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Political Intervention versus *L'Etat de Droit Economique*: The issue of convergence of competition policies in Europe

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1. Introduction.

The Treaty of Rome signed in 1957 put competition policy at the heart of the European construction. At that time, since a common defence policy and political union were unworkable options, the countries concerned decided to rely on economic integration to protect Europe from military conflicts and to ensure the emergence of a European identity.

Article 2 of the Treaty of Rome established the creation of a single unified market as the fundamental objective of economic integration. The enactment of Regulation 17 of 1962 provided the Commission with powers to achieve that goal by reducing and eliminating restrictions of competition that hindered trade between members states.

Thirty five years later, the integration process seems to have reached its final stage. A coherent antitrust jurisprudence has been established; the single market is nearly completed; a Euro-merger regulation was enacted in 1989; directives aimed at promoting competition in the energy, transport, and telecommunications markets have been drafted; a number of EC member states are striving to set up antitrust legislation and enforcement in line with the European one.

It could be argued, therefore, that European competition policy is on the verge of fulfilling its ultimate goal of creating a competition order and a level playing field between firms across the Community. On this view there remains only the issue of adjusting national and European competition policies so as to make better use of the subsidiarity principle in the relationship between the member states and the Commission. And this latter issue can be perceived as a simple matter of optimizing the administration of competition policy.

If this is correct, it is likely that interest in European competition policy will recede as increasing emphasis is given to the establishment of a single European currency

and of a European foreign policy, which represent the final stages of the European construction.

Although a lot of evidence supports this general position, the view does tend to overlook the recent criticism of some governments of member states concerning the subordination of "Euro political" objectives to the rules of competition policy. For example, conflicts have emerged about state aid: the Euro-merger regulation; directives concerned with competition in the utilities sectors; the treatment of state-owned companies; European preference in public procurement; and member states' rights to grant monopolies at the national level.

These conflicts do not simply reflect divergences among the member states when attempting to reach an agreement on particular topics. They point up the inevitable trade-offs between Euro political objectives (as perceived by some member states) and competition objectives. In brief, the *Etat de Droit Economique* within the Community and the development of a jurisprudence by the European Court of Justice appear to some member states to prevent Europe from going beyond a mere free trade area open to external competition.

The key issue concerning the priority of competition objectives over political objectives has not been comprehensively addressed over the past thirty or so years. As Hufbauer emphasised, sustained economic growth favours economic integration[1]. This was the case in Europe from the 1960s to the 1980s. During that period the development of European competition policy went alongside the processes of market internationalisation and European integration.

Today, the economic perspective is somewhat different. Many European countries are experiencing the worst recession they have known since the 1930s. Employment is at the top of the political agenda. Pressed by their electorates, the governments of member states are bound to demonstrate that they are active in protecting national interests. There are calls for more protectionism and the implementation of European preference in trade relationships, signalling a propensity to return to political interventionism in the market economy. Such interventionism is, of course, in conflict with the EC Commission stance on competition policy.

It is, then, from this perspective that the current paper seeks to address questions concerning the future of competition policies in the European Union. The first part of the paper examines the meaning of competition policy and how it compares with

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1. Hufbauer, Gary Clyde (ed.), *Europe 1992: an American Perspective*, Washington DC, The Brookings Institute, 1990.

political interventionism. Here competition policy is viewed as the state of an economy governed by "economic" laws concerned not with promoting particular industrial goals but rather with attacking restraints, and the sources of those restraints, on competition. The paper points out the importance of the institutional framework of competition policy, which provides the *Etat de Droit Economique* with scope for action, power, and deterrence. Analysis of this framework provides valuable measures of the priority given to competition policy relative to political interventionism.

The second part of the paper reviews competition policies in Europe. To begin with, it concentrates on the forces that have promoted the *Etat de Droit Economique* in Europe. It then gives an account of the past convergence process of competition policies in the European Community. Finally, it surveys the current institutional design of competition policies in the UK, Germany, France, and at the EC Commission level, and it comments on the balance of political interventionism and the *Etat de Droit Economique* in the EC.

The third and final part of the paper puts forward concluding remarks about the convergence process of competition policies in Europe. In particular, it assesses the likelihood of a recapture of competition policy by the member states.

2.Contrasting the *Etat de Droit Economique* with political interventionism.

Governments have recourse both to political interventions and competition policy when dealing with market issues. In the case of political intervention, for example, the government and its administration might implement strategic measures aimed at providing financial support for the relevant industrial or service activities.

The *Etat de Droit Economique* has no such specific objectives. It aims at controlling private restraints of competition and the political decisions that can distort competition in the market. It relies not on the administration but on lawyers, economists and judges to decide upon the degree of competition in the market. It proposes remedies implemented by law.

Analysis of the two processes will enable us to comprehend the nature of the conflicts that can emerge between the pursuit of political goals and competition policy.

2.1 Political intervention.

2.1.1 The principles. The fulfilment of government promises towards the electorate and the pressures to support national industries and local employment are the driving forces legitimising political intervention, and economic reasons may be offered in support of such policies. Externalities and the need to control the power of monopolies are two commonly cited factors. The motives for political intervention, however, extend beyond this economic rationale. In general, governments have to have regard to the welfare of key interest groups. In consequence political intervention frequently resorts to what David Henderson phrased the 'do-it-yourself economics'[2]. Key ideas and concepts in this process are as follows.

The particularism of industries. It is common knowledge that any manager asked about competition in his industry promptly stresses the particularism of his business: competition in his market cannot be compared with competition in other sectors of the economy. So if intervention is required because of the specifics of the industry, politicians must face it and accept it. When convincing, this type of argument leads to sector-based intervention and special treatment being granted to particular industries and particular firms.

The essentialism of sectors. "Essentialism" combines three notions. First, an industry is often said to be strategic when it is related in some way to national independence; this is the case for industries providing products and services for the national defence.

Second, an industry is politically essential when it appears vital to the economy at large; this applies to products or raw materials that are used in many other industries and also to cases where regional issues of employment and development are at stake. Finally, an industry might be deemed essential when high inputs of research and development are necessary, important breakthroughs are expected, or there are major balance of trade issues; energy sources, agriculture products, machine tools, and electronic components are among the non-defence sectors of the economy to which the label "essential" is most frequently attached.

_The bigness complex'. Walter Adams uses this expression to underline the shared belief of politicians in economies of scale[3]. Usually they (politicians) feel

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2. Henderson, David, *Innocence and Design: the Influence of Economic Ideas on Policy,* Oxford, Basil Blackwell, 1986.

3. Adams, W. & Brock, J.W., *The Bigness Complex. Industry, Labor and Government in the American Economy,* New York, Pantheon Books, 1986.

more secure when the national economy is dominated by large companies, since governments tend to find it easier to deal with them than with a multitude of small firms. So it is not surprising if governments are often riveted to the turnover and the ranking of national companies across the world. Further, it can be argued that competitiveness in the international arena requires domestic firms to be of a sufficiently large size. Hence, there is a temptation to accept highly concentrated domestic markets.

Excessive competition. Competition is both a creative and a destructive process. One *raison d'être* of political intervention is to limit the adverse effects of excessive competition. Governments act to guarantee that competition in the markets does not exceed a tolerable threshold, on the argument that excessive competition could lead to a social deconstruction of the economy.

Long term projects. The achievement of long term projects benefits the economy but may necessitate political intervention: such projects are frequently unprofitable in the short or medium term, and capital markets and market forces, supposedly unable to cope with large projects, therefore require support from the state. Improvements in the infrastructure of energy supply, community services and transportation tend to rely heavily upon political intervention.

2.1.2 Characteristics of the process. These main features of political intervention are commonplace. Perhaps less attention has been paid to the characteristics which set in motion the process, some of which are set out below.

Control of information by firms. The flow of information circulating between firms and the government is of great importance. Political intervention hinges on the quantity and the quality of information that both sides exchange, and here the firms have a key advantage in that they control the flow of information: information originates from their accounts and their knowledge of the market.

Rarely does the government and its administration have investigation and enforcement powers to check fully all information passed on to them. Usually they are not well equipped to monitor the commitments of firms when negotiating over protectionist measures.

Political intervention also takes place in ambiguous circumstances. Ministers tend to change frequently, but managers of firms, especially the important ones, remain in the market long after the departure of the ministers. This can provide the firms with advantages when negotiating.

Effective means of persuasion. First, managers may convince politicians and the administration that competition is a process that can be grasped only from within the firm. The politicians who decide in the last resort must count not on the abstract economist, nor on the narrow-minded bureaucrat, nor on the incompetent and unpredictable judge.

Second, firms will advocate that secrecy and the use of selective information must prevail. They are keen on persuading politicians that there are limits to the display of information. If the administration requires too much significant information the firms will argue that it will jeopardise their position in the market place by passing vital data to their competitors.

Thirdly, political intervention has to be carried out swiftly. Capital markets and business matters cannot wait. Capital markets are also said to dislike uncertainty. Therefore the decision-making process is constrained by urgency.

National elites. As sociologists rightly point out, political intervention takes place in a context where companies, managers and politicians frequently belong to the same network of national elites. They have been trained in the same schools and high profile universities. Networking is part of the intervention process.

2.2 *L'Etat de Droit Economique*.

The *Etat de Droit Economique* has emerged slowly in Europe in the period since World War II. This has meant that politicians have had to give up some of their prerogatives in favour of a more technical approach based primarily on economics and law. Rather than securing room for manoeuvre (or discretion) for politicians, this process has reduced it. The ultimate form of this second type of interventionism is the Hayekian constitutional model, a government by judges[4].

We have to go back to Montesquieu, and to the idea of a constitution that balances the different powers and divides them up, to comprehend the inception of the antitrust movement in the USA. The antitrust legislation emerged in the USA to fend off monopoly power and economy-wide administered prices. The aim was to ensure that firms had to abide by legal and economic principles.

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4. Von Hayek, F., *Law Legislation and Liberty*, Vol. 3. French Translation, Paris, Presses Universitaires de France, 1983.

2.2.1 Legal principles. Two relevant principles can be noted here.

De-ontology. Competition law mainly focuses on the relationship between economic power and other powers. It aims at restricting the exercise of market power. It handles abuse of dominant position, foreclosure of markets, price discrimination, and asymmetries in business contracts. Above all it seeks to preserve the ethics of business in a free society.

The machinery. Law makes use of particular techniques when dealing with market issues. The outcome of antitrust legislation is sensitive to the mix of *per se* prohibitions and rule of reason tests, and to the stringency and placing of the burden of proof. Jurisprudence builds up on a case by case analysis to give substance to the general principles. It presumes that the rights of defendants are to be protected and represented. It promotes transparency in business relationships among firms in the market.

2.2.2 Economics. Economic science provides lawyers and judges with representations on the functioning of market forces. It conveys ideas on how to sustain an economic optimum. Three main approaches dominate in economic laws.

Economic representations of market mechanisms. The first is based on the Walrasian model. As far as possible, competition must rely on the existence of a great number of producers and consumers who each behave independently (with the limiting case being perfect competition). Competition policy aims at fighting monopolisation, cartels, and foreclosure of markets through vertical integration, since they distort the resource allocation process in the economy and ultimately penalise consumers. The emphasis is placed on market structures.

The second approach assumes that perfect markets cannot be the ultimate goal. Perfect competition lacks a dynamic perspective and is not relevant in the real world. In practice, all markets are imperfect and economic thinking is to be used in a practical way. Making use of analytic frameworks, economists perform assessments which are limited to balancing the advantages and the drawbacks of particular situations (that is, there are no ideal market structures to be strived for).

However, the advantages and the drawbacks of different sets of arrangements are often heterogeneous and their consequences are hard to determine with accuracy, particularly since what chiefly matters are the consequences for market dynamics.

This approach recognises that economies of scale, economies of scope, and reductions in transaction costs may all occur when concentration increases.

Savings may be passed to the consumer, but increase in market power could also lead to less price flexibility and greater dependence on monopoly pricing for the consumer. The negative welfare effects of an increase in concentration and co-ordination among firms might also materialise more quickly than the benefits of scale and scope. In assessments, all these factors need to be balanced against each other.

The third approach stems from the epistemological posture of the Austrian and Chicago schools. Market forces are believed to be more resilient than one would expect from a Walrasian or even a "balanced competition" perspective. In this view markets are naturally driven toward the optimum. Any intervention, unless it be to free the market (for example, by removing statutory entry barriers), is fruitless and is liable to damage the economy. The Austrian view stresses that the market mechanism is an information process which can be encapsulated neither by planning and central intervention nor by courts and judges. One has to rely on the strength of market forces and entrepreneurial behaviour instead of intervening in the market. Cartels and monopolisation are unstable in the long run. In general, there is therefore no pressing need to change the course of market forces.

Economic tools. Economists, like lawyers, have their own techniques and language. Their concepts such as the relevant market, substitutability in supply and demand, marginal costs and profits, transaction costs, etc. are embodied in antitrust assessments.

Economists provide useful analytical tools that range from statistical analysis to game theory. Recent breakthroughs in oligopoly theory and analysis of vertical integration have given new insights to assess competition in markets. From an economic perspective, it can be argued that law lags behind the progress of economic knowledge.

2.2.3 Balancing law and economics. Lawyers and economists are frequently at odds when dealing with competition issues. There can be two, different world-views.

Lawyers are mainly interested in the existence of material evidence. They constantly refer to the way cases are handled during the investigation and before the courts, and pay close attention to respect for proper legal procedures.

Focusing on material evidence, on legal procedures, and on loopholes in the legislation, lawyers can miss the economic issue at stake. As a result they direct the *Etat de Droit Economique* in a particular way. Ultimately this can lead to a competition police whereby the rules of the game are to find out and trace evidence

of conspiracies through telexes, facsimiles, statements made by businessmen, and so on.

Moreover, the legal case-by-case approach is resistant to economic generalisation. From the standpoint of a lawyer or a judge, economic science is merely a rhetorical exercise.

The view of Gerhard Gesell, the judge in the case that involved Coca-Cola attempting to take-over Dr Pepper, is representative of the scepticism of lawyers towards economists[5]. In this case he considered that although economists were certainly sincere researchers, they came with too many theories about the likely effects of the merger on competition without providing any certainties. He stressed that economists have generally no practical experience of competition in the market.

Judges, then, tend to be suspicious of economic testimony. They regard economic analysis as providing insights but not as delivering authoritative conclusions. The danger inherent in this perspective is that over-dependence on police evidence or past judgements can, by neglecting the dynamics of competition in the markets, lead to economically costly errors in the application of public policy.

In contrast, economists tend to treat evidence collected by means of police investigation with much less respect. In their view it is largely beside the point whether secret meetings have or have not taken place. This kind of evidence can be highly unreliable: there are plenty of meetings and occasions where managers exchange views on competition in the market, and such information exchanges can be part of the more general competitive game (for example, they may seek to deceive one another). Police evidence should not, therefore, be taken at face value. Rather, the economic approach to collusion, based on market analysis, should be preferred to the traditional approach based on proof of conspiracy[6].

It is, however, of some concern when economists neglect legal evidence. The economists employed by competition agencies are engaged on the task of mapping an economy's industries, making use of a variety of economic indicators that encapsulate as far as possible the differences among markets. In this exercise, all sectors of the economy tend to be mapped in a similar way. Then, according to the values of concentration ratios, changes in prices, the structure of the industry, and the strategies of the firms in the markets, economists can easily become suspicious

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5. *FTC v. Coca-Cola,* 641 F. supp. 1128 (1986), p.1138.

6. Posner, Richard A. *Antitrust Law: An Economic Perspective,* Chicago, The University Press of Chicago, 1976.

that competition is restricted almost everywhere (particularly when working within a static, Walrasian framework).

Thus, if prices in a market are not flexible there can be a jump to the conclusion that firms have entered into a secret agreement. Similarly, if the price of a competitor is markedly under the average price in the market, it might be wrongly inferred that the price is probably predatory. If a series of take-overs of downstream firms occurs, it might be inferred that, through vertical integration, the upstream firms have sought to foreclose the market and create an entry barrier. If two significant competitors merge, the conclusion might be that they are attempting to create a dominant position so as later to abuse their market power.

In such circumstances, where incorrect or questionable inferences are made from market analysis, economists are often all too willing to promote remedies that are at best irrelevant and at worst may seriously damage the dynamics of competition. The errors here are in no sense mitigated by the use of abstract concepts and sophisticated theoretical modelling that frequently underpin economic analysis. Apparently similar economic models can differ radically in their implications, and only careful and empirical analysis is capable of sorting out the issues.

In sum, then, the *Etat de Droit Economique* is sensitive to the balance between the different frameworks adopted by lawyers and economists when handling competition matters.

2.2.4 Characteristics of the process. The *Etat de Droit Economique* is set in motion by lawyers and economists. It provides the policy process with more transparency than in cases of political intervention by organising a public and technical debate on competition issues. In a way it creates a forum for arguing cases between the involved parties. In this forum, networking among elites and lobbying are less important than in cases of political intervention.

In contrast to political interventionism, the *Etat de Droit Economique* tends to give rise to lengthy processes. Since the rights of the defendant have to be protected, appeal procedures are required. They are of vital importance, but they inevitably have costs for business strategies by increasing the delays in reaching decisions. For this reason in particular, competition agencies are pressed to adopt short pre-notification and confidential guidance procedures. As a result, the transparency of the *Etat de Droit Economique* is reduced.

In respect of information, as long as complaints by any undertaking can be formulated and handled swiftly, and provided open hearings and investigation take place, firms cannot expect to control the selection and flow of information used in

the process. There remains, however, the possibility of "capture" of the *Etat de Droit Economique* by skilful business strategists. For example, firms can use the procedures to protect themselves from an increase in competition in the market, or they can seek to use the competition laws in ways that will damage their principal rivals.

Finally, it can be noted that the *Etat de Droit Economique* relies chiefly on reactive processes. This is in contrast to political intervention which aims at achieving particular goals in the marketplace. Moreover, if the procedures are inflexible, the result can be burdensome red tape whereby business moves have to be notified to the authorities without regard to the significance of the impact on competition in the markets.

2.3 The importance of the institutional framework.

As indicated above, competition policy and political intervention both occur in the running of EC economies. The important issue is to assess the balance between the two. The equilibrium hinges on the strength of the framework of competition policy, which is usually made up of one or two competition agencies, plus competition departments in the administration and the courts of justice.

2.3.1 Organising the public debate on competition and the control of economic power. The *Etat de Droit Economique* concentrates basically on the surveillance and control of market structures and on the behaviour of the firms in these markets. Among the main activities are: monitoring competition in the market, deciding on referrals when necessary, deciding on the scope of the referrals, conducting investigations, assessing the situation, advising and making recommendations, deciding, and watching over the implementation of decisions.

A competition agency may or may not be in charge of all these aspects. For example, it can be merely an advisory body, or it can integrate the functions of assessment and decision. Various configurations are conceivable, and these will impact on the orientation of the *Etat de Droit Economique* and on the nature and the content of the public debate on competition issues.

Competition agencies detail their analysis and their decisions in public reports that tend to limit themselves either to a summary of recommendations and possible remedies or to a summary of the decisions. Greater or lesser details of the analysis and of the information gathered during the investigation can be shown, and the vigour of the public debate depends on the quantity and the quality of the information released for external comments.

2.3.2 The power to think and to act. Highly technical information is required to deal with competition issues, and part of the credibility of a competition agency rests on the information it can collect.

There are miscellaneous sources of information. One of the most important is complaints. The competition agency may handle complaints itself or the task may be assigned to a ministerial department; the choice influences the selection of the cases investigated by the agency. Either the competition agency itself selects the cases it will investigate, in which case it must also decide on the admissibility and the significance of the complaints, or the competition agency does not determine the cases referred to it.

Compulsory notification procedures supervised by the competition agency are a second source of information. They provide the agency with data on strategic moves in the market and they direct the *Etat de Droit Economique* towards a legalistic process. Compulsory notification frequently encourages the competition agency to define guidelines which increase the predictability of the process.

A third source of information depends on the power of investigation granted to the competition agency. The agency may or may not have police powers in respect of the search for information. The power to launch investigations without warning and to require information at the premises increases the prospect of finding evidence of anti-competitive behaviour, and thereby increases the deterrent effects of the process.

Widening the scope of action and increasing the response times of the competition agency change the relationship between the business community and the *Etat de Droit Economique*. For example, they put at risk the strategies of firms. When the competition agency can review the level of competition in markets across the economy, and when the competition agency can investigate a wide variety of types of economic behaviour, the *Etat de Droit Economique* becomes less predictable and infringes more on political issues.

Finally, it can be noted that deterrence is linked with the power of sanctions. Hefty fines and the availability to the competition agency of powers to require divestment or impose price controls alter the behaviour of firms in the market.

2.3.3 The necessary supervision. The findings and interpretation of the legislation by the competition agency are subject to review through various procedures. When the competition agency takes decisions, these can usually be challenged before courts. When the competition agency is confined to formulate recommendations, the minister generally decides. This changes the accountability

of the competition agency and affects the outcomes of the *Etat de Droit Economique*. In either case, the appeal procedure needs to be efficiently structured.

Of key importance is the supervision of the performance of the competition agency and of the agency's general reading of antitrust legislation. Performance can be assessed by a specialised institution, by a parliamentary standing committee, or by independent experts who either oppose or give support to the work of the competition agency.

The supervision structure helps ensure that the *Etat de Droit Economique* does not drift. It is also a safeguard against the "hunting instinct" that may develop within competition agencies. It provides the system with the possibility of guiding the orientations of the *Etat de Droit Economique*.

2.3.4 Balancing law and economics in the institutional framework. We have emphasised above the opposition between lawyers and economists. Here we distinguish two kinds of organisational structures leading respectively to open or closed systems of the *Etat de Droit Economique*.

A competition agency can be said to be open when there is a turnover of academics and business practitioners within the agency. When open, the system is more responsive to the evolution of economic thinking. As a result it can lead to a shift of emphasis toward new economic and business theories in the decision making process. In contrast, a system is said to be closed if the number and the turnover of academics and business practitioners within the competition agency are low.

Of equal importance is the organisational structure of the competition agency. It can have a horizontal or a sectoral orientation. Economists and lawyers can work either within separate divisions or together within sector based departments. The organisational structure influences the work, the orientations, and the conflicts inside the competition agency.

To summarise, the forcefulness of the processes of the *Etat de Droit Economique* rests on the structure of the institutions and the procedures used when handling competition issues.

3. Competition policy in Europe.

This section reviews the emergence of competition policy in Europe and it studies the current situation in three key EC member states: Germany, the UK, and France.

3.1 The emergence of antitrust and competition policy in Europe.

3.1.1 The US influence. Antitrust legislation started very early in the US. During and after World War II, the American administration put pressure on its allies to establish a framework on competition policy. The main concern was to avoid any discrimination against American products and firms in European markets.

The *Lend Lease Agreement of 1941* between the US and the UK insisted on promoting reciprocal measures against trade discrimination and barriers to importation. The Marshall Plan also had a notable impact on the emergence of competition policy, particularly in Germany. Germany was requested to take specific measures to organise the decartelization of the economy; the goal was to break the links between political and economic power.

Although the US administration helped the emergence of competition policy in Europe, the American antitrust model was not replicated. First of all, the main competition agencies across Europe, especially in the UK and France, were not granted full independence from the government. Second, the European countries did not rely on private litigation to enforce antitrust legislation. The treble damage principle was not enacted into the European members states' legislation. Consequently there was no incentive for the firms and the courts to invest in legal disputes over competition issues.

3.1.2 The Treaty of Rome. The Treaty of Rome was finalized in 1957. Other European institutions had previously paved the way to the establishment of a European competition policy. In 1948 the *Organisation for European Economic Co-operation* was set up to allocate Marshall Aid. Later in 1951 the *European Steel and Coal Community* established in its Article 4, 5, 65, and 66 a framework for dealing with restraints on competition and the movement of products. The success encountered by the Coal and Steel arrangements in increasing European integration led to the formation of the European Community and to the signature of the Treaty of Rome. Articles 85 and 86 of the Treaty went beyond Articles 65 and 66 of the earlier Treaty, generalizing the idea of eliminating trade barriers[7].

The manner in which this goal was to be achieved was, however, somewhat oblique. Instead of forcing the member states to adopt a similar stance, European competition policy was given the mandate to exercise its power solely when restraints on trade between member states were involved. Member states were free

7. Goyder, D.G. *EEC Competition Law*, Oxford, Clarendon Press 1988.

to choose the extent to which the *Etat de Droit Economique* would prevail at the national level.

A clear division of responsibilities was drawn up. National governments were to be sovereign when giving substance to competition policy in their home country; the EEC Commission would be sovereign when dealing with cases having repercussions in several member states. A legalistic approach would settle conflicts between member states and the European Commission on competition issues. European law would prevail over national laws. Thus, the lack of substance of competition policy in one member state, or the distorting effect on competition of a national industrial policy, would both be open to challenge by any undertaking (i.e. firms or member states) before the European Court of Justice and the national courts.

As European economic integration proceeded, the idea was that convergence would occur among the member states' competition policies. In this way the convergence process would be driven from the centre to the periphery.

3.1.3 The political game. Another factor that promoted the establishment of competition policies in Europe was political interest. Governments set up institutions and procedures that provided them with a hand in the *Etat de Droit Economique*. A grip on competition policy had two advantages. On the one hand it weakened the threat of capture of political intervention by vested interests: competition policy can be used as a threat when negotiating with firms and trade associations. On the other hand, it enables governments to transfer the responsibility for difficult decisions onto a seemingly independent power that they can pretend not to control. One solution was therefore to set up a competition watchdog that barks but does not bite.

3.2 The convergence process.

Economic circumstances set in motion and strengthened the convergence process of competition policies in Europe. Facing similar economic problems, the governments of member states were driven toward adopting similar measures.

3.2.1 Similar economic situations. In the aftermath of World War II, cartels were the key issue. They developed in the 1930s in the UK, Germany, and France, and blossomed during world war two. In many European countries the fear was that once the war was ended the habits of private collective coordination and collusion would be used to restrict output rather than to expand it in a period when there was clearly a need for reconstruction and growth.

For a period from the mid 1960s, the European countries were increasingly confronted by the issue of rising market concentration. For the first time, in 1972 at the Paris summit, representatives of member states raised the issue of a merger regulation at the EEC level. By the mid 1980s, concentration turned into a particular issue in the distribution sector. Concentration worries were also expressed in transportation, for example the airlines industry, and in other sectors such as the media.

According to their various national traditions, member states developed legal frameworks to deal with these competition issues. Reactive devices were set up throughout Europe to handle abuses of market power, and the similarities of the national devices produced a convergence effect on competition policies in Europe.

3.2.2 The principles. The Treaty of Rome embodies the shared beliefs of the member states about competition policy. Above all they were cautious about *per se* prohibitions and favoured a pragmatic approach. Economic laws were to be primarily used to make assessments, not to pursue particular competition goals and/or particular forms of market organisation.

Cartels were considered *a priori* unlawful unless the firms involved were able to demonstrate that the resulting market co-ordination could bring economic progress or social advantages, such as limiting redundancies or producing an increase in welfare at the regional level. When detrimental to the economy, the cartels were subject to cease and desist orders. In Germany and France fines were used to deter cartels.

Vertical relations such as exclusive purchase and exclusive distribution agreements were vetted on a case by case basis which, in principle, involved assessing the economic advantages and drawbacks of the relevant arrangements.

Past certain thresholds, the market power exercised by existing dominant companies or created by mergers was suspected *a priori* of distorting competition. But after World War II European countries expected a surge in the growth of American multinational companies. In most cases they believed that only big European companies would be able to compete effectively with these multinationals. Therefore the market power of gigantic firms was not in itself viewed as necessarily being contrary to the public interest; only abuses of market dominance were to be condemned.

In addition, the scope of European legislation extended to control of the distorting effect on competition of state aid to national companies. However, in the early

days this aspect of EEC policy was not viewed as a serious constraint on the industrial policies of individual member states.

More or less up to the mid 80s, each European country agreed to these principles and implemented them in delegating powers to competition agencies.

3.2.3 Competition agencies. The *Monopolies and Restrictive Practices Commission*, instituted in the UK in 1948, was renamed the *Monopolies Commission* in 1956 and the *Monopolies and Mergers Commission* in 1973. In France the *Commission technique des ententes* was set up in 1954, renamed the *Commission technique des ententes et des positions dominantes* in 1964, the *Commission de la concurrence* in 1977, and the *Conseil de la concurrence* in 1986. In Germany the *Bundeskartellamt* dates back to 1957 and the *Monopolkommission* to 1973.

Generally speaking, each of these agencies started its work smoothly. At first few cases were referred to them, and they were able to develop their expertise gradually. Their ability to legitimise their reports and decisions played an important part in the convergence process of competition policy in Europe.

3.2.4 Brussels' rising power. European competition policy developed in parallel with the work of the national competition agencies. At the beginning one would have expected that the division of responsibilities between the EC Commission and the member states would not be problematic. Each country could be expected to be sovereign when dealing with national cases, and the EEC Commission could be expected to be in charge only of settling those cases involving several members states.

In practice, the Commission constantly sought to increase its authority over the member states' competition policies. In the 1969 *Walt Wilhem case* the European Court of Justice established that when the legislation of a member state came into conflict with European legislation the latter was the relevant framework in which to assess competition cases[8]. In 1975 the decision against the *Groupement de papiers peints de Belgique* showed that national cartels could be handled by the EEC Commission even if the significance of the restraint on trade between member states was not demonstrated[9]. The European Court of Justice pointed out that although national cartels were in appearance a member state issue, the fact that the

8. *Walt Wilhem v. Bundeskartellamt* Case 14/68, (1969), ECR 1, 14: Common Market Law Reports, Modern Law Review 100, p.109-110.

9. *Groupement des Fabricants de Papiers Peints de Belgique* v. *Commission*, Case 73/74, (1975), European Court Report 1491: (1976) 1 Common Market Law Reports 589.

flow of cross-border trade could be potentially restrained gave the Commission the power to intervene.

In addition the Commission and the European Court of Justice gradually ruled more and more against member states' administrative actions and legislation which restrained competition. German legislation on the purity of beer, French legislation on price controls in respect of books and petrol, and Italian arrangements in the sugar market were significant examples demonstrating that member states were no longer going to be free to reduce or eliminate competition in their home markets[10].

In the field of mergers the Commission claimed an extension of its powers from 1970 onwards. The Treaty of Rome itself had not anticipated the issue of market concentration. Taking the initiative, the Commission submitted the idea of a Euro-merger regulation to the Council of Ministers. It appeared in Article 7 of the 1972 Treaty of Paris.

Following these developments, in July 1973 the Commission presented to the Council of Ministers a first merger regulation proposal, which had already been approved by the European Parliament and the Economic and Social Committee. The governments of the member states managed to block the proposal and began a war of attrition, refusing to leave to the Commission the degree of control over market structure implied by the regulation.

Despite opposition the Commission did not yield. In the 1972 *Continental Can Europemballage* case the European competition directorate of the Commission made use of Article 86 of the Treaty of Rome (on dominant position) to block a merger[11]. Later, in 1984, Article 85 was at the centre of a dispute about the acquisition by *Philip Morris* of a 30% interest in its competitor *Rothmans*[12]. These cases provided evidence that in the mergers area, where no European regulation applied, the Commission was able to exploit the situation to the advantage of its own authority. The European merger regulation was finally introduced in 1989.

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10. On the Italian Sugar Cartel see Case 40/73 (1975) European Court Report 1663: (1976) 1 Common Market Law Reports 295. On books and petrol prices see Case 229/83 (1985) European Court Reports 1: 2 Common Market Law Reports 286 and Case 231/83, (1985), European Court Report 305: 2 Common Market Law Report 524.

11. *Continental Can,* JO (1972), L7/25, (1972), Common Market Law Reports and *Europemballage and Continental Can* v. *Commission* (6/72), (1973), European Court Reports 215: Common Market Law Reports 199.

12. *British American Tobacco* v. *Commission* case 142/84 and *RJ Reynolds Industries Inc.* v. Commission Case 156/84.

Thus, the EC Commission made good use of the Articles of the Treaty of Rome to increase its power and its dominance over competition policies in Europe. Progressively EC competition policy became the point of reference for the member states themselves.

3.3 National governments' room for manoeuvre.

In spite of the EC Commission increasing its powers, member states have still succeeded in managing to preserve room for manoeuvre in respect of their domestic political ambitions. On a national basis governments have maintained institutional procedures to secure their own views on competition policy. Therefore if the member states' competition policies have converged, it must be concluded that, at present, the harmonisation is far from being complete.

3.3.1 Policy inertia. Members states' competition policies took root in an environment dominated by past habits of political interventionism. In contrast with the US, there has been no substantial public pressure in favour of antitrust legislation aimed at defending consumers' interests. Rather, member states' governments generally had a free hand in the organisation of competition policy, and the principal interest groups with which they had to deal came from the business community.

In Germany, cartelization is a very old issue. The first resolution requesting the creation of a cartel commission was debated in the *Reichstag* in 1908 and the first legislation on abuse of dominant position -- the ordnance *Verodnung gegen Missbrauch wirtschaftlicher Machtstellungen* -- dates back to 1923. From the beginning the German view was clear: market power is not in itself the key issue, rather the threat is the linkage between economic dominance and politics. Cartels and leading firms could potentially exercise an undesirable degree of political power. The *Bundeskartellamt* was set up to be as independent as possible from the relevant ministerial departments for precisely this reason.

Later, in the 1970s, the *Monopolkommission* was established to survey the evolution of concentration in the German economy. In particular, it has been concerned to monitor ownership ties among companies in the context of levels of concentration in the economy. Close attention is paid to the press and to the likely effects on politics of an increase in concentration in this sector.

In fact, German competition policy appears not to be based on the pursuit of movements toward the "ideal" of perfect competition. If anything, it regards enlarged oligopolies as the most appropriate form of market structure in most cases.

Currently, the emphasis of German policy is more on control of market structure -- concentration -- than on the behaviour of firms (i.e. abuses of market power)[13].

France, in spite of the existence of a liberal tradition in economics, extending from the *physiocrats* through *Leon Walras* to *Maurice Allais*, has invariably endorsed a *Colbertist* stance on competition policy. The liberal experiments have been rare and short-lived.

After World War II the French economy comprised mainly small farmers and firms. The policy adopted required that they be reorganised and boosted via State intervention by a powerful administration. It is not by chance that the word *entente*, used in the French language instead of *Kartel* or *Conspiracy*, has the positive connotations of good relationships and agreements among undertakings. Civil servants have always viewed business coalescence and co-ordination among the main national firms as giving rise to positive opportunities for the development of the French economy. Consequently, there has been no significant control of mergers in France except for take-overs involving foreign companies, the latter being carefully scrutinised via use of the *Trésor* procedure.

Significantly, up to the end of the 1980s, competition policy got entangled with industrial policy and more markedly with price controls. French competition policy was used as an appendage of pricing policy. The 1945 ordinance on price controls remained valid until December 1986, and for forty years periods of price controls alternated with short periods of price liberalisation. In periods of liberalisation governments highlighted competition policy as a substitute for prices policy in curbing inflationary pressures[14].

The UK resembles France in a number of respects. At the inception of UK competition policy, the *Board of Trade* arbitrated over the dismantlement of cartels organised through trade associations[15]. In the early 60s the Labour government launched an industrial policy to encourage mergers; in the late 70s

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13. From 1984 to 1989 the number of cases on abuse of dominant power vetted by the *Bundeskartellamt* has dramatically decreased in Germany. See *Monopolkommission reports for 1988, 1990, 1992.*

14. Dumez, H. & Jeunemaitre, A., *Diriger l'Economie, l'Etat et les Prix en France (1936-1986),* Paris, L'Harmattan, 1989.

15. Gribbin, G.D., *The Post-War revival of competition as industrial policy,* Government Economic Service, Working Paper no. 19, Price Commission, December 1978. White Paper, *Employment Policy,* CMD 6257, London, HMSO, May 1944.

another Labour government established the *Price Commission*, which infringed on competition policy issues.

Broadly speaking, the main feature of UK competition policy has been the temptation to accommodate the advantages and the drawbacks of competition with policy support for domestic industries. Thus, successive governments have always searched for a flexible approach. Economic debates have been intense, with wide consultation of business opinions through *green* and *white papers*[16].

The concern to accommodate business anxieties gave rise to the *public interest* criterion which plays a central role in the UK approach. Focus on the public interest meant that competition would be one of several elements in competition policy assessments.

A number of other features of UK competition policy are worth mentioning. First, the UK stance on competition policy has been characterised by an aversion to delegate strong powers of police investigation and enforcement to an agency unaccountable to Parliament. In consequence, the attack on cartels has had limited deterrence effects.

Second, changes in legislation have tended to be problematic. For example, recent proposals for reform have awaited a slot in the parliamentary timetable and, since competition policy issues are not high on the political agenda, they have been subjected to considerable delays. More generally, legislation has developed in a piecemeal fashion. The outcome has been an increase in the complexity of the procedures, and a full rethinking of competition policy has never occurred[17].

Third, competition policy has been moderated in its application to the (important) financial sectors of the UK economy. It has attempted to adapt to the rhythms of take-overs and privatisations in the UK, and it has sometimes been used to protect national interests.[18]

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16. For an assessment of the most recent of these papers, see G. Yarrow, *Abuse of Market Power: A Commentary*, Essays in Regulation, No. 3, Oxford: Regulatory Policy Institute, April 1993.

17. Currently UK competition policy is based on four different Acts: *Fair Trading Act (1973), Restrictive Practices Act (1976), Resale Prices Act (1976), Competition Act (1980).* Specific competition objectives were also included in the privatisation legislation for the utility industries. For details, see P.J. Freeman, *UK Competition Law Reform: A Practitioner's View*, Essays in Regulation, No. 3, Oxford: Regulatory Policy Institute, April 1993.

18. For example: Monopolies and Mergers Commission, *Hong Kong & Shanghai Banking Corporation/Royal Bank of Scotland*, London, HMSO, 1981.

Thus, competition policy has developed in each country according to its own political tradition. As a result the full harmonisation of member states' competition policies on a single basis has simply not been feasible. Moreover in each member state the decision criterion is not exclusively a competition appraisal of the situation in question. And in each member state the minister has powers to veto the competition agency when important issues are at stake.

3.3.2 The decision criteria: competition versus other factors. Stemming from the tradition of political intervention in member states, the promotion of increased competition has not been the only goal of competition policy.

For example, in Germany agreements between firms which restrain competition must be notified to the authorities. In its assessment the *Bundeskartellamt* takes into account the specifics of each situation, although the bulk of notifications apply to small or medium-sized firms which generally do not threaten competition. Legislation provides that the participants to an agreement can go before the Court of Justice to request a decision on grounds other than the competition criterion. Moreover, the *Monopolkommission* reports every two years on the activity of the *Bundeskartellamt* in respect of concentration and abuses of dominant position. This procedure represents a limitation to an excessively zealous policy on the part of the *Bundeskartellamt*.

In France, the assessment of cartels and abuses of market power is based on the use of the *progrès économique* principle. This means that the *Conseil de la concurrence* has to balance the detrimental effects on competition against the possibility of benefits in terms of economic progress.

In the UK, legislation has been framed so as to tackle almost all possible issues and situations. In theory the framework provides the possibility of making decisions according to the necessities of the moment. The legislation has recourse to concepts such as *complex monopoly* and it is based on the *public interest* criterion, including all matters that might be relevant in terms of public interest. In principle, the interests of the consumers, the efficiency of the industry, regional issues of employment, and so on should be incorporated into assessments.

In comparison with the United States then, the competition policies of European member states exhibit some notable differences. There are no very explicit "competition guidelines" and member states' competition policies embrace considerations that usually come under the headings of industrial and/or price control policies. This political dimension of competition policy is apparent in the

procedures that provide ministers with significant discretion when dealing with competition issues.

3.3.3 The political dimension of competition policy. In the UK, important and difficult decisions regarding business interests are usually taken by the *Secretary of State for Trade and Industry.* The minister can intervene at two stages of the policy process: at the stage of deciding whether or not to refer a case to the *Monopolies and Mergers Commission* (MMC) and, later, at the stage of deciding whether or not to implement any recommendations made by the MMC. The role of the minister in referral and remedies decisions reduces the transparency and the certainty of the UK competition policy process.

In France, a clear division of responsibilities was enacted in 1986. Cartels, restrictive agreements and abuse of market power are handled by the *Conseil de la Concurrence.* It is an independent body both in the referral process and the decision making process. Its decisions can only be challenged before the courts. Mergers are handled by the administration of the Minister of Finance. An optional notification procedure enables the administration to follow changes in market structure. In any merger case, the Minister may choose to call for advice from the *Conseil de la Concurrence.* However, he is not bound by its advice and its proposed remedies, if any. In other words, decisions on market structure are in the hands of the *Direction de la Concurrence* within the Ministry of Finance and the private office of the Minister. The appeal procedure on mergers is administered via the *Conseil d'Etat.* So far, except for a few symbolic mergers (usually involving foreign companies) there is in practice no overt competition policy regarding mergers. For instance, the Minister of Finance and the French Minister of Industry have organised the Air France / UTA merger without referring the case to the *Conseil de la Concurrence.*

In Germany, the powers of the Minister are more limited than in France and the UK. First, a merger falling within the scope of the legislation has to be notified to the *Bundeskartellamt.* If there are perceived to be significant competition disadvantages, the merger is prohibited. From then on the firms make a choice. Either they engage in an appeal procedure before the Appeal Court of Berlin or they appeal before the Minister of the Economy. In the second case, prior to deciding, the minister is bound to refer the merger to the *Monopolkommission,* which reports on whether other advantages can balance the negative impacts on competition. The minister can then choose whether or not to follow the advice of the *Monopolkommission.*

In the 1990 MBB / Daimler Benz case the minister cleared a merger previously prohibited by the *Bundeskartellamt.* Debates took place about this decision. The

case showed that the forces supporting concentration and restrictions to competition were significant in Germany.

In sum, through various procedures and decision criteria, the national competition policies in European countries have been designed so as to create room for manoeuvre by politicians who may have goals other than the promotion of competition. With the implementation of the single European market at a time of world-wide recession, and with the enforcement of new Euro- merger regulations, new tensions have appeared between national governments seeking to retain these prerogatives and the Commission.

3.4 Political Interventionism and the *Etat de Droit Economique* in Europe.

The first part of this paper contrasted political interventionism with the notion of the *Etat de Droit Economique*. It stressed the importance of the institutional design of competition policy when assessing the balance between the two policy processes. Thus far, this second part of the paper has illustrated the development of competition policy in Europe and the introduction of political considerations into the processes of the *Etat de Droit Economique*. The current section gives more attention to the institutional framework of competition policies in Europe in an attempt to characterise the situation in EC countries.

3.4.1 Germany. The German policy framework can be viewed as being largely legalistic. The *Bundeskartellamt* is an independent body that controls the referral process, assesses the situation in question, and takes the decisions in competition cases. It cannot intervene in markets except via its actions in an individual competition case. The institution has powers of police investigation, can impose fines, and can require divestment of assets. The information system is fed by complaints, compulsory notification procedures, and external data.

The *Bundeskartellamt* is roughly divided into two horizontal and ten sector-based divisions. Each sector-based division works as a separate jurisdiction; economists and jurists are represented in equal proportion in each division. The appeal procedure is before the Berlin Appeal Court *(Kammergericht).*

Turnover of civil servants is fairly low, and therefore since its inception it has been a 'closed system', hardly influenced by new economic thinking. Finally, it has relied on building up a very detailed jurisprudence.

Alongside the *Bundeskartellamt*, which employs around 200 civil servants, is a smaller structure, the *Monopolkommission*. Its budget depends on the Ministry of Home Affairs. It comprises five members, including at least one professor of law

and one professor of economics. The institution reflects upon concentration and competition policy issues, and it assesses the *Bundeskartellamt's* activity.

The *Monopolkommission* has few powers of investigation in spite of constant pressures from its members. The institution relies primarily on official statistics and has only been recently granted the use of classified information from the Federal Statistics Office. It publishes several kinds of reports: on the evolution of concentration in Germany on a biannual basis; on mergers and specific sectors at the request of the Minister of the Economy (for example, on the media and on satellite broadcasting); at its own discretion, about firms, sectors or legislation (for example, on the *Bundespost*). The minister is bound to comment on the general reports laid before the German Parliament, but he is not bound by the recommendations and by the general assessment delivered by the *Monopolkommission*.[19]

In sum, competition policy agencies have been granted independence and significant powers, but they are contained within fairly strict boundaries. Above all, German competition policy is a reactive device dedicated to dealing with anti-competitive structures and practices. It is hardly influenced by political intervention and is mainly regulated by law.

3.4.2 France. The foundations of competition policy in France are chiefly administrative. Until 1986, competition policy was very much intermingled with price controls. From 1945 the administration -- *Direction des Prix*, later *Direction des Prix et de la Concurrence* -- has retained its police powers. These powers were granted to fight against black markets and market abuses in the reconstruction period. The result was the creation of an important administrative component in the running of competition policy. Indeed until 1986 competition policy was chiefly a prices policy in disguise, and the legislation had primarily focused on anti-competitive individual practices dealt with by *per se* prohibitions.

The current system is dual one. There is an independent competition agency, the *Conseil de la Concurrence*, comprising about fifty top civil servants, generally *énarques* coming from the administration and jurists. The *Conseil de la Concurrence* has at its top a board of twelve members belonging to the business community or representing important organisations. There is only one economist, the *Vice-President* of the *Conseil de la Concurrence.*

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19. In the years 1990/1991, 3555 mergers have been reported to the Cartel Office. 8 were prohibited -- 16 in 1988/89; 911 cases were mergers involving East German firms. The number of cases on abuse of market power -- dominant position-- has decreases in the past five years.

The *Conseil de la Concurrence* can be approached by undertakings, firms, consumer associations, and government departments on any competition issue. It decides on the relevance of complaints and on referrals for investigation in the case of cartels and other abuses of market powers. It can also decide to refer cases on its own judgement.

In these matters the legislation is in line with German and EC procedures, except that there is no notification procedure for agreements. As with the EC Commission, the *Conseil de la Concurrence* has powers of police investigation and may impose fines or require divestment; the board decides on the sanctions. The appeal procedure is before the *Cour d'Appel de Paris.*

In the case of mergers, sector-based analysis, and reviews of national legislation, the *Conseil de la Concurrence* provides advice only at the request of the Minister.

Alongside the *Conseil de la Concurrence*, the *Direction de la Concurrence de la Consommation et de la Répression des Fraudes* of the Ministry of Finance employs two thousand civil servants of which five hundred are based in Paris. They are partly assigned to competition policy issues. At its headquarters it is a sector-based organisation with a separate mergers division. There are no professional economists or lawyers. This directorate plays a key role in addressing forty *per cent* of the referrals on anti-competitive practices and agreements to the *Conseil de la Concurrence.* It is the institution which represents France in its relationship with the EC Commission, and it handles prices policy toward the utilities and state-owned companies.

Thus, French competition policy can be viewed as a mix of administrative and *Etat de Droit Economique.* Market structure is controlled by the administration and the minister, while anti-competitive behaviour of firms is handled via legal processes. In both cases, the process is steered by civil servants. In this way the system can be said to be closed, since there are no economists and lawyers circulating within the competition institutions and the process is little influenced by new economic thinking.

3.4.3 The United Kingdom. UK competition policy developed within a parliamentary tradition. It has already been emphasised that this tradition has hampered the passing of a general, remodelled Act on competition policy.

Several institutions deal with competition issues: the DTI competition policy division and the Secretary of State for Trade and Industry, the OFT, the MMC, the

RTP Court. The MMC relies on around one hundred civil servants and the OFT has one hundred and fifty staff involved in competition matters.

In addition to these institutions, agencies have been set up to regulate the newly privatised companies in the utilities sector. These new bodies have mandates to promote or enable competition in these sectors.

The existence of groups of economists within the OFT, the DTI and the MMC -- professors of economics and management are members of the MMC -- provides competition policy with an underpinning of economic debate, and therefore with opportunities to open the system to the influence of fresh economic thinking.

The referral procedures, the investigations, and the final decisions on remedies are handled separately, and they are all subject to public interest criteria. There is no appeal procedure other than judicial review, which mainly focuses on the way in which decisions are taken (rather than on the substance of the decisions).

The global consequence of this framework is that it works to the detriment of the establishment of sound jurisprudence and clear orientations for competition policy. In particular it involves considerable uncertainty in the referral and decision processes, and it is characterised by low accountability for the competition policy agencies since their conclusions cannot readily be challenged before the courts.

Lack of powers in respect of police investigations, enforcement, and sanctions also deprives competition policy of the legalistic component which provides an appropriate balance in the *Etat de Droit Economique*, leaving a political intervention component with greater weight than it merits.

The privatisation of monopolies in the utilities sector has brought to light imbalances in UK competition policy. For example, the regulation debate has tended to become personalised. The Directors of the regulatory agencies are much in the news, and they have the power to refer utility companies or an entire utility sector to the MMC on various grounds. As a result, the MMC and the UK competition policy agencies are more embroiled than ever in prices policy and industrial policy issues[20].

In sum, UK Competition policy lacks the basic structure efficiently to handle anti-competitive behaviour in the markets, and at the same time it deals with issues that are beyond the goals of the *Etat de Droit Economique*.

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20. Veljanovski, C., *The Future of Industry Regulation in the UK. A report of an Independent inquiry,* London, European Policy Forum, January 1993.

3.4.4 The EC Commission. The main difference between the European competition directorate and its counterparts in member states is that it works as a governmental body with little political constraint and institutional supervision.

DGIV and the Merger Task Force have roughly three hundred civil servants to handle competition issues at the EC level. There are compulsory notifications for agreements, mergers, and state aids. Individual and block exemptions can be granted.

The European competition rules are stated in the Treaty of Rome, from Article 85 to Article 94. In addition a merger regulation was enacted in December 1989. In all competition cases Commission decisions can be appealed before the Court of First Instance and the European Court of Justice. DGIV has powers of police investigation. It can impose fines and the Merger Task Force can require divestment.

On the whole EC policy is based on a legalistic framework which does not provide much room for manoeuvre (discretion) to take into account criteria other than competition in the handling of cases. DGIV itself handles the referral, the assessment, and the decision in successive stages.

So far the approach of DGIV has been more pragmatic than economic. There are no general guidelines, other than that the Commission is chiefly concerned with impediments to cross-border trade within the European Community. However, in applying this principle DGIV has been led to develop a free market approach that has come into conflict with the industrial and price policies of a number of member states[21].

For example, important mergers organised by means of political arrangements within and between member states now have to be sanctioned by the Merger Task Force. Similarly, significant subsidies to major, state-owned companies have to be vetted by DGIV. Although the Treaty of Rome does not prohibit state-owned companies, DGIV treats them as if they were private undertakings.

Going further, in some circumstances the EC Commission has powers to organise market competition. Any monopoly granted by a member state that might have repercussions at the European level can be challenged by the Commission. In this way DGIV is not merely a *Bundeskartellamt* or a *Monopolies and Mergers*

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21. See M. Waelbroeck, *Is the Common Market a Free Market?*, Essays in Regulation, No. 1, Oxford: Regulatory Policy Institute, October 1992.

Commission. It participates in the elaboration of directives which set the framework for competition in sectors such as transport and telecommunications. In individual member states this tends to be a prerogative of government departments (although the new regulatory bodies in the UK also have these types of power).

Thus, study of the institutional framework of competition policy illustrates the various different ways in which policy is conducted in Europe. The third and final part of this paper will discuss the stumbling blocks to a continued process of convergence.

4. The future of Competition Policy in Europe.

4.1 The Commission's strategy.

Competition policy is a crucial instrument for achieving a single European market and a competitive order. The Competition Directorate at the EC Commission sees itself as occupying the driving seat of competition policy in Europe[22].
DGIV is eager to extend its control over state-aids and mergers, and to increase its influence on directives concerning the regulation of utilities and other highly concentrated industries.

Particularly revealing is the fact that DGIV opposes the possibility of being turned into a *Eurokartellamt* distinct from the Commission. It fears the prospect of being reduced to an agency dealing solely with competition cases. Nor does it wish to see institutional supervision on the *Monopolkommission* model or the implementation of an appeal procedure that would introduce political criteria (and therefore the possibility of by-passing its competition decisions).

Facing both budget constraints and criticisms over the delay in which it reaches decisions under Articles 85 and 86, DGIV has introduced procedural reform aimed at reducing the uncertainty and delay over the handling of joint ventures[23]. It will rely on comfort and warning letters for this purpose.

DGIV also intends to make extensive use of the subsidiarity principle. But, in the view of the Commission, subsidiarity should not be used to increase the scope for

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20. Sir Leon Brittan. *The future of EC competition policy,* Centre of European Policy Studies, Brussels, 7 December 1992.

23. See C. Jones, *Recent trends and developments in European Competition Policy*, Essays in Regulation, No. 4, Oxford: Regulatory Policy Institute, December 1993.

political interventionism in member states. Thus, the Commission has made it clear that it will decide upon references of cases that fall below the threshold of the Euro-merger regulation but that nevertheless have significant effects in a number of member states.

In matters of state-aids the DGIV will not delegate its powers to the member states' competition agencies. When dealing with anti-competitive practices, notably secret cartels and predatory pricing, the Commission intends to by-pass the lack of substance in the competition policies of a number of member states by assisting national courts when a complaint by a firm has been lodged on the grounds that Article 85 has been infringed. It will encourage the national courts to develop expertise in this area.

As things stand, however, it is far from obvious that these initiatives will have significant impact. First, member states are reluctant to lower the thresholds of the Euro- merger regulation. France, Germany, and the UK have resisted proposals that would increase the power of Brussels in this area[24]. Second, encouraging national courts to deal with competition issues is not easy in practice. Member states' competition agencies already provide support to national courts when necessary, and it is not clear what will be added by the additional assistance of DGIV.

On the other hand it is frequently argued that, since European laws take precedence over national laws, it is already possible for any undertaking, in any member state, to go before the national courts and ask for reparations in the event that it is adversely affected by an anti-competitive agreement or practice, or by an abuse of market dominance.

Again, however, what is possible in principle may be difficult to achieve in practice. To begin with, the firm lodging the complaint has to prove the existence of detrimental effects on cross-border trade. It has to devote resources to collecting the basic information and it does not have the investigatory powers possessed by competition agencies. The Commission can certainly provide assistance in collecting information, but this clearly would not provide a guarantee of success.

Second, the ordinary national courts rarely have the technical expertise to handle such cases. In France, Germany and the UK (in the form of the Restrictive Practices Court) specialised courts have been set up for that purpose. When courts are not familiar with antitrust economics and antitrust jurisprudence, the outcome

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24. In the case of France, see Blin M., *La politique communautaire de la concurrence,* Paris, Sénat, Rapports d'information no. 204, 23 December 1992.

of the litigation is likely to be more uncertain, and the risks facing potential litigants will be increased. Finally, since there is no equivalent to the treble damage possibility in the US, the incentives for firms to engage in such a process may be weak.

Nevertheless, the recent moves of the Commission in all the areas mentioned above will pose some threats to the control of competition policy by member states. Brussels can, therefore, be expected to be a continuing source of pressure for adjustments in national competition policies over the coming years.

4.2 The possible recapture of national competition policies.

At a time of general economic recession, the *Etat de Droit Economique* becomes part of the political game. Three key issues deserve particular attention, since they could signal a resurgence of political interventionism in market mechanisms.

4.2.1 Inefficiencies in European competition policy. On many occasions the results of DGIV investigations have not been as might have been expected. Secret cartels have proved to be difficult to handle at the European level. They tend to involve many very large companies and, after lengthy and difficult procedures, most Commission decisions have been overruled by either the Court of First Instance or the European Court of Justice[25].

In fact, many secret cartels are regionally based, and it is frequently easier to cope with them at the regional or national level (where they also tend to involve a smaller number of firms). This raises the issue of the lack of effectiveness of the member states' competition policies since, at the national level, member states still have the opportunity to take a lenient approach to cartels on political grounds.

In respect of state aids, member states have constantly challenged Commission decisions before the European Court of Justice and have dragged their heels over providing information to the Commission.

In respect of mergers, only one European case was prohibited in the period up to 1993, namely Alenia-ATR De Havilland [26]. The reaction of the French government in particular has been so fierce that DGIV had to change its procedure by making it compulsory to take note of the views of DGIII -- the directorate

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25. A recent case was the woodpulp industry. OJ no. L 85/1, 85/202 19 December 1984, and *A. Ahlström Osakeyhtio and others* v. *Commission, 31 Mars 1993,* European Court of Justice.

26. OJ European Community, no. L 334, 5 December 1991.

concerned with industrial affairs -- before reaching a decision. In this way, the inclusion of political considerations has been legitimised in merger decisions.

In practice, then, member states make use of all the loopholes and of the complexity of the procedures in attempting to influence decisions at the European level.

4.2.2 International trade. The impact of trade on production structures in member states is an ever-present issue which tends to assume greater prominence in periods of economic recession. Consequently, the trade relationships between the major industrialised countries (for example, the US, Japan and the EC) is a constant source of tension. Within the general, international bargaining that goes on, the *Etat de Droit Economique* tends to become a strategic issue. Thus, the US has put pressure on Japan to enforce anti-monopoly laws and to open Japanese markets to competition through the use of the Super 301 legislation. The agreement on competition policy negotiated between the US and the EC pursues a similar goal in seeking to achieve a fair competition order across countries.

Thus far, however, these attempts at supranational arrangements have had little impact on the harmonisation of member states' competition and industrial policies. Of more importance are the relationships between the Community and fast-developing countries with low labour costs, particularly in South East Asia. Whereas European competition policy deals with Community market structures and the behaviour of the firm in European markets, governments of member states are increasingly perceiving that a much more important problem is the cost structure of European producers relative to the cost structures to be found elsewhere in the world.

Further, while it is relatively easy to secure popular "legitimacy" for competition policy when competing firms have similar employment costs, such acceptance of competition policy will be much more difficult when employment costs differ radically. And this, of course, is precisely the issue that is growing in importance. Facing increased unemployment and pressures on standards of living (particularly in those sectors most affected by import competition) member states will be attracted to interventionist measures to protect their internal markets.

The fact that European antidumping legislation offers only limited scope for protectionist measures, together with the prospective enlargement of the European Union to encompass a part of the former Eastern block, threatens the Community's current stance on competition policy. Already one fourth of cartel cases handled by the Commission are linked to antidumping measures. Thus, it is easy to see how anti-competitive practices and coalescence among the business community could be justified by reference to the need to respond to competition from abroad,

particularly if there are grounds for claiming that such competition is, in some sense, "unfair".

4.2.3 Privatisation and competition policy. DGIV's steady pressure against certain aspects of the monopolies granted by member states in the utility industries provides further incentives for the privatisation of state-owned firms in these sectors. Liberalised access to network infrastructures across the Community would have the effect of removing exclusive rights granted by the governments of member states, and would therefore eliminate a large part of the *raison d'être* of public firms. In the name of greater competition, open access to networks jeopardises both vertical integration and the cross-subsidisations implicit in the objective of providing a universal public service. It remains to be seen if these changes will be successful and, if so, the extent to which the benefits are passed on to the consumer.

Thus far, the UK is the most advanced member state in terms of the privatisation of its utilities sector, but there privatisation has been accomplished by granting regional or national monopolies to private firms rather than by breaking down monopoly power. This has resulted in an increasingly complex regulatory framework in which traditional regulatory concerns such as setting price limits have become entangled with important aspects of competition policy.

If a similar process is adopted elsewhere in Europe, not only will new regulatory principles have to be introduced, but also the competition policies of member states will necessarily have to adapt. Starting with the patchwork quilt of existing institutional frameworks in member states and in Brussels, a thorough rethinking of the organisation of competition policies will be required. If this does not take place, the most likely outcome will be a developing tendency toward greater political intervention in both competition policy and regulatory policy, adding yet more complexity to the existing arrangements.

5. Conclusions.

Starting from rather different traditions, member states of the European Union initially developed rather different approaches to competition policy. In particular, the balance between political interventionism and the *Etat de Droit Economique* differed from country to country.

Pressures from the European Commission, which has viewed competition policy as a key policy instrument in the drive toward the creation of a single European market, subsequently led not only to a process of convergence among the competition

policies of member states, but also tilted the balance toward approaches based upon the *Etat de Droit Economique*. That is, on balance the operation of European competition policy has tended to be a force limiting the discretion of the governments of members states to intervene in markets to support domestic industries.

The convergence process has, however, been highly incomplete, in that substantial differences in attitudes to competition policy continue to persist among member states' governments. Similarly, discretion for politicians to intervene in the processes of competition policy has been maintained not only in countries such as France, where interventionist traditions have strong roots, but also in countries such as the UK which have been vociferous in extolling the virtues of greater competition and in warning of the dangers of state intervention. The *Etat de Droit Economique* is, therefore, far from being universally established in Europe.

Moreover, the balance between political interventionism and the *Etat de Droit Economique* is not something that can be assumed to be moving continuously in the same direction. Much will depend upon the precise economic conditions of the day and on the relative strengths of the various interest groups that influence policy processes. By way of illustration of this general point, three factors have been mentioned that could facilitate the recapture of large parts of competition policy by national interests favouring greater political intervention. These are: inefficiencies in the conduct of competition policy within existing frameworks, increased concerns about the domestic effects of policies of free international trade, and increasing complexity and confusion at the interface between traditional regulatory policies and competition policy in sectors such as telecommunications, broadcasting, postal services, water, and energy.