overcome by monopolies: "However the responsibility for this unfortunate development may be divided, a situation in which Europe, by aid of unemployment doles, is storing up industrial labour which is not allowed to perform useful work in the service of the world's economy, while at the same time agriculture and colonial production suffer from an insufficient and too highly priced supply of industrial products, must be looked upon as the most emphatic expression of the fundamental fallacy of monopolism." (Cassel, 1927, p. 45).

At the end of the discussions the experts could only agree on a very vague statement in the final report on the World Economic Conference: "The Conference has examined with the keenest interest the question of industrial agreements, which have recently considerably developed and have attracted close attention from those sections of the community whose interests are affected by them and from the public opinion of the various countries. The discussion has revealed a certain conflict of views and has occasioned reservations on the part of the representatives of different interests and countries. In these circumstances, the Conference has recognised that the phenomenon of such agreements, arising from economic necessities, does not constitute a matter upon which any conclusion of principle need be reached" ⁹

While the Economic Conference and other similar attempts of international diplomacy did not achieve concrete results, the practical development of cartels advanced during the 1920s. From the middle of the 1920s on, the international institutional environment provided a framework conducive to strategic behaviour and business diplomacy of various interest groups.

The International Steel Cartel can be seen as the most important historic example of an international industrial agreement in this period.

The pre-war structures of the European steel industry were massively affected by the treaty of Versailles. The return of Alsace-Lorraine to France doubled this country's

theoretical capacity of steel production¹⁰ and increased its dependence on Ruhr coke and coal. The French were interested to have access to the German market and to achieve general regulation of the steel output. On the other hand, German industry needed access to the French market for machinery, and the question of the Saar ores had to be settled. During the first years after the war the Ruhr industrialists were reluctant to conclude an agreement. The inflation¹¹ which lasted until 1923 facilitated their export sales. They had embarked on a construction program not to be completed before 1924. In 1923 France occupied the Ruhr. German room for manoeuvre in international negotiations was limited by some clauses of the Versailles peace treaty until 1924 (tariffs, coal deliveries, etc.), and the domestic cartels had dissolved after the war. After the death of Hugo Stinnes in 1923¹² the steel properties of his conglomerate were taken over by the newly founded Vereinigte Stahlwerke. The formation process of this new German steel giant lasted until 1926. (Reckendrees, 2000). The “cartelless” period ended in 1924 with the formation of the new crude steel syndicate (Rohstahlgemeinschaft). The organisation served as a parent cartel for a host of product syndicates and embraced 90 percent of the industry’s production. (Feldman, 1977, p.162). It could confront the French concerns as a monopoly agency of great power. (Maier, 1975, p. 526). After Germany had regained her tariff sovereignty the trade negotiations with France set in on the official diplomatical level. At the same time the industrialists embarked on private negotiations to settle the questions concerning the steel industry. Both levels were firmly interwoven in a complex set of strategic behaviour. French domestic industrial organisations were relatively underdeveloped. The Comptoir Sidérurgique was suspended in 1921. The Comité des Forges served as an informal directorate for the industry in general. (Gillingham, 1991, p. 25).

The German and French needs were complementary enough to allow for an understanding that was reached in 1926. Germany was to absorb French steel, France was to absorb German finished goods and the Saar question was to be settled. (Maier, 1975, p. 531). Consequently, the steel industries of France and Germany, together with the works of Belgium and Luxemburg, formed the international steel cartel. The agreement covered the entire steel production of all

⁹ LON C. 356. M. 129. 1927.II. League of Nations. Report and Proceedings of the World Economic Conference, Vol I, pp. 49-50.

¹⁰ Teichova, 1988, p. 18-20.

¹¹ Holtfrerich, 1997, Feldman, 1997, pp. 631-697.

¹² Gerald D. Feldman, 1998, pp. 841 ff.

members, for domestic consumption as well as for export. The production was to be controlled by a quota system. Quotas, together with a system of penalty payments for excess production, should result in raising prices. (Wurm, 1994, p. 257). The steel producers of Czechoslovakia, Austria, and Hungary acceded to the syndicate in 1927. (Teichova, 1974, p. 141, Hexner, 1946b, p. 73, Resch, 2003, p. 58).

In a like manner various cartels for finished or semi finished goods made of iron or steel were agreed upon. For example, in 1926 the old rail cartel was revived. The earlier abbreviation of "IRMA" (International Rail Manufacturers' Association) was changed to "ERMA" (European Rail Manufacturers' Association) because as a consequence of the US-antitrust legislation the US steel industry hesitated to participate officially in the agreement. But American participation was secured by an unofficial reduction of the British quota. Other international cartels of the iron industry were aimed at regulating the business for crude iron, rolled wire, ferromanganese, and rolled materials.

Further cartels of international importance emerged to organise among others the markets for magnesite, carbide, glue, explosives, Chile saltpetre, aluminium, copper, bottles, plate-glass, electric bulbs, paper and some textiles.¹³ The industries of many continental European countries participated in these international cartels. The British industrialists did not yet enter into an agreement with the international raw steel cartel but took part in several other international combinations.

The international steel cartel disappointed the hopes of the politicians and businessmen who had contributed to its emergence. The quota system turned out to be too rigid for the development of the respective industries. Mainly the Germans re-negotiated some clauses of the quota and payment agreement soon after they had signed the steel agreement. The organisation disintegrated in 1930-31.

All in all, the system of trade agreements of the late 1920s stimulated the emergence of national and international cartels. Some of the international organisations, like the steel cartel, developed in line with international trade negotiations.

On the other hand the market power and stability of the collusive organisations was limited by many factors. In many countries cartel treaties could hardly be enforced in courts. In Germany first attempts to control the abuse of market power were made and in some countries the cartel members were threatened by laws against

profiteering. Under the circumstances of a fairly free international market economy most economic players could with credibility announce to leave their respective cartel and to become outsiders in the domestic and foreign markets. The cartels could not shield themselves from actual or potential competition. So the agreements in general tended to be unstable. Consequently, only industries showing particular structural features could effectively be cartelised. Some had concluded technology sharing agreements, like the industries for electric bulbs and chemistry. Elsewhere, there existed massive entry barriers because of substantial set up costs and sunk costs, as in the heavy industries. The absence of specific competition legislation did not only mean a lack of abuse control. It also meant that national governments did not lend additional power to the market organisations. Early attempts by France to achieve international agreements for the regulation of markets remained without practical results.

Under those circumstances most of the national and international cartels dissolved during the great slump. The obvious failure to stabilise the European economic order by means of international cartels did not prevent industrialists and politicians from further attempts made under the new conditions of the 1930s.

During the great depression the international currency system collapsed, and extensive new barriers to trade were implemented. The international financial and goods markets broke down, and the international economy dramatically disintegrated.

These developments were causes as well as consequences of increasing interventionism and economic nationalism. During the 1930s various forms of corporatism and state interventionism gained influence in Europe.

French politicians and economists continued to propagate international industrial agreements as a “remède infaillible”¹⁴ to revive international trade and production. (Nocken, 1989, p. 80). The relation between cartels as private agreements and politics developed in a contradictory manner. On the one hand, many national governments began to support cartels to strengthen them as members of international agreements. (Wurm, 1989, pp. 18-29). In their view, cartels were to be a weapon of competitive nationalism. On the other hand strength in international

¹³ As a concise contemporary overview see LON Archives Geneva, Economic Committee, Doc. E 465 (a-e) (1929).

¹⁴ Ballande, 1936, p. 323.

organisations could protect industrialists against domestic political influence. Even in Great Britain a general reconsideration of free trade and cartelisation occurred. In 1932 the Import-Duties-Act and the Ottawa-Conference ended the era of free trade. The administration developed attempts to reorganise coal mining and cotton industry, and central organisations of the industry gained more influence. In France as well, the administration worked out special projects for certain industries.

As another consequence of this prevailing trend many European countries for the first time implemented special cartel legislation.¹⁵ States aimed at controlling the cartels, but in the first instance they wanted to strengthen domestic industrial groups to compete for the narrow remaining international markets. Thus they could try to use domestic cartels as institutions of economic nationalism in the framework of international agreements. For example the Nazi regime in Germany, after initially being hostile, encouraged the formation of cartels. (Gillingham, 1985, p. 23).

In many countries cartel acts were passed, which required compulsory registration of all valid agreements. Stronger government control over cartels was aimed at. But at the same time registration and affirmation improved the legal certainty of the registered organisations which stabilised the agreements.

In Hungary, for example, cartels after 1931 had to submit their formative treaties to the ministry of economics. In 1933 registration became compulsory in Czechoslovakia, Poland, and Rumania.

In many countries, common attempts of governments and private organisations to regulate certain industries resulted in laws providing for enforced cartelisation. In fascist Italy cartels became a part of the corporatist economic structures. In 1932 a law for compulsory cartelisation was passed. Germany followed suit in 1933, allowing for the formation of state enforced cartels. (Feldenkirchen, 1985, pp. 129-144, Nocken, 1985, pp. 167-175, Wessel, 1985, pp. 188-201). Given that those laws were hardly ever applied, the possible threat to use them sufficed to create additional pressure on the outsiders of the existing collusive organisations. In Italy, only the steel and silk industries were directly affected by enforced organisation. (Schröter, 1996, p. 136).

Other countries embarked on the enforced organisation of single industries. For example in the United Kingdom in 1930 the Coal Mines Act was passed and the

¹⁵ For a comparative overview see Friedländer, 1938, Lovasy, 1947, pp.10-11.

French administration attempted at the organisation of the coal mining and silk industry.

Furthermore, in many cases the state administration protected existing cartels from new entrants. In Italy a special law impeded the market entry of new firms. In most countries the administration used existing laws, e.g. building regulations, to frustrate new start ups. In some cases special laws were passed to obstruct new competitors. For example in Austria in 1933-34 the Hungarian firm Manfred Weiss AG built a new factory for tubes in Vienna. A few weeks before it was opened some industrialists succeeded in lobbying for a law which forbade the erection of new tubes-factories. Only after lengthy negotiations with the Austrian tubes cartel and the state authorities Weiss obtained a license to open the work in 1936. (Resch, 2003, pp. 77-78). On an international level, quota agreements among national cartels frequently were reinforced by preferential duties for quantities within the negotiated quotas or by barter agreements.

After it's winding up in 1930-31, the international steel cartel was re-established in a modified form in 1933, under the name of international steel export cartel (ISEC). (Barbezat, 1993, pp. 157-175, Wurm, 1994, p. 257). The old charter members, Belgium, France, Germany and Luxemburg now met an agreement that was to relate exclusively to steel exports. The quota system was to be extended to particular steel commodities, and the prices were to be regulated directly through export syndicates. Furthermore the cartel was to promote cartels of merchants in importing countries. The 1933 arrangement consisted of a general agreement and of a set of sectional comptoir agreements for specific goods as heavy rails, merchant bars etc. (Hexner, 1946b, pp. 82-84).

Following intense negotiations the British steel industry entered the agreement in 1935. The bargaining positions had changed as a consequence of the devaluation of the pound sterling in 1931/2 and the implementation of protective tariffs. In the United Kingdom the Import Duties Advisory Committee, a governmental agency, and the British Iron and Steel Federation closely co-operated to exert economic pressure on the continental producers. Simultaneously they organised the domestic production. Cartel-members on the continent were confronted with a tariff wall threatening them with loss of their British markets. Therefore they had to agree that imports to the United Kingdom would be restricted to 670,000 tons for the first year and later to

525,000 tons. After Parliament had ratified the agreement, the British Iron and Steel Federation inaugurated a licensing system under which imports within the agreed quotas were admitted upon payment of preferential duties. (Stocking, Watkins, 1947, pp. 194 ff).

Finally the ISEC was extended to become a world cartel, when the U.S. steel industry entered in 1938. The Steel Export Association of America agreed to recognise the domestic markets of the European members as their exclusive marketing territory. In return, the cartel recognised certain areas of American spheres of influence.

The ISEC survived growing political tensions in Europe during the 1930s. When the Nazi-party seized power in Germany in 1933, this did not change the behaviour of the German industrialists in the ISEC. In 1935, when the Saar returned to the German customs area, the Ruhr absorbed the output previously sold in France. After the "Anschluss" of Austria in 1938 the German quota shares were increased by the Austrian share as part of the central European group. After the total invasion of Czechoslovakia in March 1939 the German group did not require the dissolution of the Czechoslovakian group at the time. The ISEC did not cease to exist until the beginning of the war in September 1939. (Hexner, 1946b, pp. 90-91).

As in the 1920s, the international steel agreement was embedded in a network of further cartels covering rails, tubes, cold rolled brands and strips, wire products, etc. (Lovasy, 1947, table 2). Furthermore, a web of agreements in coal and coke complemented those in steel. In November 1936 an international coke cartel was concluded. During the last years before World War II the steel and coke cartels functioned as one of the main channels of influence for British and French economic appeasement policy. Until the early months of 1939, both the British and French hoped that economic deals with Nazi Germany would prevent war— a strategy that ended in complete failure. (Gillingham, 1989, pp. 96-101).

Not only in the iron and coal industries, but also in other sectors of industry, cartels shaken during the years of the economic downswing began to re-emerge from the early 1930s on. The international tin cartel for example re-emerged in 1931. The aluminium cartel was renewed in 1931. The European nitrogen cartel was re-established in 1932, Chile and Japan joined during the next years. The dye stuff cartel, founded in 1927, was deepened by means of new treaties with the British industry (Imperial Chemical Industries), Japanese and far eastern producers in 1934. The network of cartel agreements in the chemical industry was extended. (Teichova,

1974, pp. 277 ff). After the successive decay of the old railway rolling stock cartel during the early 1930s, a new international organisation emerged in 1935. It included producers from Germany, the United Kingdom, USA, and other countries. In the same year a new organisation of the industry for enamel goods appeared. The list could easily be extended.¹⁶

It is obvious, that the cartels in general achieved maximum strength in history during the 1930s. As a result, monopolistic pricing was made possible to a certain extent on the domestic and international level. About 40 to 50 percent of world trade were affected by international industrial agreements. British, French and American industries participated in considerable amount. It seems, that German firms had the greatest part in them. The strong position of German industry in the international organisations may have provided for a certain dispersion of German practices of “organised capitalism”, which featured producer regulation and a close relationship between state and industry. But this development also fell in line with the French tradition of state intervention, and with the British turnaround in economic policy from the early 1930s on.

Due to the petrification of existing organisations and the obstruction of new entrants, the market process was lastingly blocked during the 1930ies. Without such a market process, there was no continuous search for best solutions (as stipulated by the Austrian School of economics) and no continuous process of progress by “creative destruction” (in the sense of J.A. Schumpeter). Capital markets and job markets for managers were more regulated than ever. Furthermore, goods markets were effectively controlled. This must have massively increased the deficiencies of the system of corporate governance prevailing in continental Europe.

European traditions and “Americanization” of competition policy after World War II

During the period after World War II the United States sought to transplant U.S. antitrust notions to their spheres of influence. The Potsdam Agreement of July 1945 planned to dismantle powerful vested business interests and cartels in Germany. The

¹⁶ See for example Lovasy, 1947, table 1-3, Hexner, 1946a, Stocking, Watkins, 1947.

Americans regarded German cartels as dangerous weapons of economic warfare. Their plans for competition legislation aimed at reconstructing democratic and efficient economic structures in Germany. During the early stages of the cold war the main focus shifted from dismantling German industry to rebuilding the German economy as that of a prospective ally. However American politics continued to be somewhat contradictory. (Asbeek Brusse, 1997, pp. 164-169, Milward, 1984, pp. 362-420).

German cartels were declared illegal by the Allied Military Government. In 1947 general laws aiming at decartelisation were passed first for the American zone, and later for the joint British-American "bizon". Specific regulations to dismantle I.G. Farben, large coal and steel syndicates, major banks and the film industry followed. (Wank, 1985, p. 205).

The European powers were not enthusiastic about American style antitrust. In Europe, a sceptical attitude towards the uncontrolled powers of a free market system prevailed. To Europeans, various forms of collective economic regulation appeared quite compatible with the prevailing trends of corporatist state interventionism: French planification, British nationalisation of heavy industries and German social market economy. Consequently, the Americans were not successful in putting through their attitudes of antitrust within a multilateral framework. Various options were tried in vain, including the International Trade Organisation, the Council of Europe and the General Agreement on Tariffs and Trade. (Asbeek Brusse, Griffiths, 1997, p. 165). Only the European Community for Steel and Coal (ECSC) provided for explicit antitrust clauses. The formative treaty prohibited in article 65 agreements and concerted practices that aimed to "prevent, restrict, or distort the normal operation of competition" within the Community. Article 66 forbade "unauthorized concentrations" and permitted the Community's High Authority to combat abuses committed by enterprises possessing a dominant market position. Thus for the first time – at least in theory – a transnational competition policy was adopted in conjunction with trade liberalisation within the ECSC. (Scherer, 1994, p. 33).

The strong antitrust clauses in the treaty were the result of specific historical circumstances. In some respect the Plan Schuman, which led to the emergence of the ECSC, can be seen in the tradition of French plans for French-German economic integration, developed in the inter-war era. Around 1950, France needed an understanding with Germany to safeguard the domestic plans for modernisation,

created by Jean Monnet. Western Germany gradually regained its sovereignty from 1949 on, and allied control over the heavy industries was to be loosened. The French iron industry depended on free access to German coal production. Furthermore German re-industrialisation went ahead rapidly and the German iron and steel industry had significant cost advantages over that of France, mainly because of cheaper coal input. (Milward, 1984, p. 377).

The German, French, Dutch and Belgian industrialists would have clearly preferred to come back to the old international steel exporters' cartel. But this was impossible because of the strong American anti-cartel commitment. Consequently, French planners were willing to subject their own industry as well as the industry of the other participants to a supra-national regime as provided by the ESCS.

American authorities were suspicious that the old cartel should be restored. So Schuman had to provide for explicit clauses for antitrust policies and for the free integration of the national coal and steel markets.

After complicated diplomatic negotiations, the formative treaty could be signed in April 1951. It created a common market for coal and steel encompassing Belgium, the Federal Republic of Germany, France, Italy, and the Netherlands. The former direct authority of the allied forces to control the Ruhr gave way to the High Authority as defined in the treaty. In the years to come, the High Authority was anxious to keep the goodwill of the industrialists, who had opposed the anti-cartel alignment. Ignoring Jean Monnet's wishes, the High Authority denied to embark on severe anti cartel measures. In July 1953 cartel registration was required. Of the 80 syndicates reported by 1958, the ECSC had dissolved only three, none of them important. Even the German coal syndicate Deutscher Kohleverkauf, successor of the old Ruhr syndicate, was only reluctantly dismantled in 1953. A new export cartel, the Entente de Bruxelles, was formed in March 1953, shortly before the opening of the common market for steel. (Gillingham, 1991, p. 336). To sum up, the Schuman Plan was an important step for the integration of Europe but the ECSC was, in spite of its rigid antitrust clauses, very ineffective in fighting cartels.

As another strategy that did not prove very successful, the Americans tried to influence European national competition legislation via the European Recovery Program. The Marshall Plan administrators attempted at using their power over counterpart funds as leverage for this objective. (DeLong, Eichengreen, 1993, p.

217). Consequently around 1950 anti cartel laws began to appear in several countries participating in the Marshall Plan. In many cases these laws were passed as a formal matter to satisfy the Americans but were not really meant very seriously. For example, the Austrian Government in the commentary to the cartel law, passed in 1951, expressed the conviction that cartels were not necessarily harmful, but in the contrary could be useful because of their stabilising economic effects. (Tüchler, 2003, p. 131). Cartel legislation was also passed in the Netherlands in 1951 and in France in 1953, but failed to have far reaching practical consequences. (Asbeek Brusse, Griffiths, 1998, pp. 15 ff, Mohand, 1998, pp. 205 ff).

In Germany a draft cartel law was passed in 1951 under the control of the Allied Forces. It was replaced in 1957 by German legislation. The new law was influenced by American antitrust and by the German Ordo-liberal school. It established a per se rule against cartels and vertical agreements. Exemptions from the per se rule provided for an approach according to rule of reason.¹⁷ So in fact the German tradition to make a distinction between “good” and “bad” cartels could be continued.

In 1957 in Rome the member states of the ECSC reached an agreement to found the European Economic Community (EEC) and Euratom. The Treaty of Rome resulted from two different approaches to extended economic co-operation. French officials wished to integrate further economic sectors, whereas the Dutch preferred an overall economic integration. (Asbeek Brusse, 1997, p. 59). The negotiations proceeded under less direct influence of American politics than the process leading to the ECSC. As a result, the founding treaty of the EEC was less equivocal in its adoption of pro-competitive measures.

Article 85 of the Treaty of Rome prohibited all cartels and restrictive practices distorting competition. It sounded like a per se prohibition, but it contained far reaching exemptions for “agreements that contributed ‘towards improving the production or distribution of goods or promoting technical or economic progress while reserving to users a fair share in the (resulting) profit,’ provided that the agreements did not go beyond what was essential to attain those objectives, and provided also that competition was not eliminated on ‘a substantial portion of the products in question.” Thus a complex balancing process was instituted, following a “rule of reason” approach. (Scherer, 1994, p 35).

¹⁷ Neumann, 1998, pp. 41-53, Kamacke, 1998, pp. 143-159, Katzenbach, 1990, pp. 189-205.

Article 86 prohibited the abuse of a dominant position. Furthermore, article 90 aimed to control state monopolies. Article 92 prohibited state aid that threatened to distort competition. (Laudati, 1998, pp. 385-386).

Regulation 17/1962 provided for a strong role of the European Commission to enforce EEC competition law. Commission powers include investigation, fining, consulting with governments, and even conducting “dawn raids”. Yet until the late 1980s those powerful instruments were hardly used. (Gillingham, 2003, p. 249).

The European Commission usually took a hard line towards anticompetitive violations. In general, the decisions were guided by the principle to prevent agreements that hampered the integration of EEC markets. Offences, such as price fixing, quotas, and market sharing agreements were prosecuted, if they affected the common market. In addition, the commission stood against vertical agreements between producers or importers and distributors. Exemptions or block exemptions were not granted for agreements between entire groups of producers and distributors. Furthermore, exemptions were denied if parallel imports were impeded. (George, Jacquemin, 1990, pp. 214 ff).

The common competition policy on EEC level successively led to a certain accommodation of national legislation. Following the entry into force of the Treaty of Rome in 1957, each of the member states enacted some form of competition law, or modified already existing laws. The second wave of laws was enacted in the 1970s and early 1980s. The third wave of national legislation to harmonise with EC-law followed in the 1990s. (Laudati, 1998, pp. 381-410).

Recent developments

During the last decades of the 20th century the competition environment has changed. Globalisation, the breakdown of the “Eastern block” and new technologies as well as the development of the Internal market of the EU, the European Monetary Union and EU enlargements have provided for new demands on EU competition policy.

The first half of the 1980s was characterized by massive crises of “old industries “, such as steel production, chemical industry and textiles. Painful processes of

restructuring became inevitable. Politics on national and EC levels responded with massive state subsidies and a temporary encouragement of collusive agreements. From the second half of the 1980s on subsidies were reduced and directed more consciously towards the promotion of research and development. State subsidies in general declined. (Gillingham, 2003, pp. 253-254). The successive privatisation of state owned industries and the liberalisation of international financial markets slowly changed the structure of European capital markets, and the number and scope of mergers increased. (Neal, Barbezat, 1998, pp. 80-84).

The reform process of the EU competition policy had to cope with those new developments.

In 1989, after long lasting negotiations a Merger Regulation (4064/1989) was passed, enabling the Commission to tackle cases surpassing certain thresholds of market share or turnover. (George, Jacquemin, 1990, pp. 233-234). The merger rule aimed at a market structure conducive to viable competition. Interestingly, this responds to an approach the Americans had tried to implement in Europe during the 1940s and 1950s, but with little success. Their seed has germinated with a time lag of 40 years. In the meantime, from the late 1970s on, U.S. antitrust politics had developed towards a more differentiated approach. In accordance with the findings of the Chicago school, concerns for the market structure were complemented by efficiency oriented aspects.

In Europe as well, questions of efficiency gained more weight in the decision making process during the last years. But it seems that European common competition policy was more eager to inhibit collusive behaviour, vertical restraints and mergers than American authorities. (George, Jacquemin, 1990, pp. 223-234).

According to the changed economic environment the number of cases the Commission had to deal with greatly increased. (Pons, Sautter, 2004, pp. 29-62). In 2000 the Commission took 345 final decisions for Article 81 and 82¹⁸ cases. The number of mergers and so called phase 2 investigations reached a record high in 1999 and 2000. More than 2000 mergers have been reviewed since 1990. 95 % of the mergers notified were directly authorised by the Commission, 5 % required further investigation and only 1 % were blocked.

As a side-effect of globalisation the international aspects of competition policy gained enhanced importance. Though many cases of international relevance were handled

uniformly by the antitrust authorities in Europe and the U.S. the much discussed decisions on Boeing/McDonnell and GE-Honeywell highlighted the relevance of this development. Commissioner Mario Monti raised the prospect of a convergence of American antitrust law and European competition law. (Gifford, Kudrle, 2003, 727-780).

In October 2001 the International Competition Network (ICN) was launched by 16 national competition authorities as a forum to address practical competition enforcement and international policy issues (Weinrauch, 2004, p. 160). Negotiations of a WTO competition law agreement have not produced seizable results so far. US antitrust agencies favour an approach that emphasises the extraterritorial application of the Sherman Act combined with bilateral co-operation in investigation and enforcement. This goes together well with the American development of antitrust law under a common law case by case model. In 1982, the US Congress adopted the Foreign Trade Antitrust Improvements Act (FTAIA) to simplify the extraterritorial reach of US antitrust laws. Recently, a case with regard to the international vitamins cartel provided for some clarification of the extraterritorial reach of the Sherman Act. The foreign vitamin distributor Empagran who had purchased cartelized goods in Australia, Ecuador, Panama, and Ukraine presented the jurisdictional question whether foreign plaintiffs, who had suffered overcharges in transactions occurring outside the U.S. could maintain claims in U.S. courts under U.S. antitrust law. In amicus curiae briefs filed in the Supreme Court, several European governments argued that permitting such claims would interfere with global antitrust enforcement and fail to respect the sovereign authority of other nations.¹⁹ The case presented the Supreme Court with a question at the intersection of antitrust policy and international jurisdictional law. The court adopted a narrow interpretation of the FTAIA, holding that the plaintiffs own claim must arise from the effects of conduct on U.S. commerce. The court unanimously ruled that the FTAIA should not be read as a general prohibition against price fixing in all parts of the world but as an exception for foreign commerce that affected domestic commerce.²⁰ The opinion signals a serious interest

¹⁸ The articles were renumbered in 1992/93 as a consequence of the Maastricht treaty. Former Article 85 became 81, 86 since then is 82.

¹⁹ See e. g. Briefs of the Governments of the Federal Republic of Germany and Belgium and of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands, 2003 U.S. Briefs 724.

²⁰ *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004); <http://www.oyez.org/oyez/resource/case/1746/> (01.17.2005). Joseph E. Stiglitz and Peter R. Orszag argue in their brief in support of the respondents that failing to provide an effective deterrent against

on the part of the Supreme Court in using principles of comity instated of extraterritorial jurisdiction.²¹

In Europe common antitrust legislation has been an important vehicle of the market integration. According to this tradition, the EC in general has been more willing to promote international antitrust policy. The Commission has been particularly active in discussions within the WTO, the OECD, the ICN and the United Nations Conference on Trade and Development (UNCTAD). (Dabbah, 2003, pp. 130-132, Weinrauch, 2004, pp. 157-160).

The most important reform of competition law within the EC was started with the White Paper issued by the Commission in April 1995. The Commission's proposal to amend regulation 17, dating from the year 1962 was adopted by the Council on 16 December 2002. (Pons, Sautter 2004, pp. 50-62).

The changes were of a kind to allow the Commission to concentrate on big international cases. Antitrust federalism helped to reach this goal. Smaller cases are dealt with on a national level. The proponents of the reform are convinced that it will provide for the EU antitrust regulators gaining "Muscle for Big Cases".²² Critics are afraid that the consistency of application of the law in the different countries may turn out to be a critical issue and that in some cases a nationalistic approach may re-occur.²³

The aim expressed by Mario Monti, at convergence towards the American antitrust law will not easily be achieved. (Gifford, Kudrle, 2003). A simple imitation of American regulations might even cause unexpected and detrimental effects because of the different history of the European business environment.

As a result of the historical development of the European economy the structures of business still differ in comparison to North America. In Germany more than 90 percent of all listed stock corporations are part of a Konzern. (Prigge, 1998, p. 970). Ramified cross holdings provide for tendencies of collusive practices and restrict the development of open capital markets and job markets. They limit the threat of a take over, which is an important power of corporate governance in open market structures. (Wenger, Kaserer, 1998, p. 504).

global cartels undermines protection against antitrust abuses within the U.S. itself. Because of that reason they plead for allowing foreigners harmed by global cartels to file suits in the United States. U.S. Briefs 724, No. 3, March 15, 2004.

²¹ For a more differentiated comment see Buxbaum, 2004.

²² The Wall Street Journal Europe, 29 April 2004.

²³ Fortune, 3 May 2004.

Consequently, in the European system of corporate governance the control exercised by blockholders and competitive product markets remains one of the most important powers for coping with agency problems.

Blockholders can be private persons and families or banks. Bank influence derives from chairmanship of supervisory boards, proxy votes and blockholdings. (Franks, Mayer, 1998, p. 657). Bank managers as well as industry managers are part of interwoven Konzern-structures and crossholdings. So they are not as free as private share holders to execute their control functions. The findings of numerous studies are inconclusive in deciding whether interlockings via bank shareholdings act as a particularly efficient mechanism to cope with corporate governance problems.²⁴

According to recent studies the system of mutual stockholdings provokes the danger of collusion among managers tied together. This may also be the reason, why stock option programmes do not work as well in continental Europe as in the USA.

(Wenger, Kaserer, 1998, p. 531).

The openness of competitive goods markets was ensured by the strict competition policy pursued by the European Commission. As mentioned above, the aim was to advance the economic integration of the European markets. More or less as a side effect, the strengthened product market competition became a vital part of European corporate culture. It is one of the forces that make poor management performance apparent to outsiders. (McDonnell, Farber, 2003, p. 818). Because of this reason, effects on corporate governance as well as effects concerning efficiency have to be considered in connection with European competition policy.

At present, European capital markets experience a phase of gradual change. Banks scale down their holdings, and lending to corporate customers has become less important. (Mülbert, 1998, p. 485). Direct approach to capital markets instead of bank intermediation gains importance. Also, cross holdings have been considerably reduced in the recent past. (Wenger, Kaserer, 1998, p. 510).

One could argue that under such conditions European competition policy should adopt to present American style antitrust. That would imply to give less weight to the promotion of competition per se as a goal of competition policy and as a mean for economic integration, and to turn towards a more pronounced efficiency orientation.

²⁴ Gorton, Schmid, 1996, Mülbert, 1998, p. 485, Wenger, Kaserer, 1998, pp. 499 ff.

But, since the historical peculiarities of European business structures seem to be tenacious of life, Europeans should be careful with a rash convergence.

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