Competition vs. property rights: American antitrust law, the Freiburg School and the early years of European competition policy

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2008

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The paper aims at investigating the influence of American antitrust tradition on the foundation and early years of European competition policy. The argument may be summarized by four propositions. First, by taking into account what I call the "competition versus property rights" dichotomy, it turns out that the economists' contribution to the historical evolution of US antitrust law has been smaller than usually believed. Second, as far as the foundation of EEC competition policy is concerned, the influence of the American antitrust tradition has, again, been less than what is commonly claimed. Third, a crucial role on the birth of EEC antitrust has been played by a law and economics argument based on the constitutional standing of competition rules, an argument put forward by the highly influential Freiburg School of Ordoliberalism. Fourth, the ordoliberal origin of EEC competition rules, when combined with the Community's integration goal, helps explain why the impact of the "competition versus property rights" dichotomy on European antitrust law has been limited and, contrary to the US, always solved more favorably to the "competition" pole than to the "property rights" one.

JEL Codes: B13, B21, K21

Keywords: antitrust, property rights, competition law, EEC, Sherman Act, Freiburg School

Introduction

The paper aims at investigating the influence of American antitrust tradition on the foundation and early years (up to the mid-1960s) of European competition policy. This within the more general goal of assessing the role of economic theory in the development of antitrust law and policy, both in the US and Europe.[1] Given the ever increasing importance that competition issues play in the ordinary functioning of economic systems, it seems indeed relevant to cast new light on the origin of antitrust law. It is all-too-frequent to register a contrast between the decisions of antitrust

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[1] In the paper the words "antitrust law" and "competition law" will be used as synonymous, though the first term should properly be used only for the US.

authorities and courts and the prescriptions originating from the most up-to-date models of competition economics. I believe that part of this inconsistency is due to a still incomplete understanding of the history of antitrust law and, in particular, of its relationship with economic theory. Filling this gap is most important in the case of EEC competition law, both because its origin has so far been under-investigated from the viewpoint of the history of economics and because, as I show in the paper, acknowledging the peculiar economics underlying this origin may help explain the European Court of Justice's first antitrust rulings or the content itself of the EEC Treaty's competition rules.[2]

Economists and historians of economics have dedicated several studies to the history of American antitrust law. The standard conclusion is that economic theory has always exercised a substantial influence on the development of both statutory and case law (see Posner 1999, 229). The canonical narrative views the latter's turning points as almost invariably triggered by changes in the economists' notion of competition: from classical laissez-faire to neoclassical perfect competition, from 1930s imperfect competition to Harvard structure-conduct-performance (SCP) approach, from the Chicago revival of price theory to the modern game-theoretic view. A corollary of such a narrative is that both the Congress and the Supreme Court just applied the ideas flowing from the economists' debates along the years. However, an alternative reading of US antitrust history is possible, one that gives a more prominent role to strictly legal issues and, in particular, to the perennial antagonism between two conflicting desires: preserving competition and warranting the maximum freedom in the exploitation of individual property rights. This reading has several implications, including that the economists' influence on the evolution of US antitrust law turns out to have been far less important than usually believed.

Moving on to Europe, the story looks simpler, but actually isn't. The standard view is that EEC competition law and policy was just inherited from the US, via the role played in the early phases of the European unification process by the American government in general, and the Allied occupation authorities in particular. Hence, EEC antitrust rules were just a by-product of US postwar debates on competition law, and therefore, once again, an offspring of the economic theories that elicited them. However, as soon as we realize that most founding members of both the EEC and its forerunner, the European Community for Steel and Carbon (ECSC), already had in their national legislation some form or another of competition rules, the question arises as to how much of these national traditions – and of the legal and economic theories which inspired them – eventually flowed into the ECSC and EEC antitrust provisions. Moreover, the influence of the Freiburg School of law and economics (so-called Ordoliberalism) must be taken into account. One of the School's

[2] In the following I will use the old denominations, like "EEC" or "European Community", rather than the new ones ("European Union" and "EU"), as the former were the official ones in the period under scrutiny.

key concepts was the idea of an economic constitution, that is to say, of the formal set of rules (including competition law) which characterize the nature and functioning of an economic system. Given the influence which Freiburg scholars exercised, either directly or indirectly, on the process of European unification in general, and on EEC competition rules in particular, it may well be argued that, yes, European antitrust law was eventually driven by an economic theory of competition, but, no, such a theory was neither American nor standard – i.e., either classical or neoclassical or SCP – but rather the peculiar product of German ordoliberals.

This reconstruction of the foundation of European competition policy is tested in the paper against the actual content of ECSC and EEC antitrust rules, as well as against the "competition versus property rights" dichotomy. The key insight is that, official claims notwithstanding, the first and foremost interest of European competition enforcers, at both the Commission and the Court of Justice, has never been in competition per se, i.e., as an instrument to improve economic welfare, but rather in competition as a tool to achieve the real EEC goal, namely, the Common Market. By taking due account of this, we may understand why the ordoliberal recipe for competition law was welcomed in the Community, as well as why, again in contrast to the American experience, the above-mentioned dichotomy has never seriously affected European antitrust policy.

To sum up, the paper offers the following answer to the question raised in the opening paragraph. I claim that: *first*, by taking into account the "competition versus property rights" dichotomy, it turns out that the contribution of economists and economic theory to the historical evolution of US antitrust law has been smaller than usually believed; *second*, as far as the foundation of EEC competition policy is concerned, the influence of the American antitrust tradition has, again, been smaller than usually believed; *third*, a crucial role has on the contrary been played by national antitrust traditions and, above all, by a law and economics argument based on the constitutional standing of competition rules – an argument put forward by a very original, and highly influential, school of thought, the German Ordoliberals; *fourth*, the ordoliberal origin of EEC competition rules, when combined with the Community's key integration goal, helps explain why the impact of the "competition versus property rights" dichotomy on European antitrust law has been quite limited and, in any case, always solved in terms more favorable to the "competition" side than to the "property rights" one.

The content of the paper is as follows. The first § contains the economists' canonical narrative of US antitrust history. Those who already know it may well skip these pages and turn to §2, which offers an alternative reading, based on the "competition versus property rights" dichotomy. The third § presents what, again, may be considered the standard narrative of the birth of competition law in postwar Europe. In §4 I describe the main ideas of the Freiburg School. The fifth § shows how these ideas provide the ingredients for a different reconstruction of European antitrust history. The sixth § presents the *Grundig* case, i.e., the first crucial antitrust case in the EEC.

1. The history of American antitrust: the economists' cut

Reading the economists' accounts of US antitrust history, it is customary to find one version or another of a narrative that identifies five major periods of that history, with only minor differences as to the starting date and length of each phase.[3] The first period goes from the early debates on, and eventual approval of, the first antitrust legislation, the 1890 Sherman Act, up to the famous Standard Oil ruling by the US Supreme Court (1911), which established the rule of reason as the basic method for assessing antitrust cases. The second phase ranges from the approval of the Clayton and Federal Trade Commission Acts (1914) to Roosevelt's New Deal: this was an era of relative neglect of antitrust, as policy-makers became attracted by more direct forms of intervention in market economies. The third period – from mid-1930s to the late 1960s – was characterized on the theoretical side by the structure-conduct-performance (SCP) approach, and, on the policy side, by the aggressive pursuit of antitrust goals, including several Supreme Court's per se prohibitions against various business practices. As a reaction, a new phase began in the 1970s and lasted well into the 1980s, with the rise to dominance of the Chicago approach to antitrust and the consequent rejection of many of those prohibitions. The fifth and final period started in the late 1980s and is still continuing: the main feature of the so-called post-Chicago antitrust is the recourse to game-theoretic methods which have cast new light on most of the third period prohibitions.

The canonical narrative explains the transitions from one period to another in terms of either a change in the economists' attitude towards antitrust or the rise to dominance of one school of economic thought over the other. Among the keenest supporters of an economics-driven antitrust history is William Kovacic,: <<…there is considerable evidence indicating that […] the ideas of economists affect how judges resolve antitrust cases. […] Antitrust law and industrial economics have evolved in tandem, with doctrine and enforcement policy lagging behind the formation of a consensus among economists...>> (Kovacic 1992, 300, 303). Even leading industrial economist Stephen Martin, who has brilliantly reconstructed this history (e.g. Martin 2007; 2007a), believes that: <<It is impossible to have a full understanding of the evolution of antitrust policy without taking the contributions of academic scribblers [read: economists] into account.>> (Martin 2007a,

[3] Note that the same periodization is quite common among law historians too.

5). Any alternative reconstruction of US antitrust history cannot therefore beg the requirement of identifying the gist of the American economists' views during each of the five period.

It is well known that US economists had no role in the legislative process leading to the 1890 Sherman Act. Yet, this does not mean that they neglected antitrust issues: quite to the contrary, these were the subject of fierce debates in late 19th-century economic journals. For the majority of US economists, antitrust rules were undesirable because trusts were necessary to obtain large scale economies and efficiency gains.[4] This position stemmed from the general perception – typical of American Progressives, and of the many prominent economists who shared their creed – of competition as a wasteful process, as well as from the support for Taylorist criteria of industrial organization, also viewed as indispensable for raising the efficiency of production processes (see Leonard 2006). The alternative position was held by those economists, like John Bates Clark, who believed that competition – that is, price rivalry – was always beneficial, provided it obeyed some rules.[5] Starting from the belief that trusts were often "natural", Clark distinguished between actual and potential competition and argued that the latter might always exist, even with respect to trusts and monopolies.[6] Hence, markets had to be regulated in order to prevent trusts from exploiting their power by implementing some kinds of business conduct capable of impeding both actual and potential competition. The latter view, which Clark articulated since the late 19th century (see e.g. Clark 1890, 225-227), was to become one of the leading principles of modern antitrust law.

As to the Sherman Act itself, several scholars have underlined that many heterogeneous goals led to its approval.[7] Modern economists have learned to consider the Act's goal as promoting and preserving competition as *conduct* – the "promotion" of independent business decisions being ensured by the Act's §1 (restraints of trade) and the "preservation" of the possibility of entry being defended by its §2 (monopolization). Yet, this was hardly the aim of US Congressmen debating the Act in 1890, and neither was the pure and simple intention to further consumer welfare.[8] Their true goals ranged from the extension to consumers of recent technology gains to the protection of small business, from the "cover up" of the subsequent McKinley Tariff to the dispersal of excessive economic (and, possibly, also political) power, and even Sherman's personal revenge against Russel Alger, the man who had spoiled his 1888 presidential ambitions and who also happened to be the head of the match trust! In modern economic jargon, such a multiplicity of intentions followed from

[4] Note that the kind of efficiency they were talking about was productive efficiency, rather than allocative efficiency: see Scherer 1990, 247.
[5] On the various notions of competition of late 19th-century US economists, see Morgan 1993.
[6] To Clark's view, <<…potential competition is that which would develop if monopolies actually used their economic power to raise prices much above the competitive level.>> (Fiorito & Henry 2005, 5).
[7] See e.g. Martin 2007a; Peritz 1996, 13-26; Hazlett 1992; Bradley 1990.
[8] As claimed by Robert Bork: <<The legislative history of the Sherman Act […] displays the clear and exclusive policy intention of promoting consumer welfare.>> (Bork 1978, 61; also see ibid., 62-66).

Congress's failure to distinguish among three different notions of competition: competition as market structure, as conduct, as performance.[9] The very same confusion affected most of late 19th-century US economists, so much so that it is difficult to understand whether it was cause or effect of the economists' absence from the Congressional debate on the Sherman Act .

It was up to the Supreme Court to define more precisely the boundaries of the Sherman Act. In *Northern Securities* (1904), the Court formulated what Martin (2007a, 13-14) has called "the principle of competition", namely, the idea that with the Sherman Act the Congress had acknowledged that free competition was the most desirable mechanism for resource allocation in society. The principle's immediate implication is that anything directly interfering with the free working of competitive markets must be considered a restraint of trade and thereby be declared per se illegal. As the canonical narrative goes, the Court's view mirrored the big progress achieved by theoretical economics during the two decades after the Act's approval. In short, those economists who in 1890 were unready to contribute to the legislative process because of their lack of a sound theory of competition and allocative efficiency, did have such a theory in the early years of the new century and could therefore influence the Supreme Court's views.

The most important Supreme Court ruling of the early years of the Sherman Act is the *Standard Oil* (1911) ruling. This case has had tremendous consequences on antitrust history, including the official entry of professional economists in the field. Among the enduring marks left by this decision, feature the first application of the market share criterion to assess the extent of monopoly power and, above all, the establishment of the *rule of reason*, i.e., of a case-by-case evaluation of business conduct, as the basic method of antitrust analysis.[10] The new criterion was immediately read as a softening of the Sherman Act rules. This ignited a strong reaction in American politics: antitrust became a major issue in 1912 presidential elections, while Congress approved in 1914 two new statutes, the Clayton Act and the Federal Trade Commission (FTC) Act, with the specific goal of strengthening competition policy. Remarkably, economists were to play a major role in the process leading to the new legislation.

The standard story tells us that the 1910s were the decade when economists eventually got caught by antitrust issues. The main reason was once again purely theoretical, namely, the advances in market and price theory which had brought neoclassical economists to focus on market power, rather than size or technological efficiency (Stigler 1982).[11]

[9] Indeed, the word "competition" is never mentioned in the Act.
[10] See 221 US 1 at 58 and 62; Kovacic & Shapiro 2000.
[11] For a partially different reconstruction see Mayhew 1998, 187 ff.

A crucial role was played once more by John Bates Clark who, in a famous 1911 testimony in Congress[12] and then in the second edition of *The Control of Trusts* (1912; written in collaboration with his son, John Maurice), partially reneged his early views and concluded that, since *potential* competition could no longer be trusted as an effective check to monopoly behavior, it was up to the lawmaker to actively promote *actual* competition. This should be done by preventing big firms from interfering with their rivals' ability to compete, i.e., by either prohibiting or regulating all forms of anti-competitive behavior. Clark also added that, whenever no such interference existed, it should be left to the free play of market forces to determine success and failure in the marketplace.

The standard narrative highlights the economists' influence in the process leading to the 1914 approval of the Clayton and FTC Acts. Indeed, Clark's suggestion that some business behaviors be listed as illegal was accepted: the Clayton Act contains an explicit prohibition of price discrimination (§2), tying, exclusive dealing and requirement contracts (§3), and merges carried out by financial manipulations (so-called covert mergers: §7).[13] Even more remarkably, with the Clayton Act Congress embraced a more specific notion of competition and antitrust – specifically, a conduct-based notion. The goal of antitrust became defending competitive behavior by either limiting or prohibiting all kinds of anti-competitive conduct.

The end of WWI brought a new attitude towards market processes. The 1920s and early 1930s were the era of the so-called associationalist vision of business-government relations (Kovacic & Shapiro 2000, 46). Competition was again deemed a wasteful method of resource allocation, surely inferior to cartels and trade associations. In the aftermath of the 1929 crisis, business agreements between rival firms, especially price agreements, became even more attractive: curbing competition was seen as a way to contrast price deflation and thus help a quicker recovery from the depression. In 1933 the National Industry Recovery Act (NIRA) authorized trade associations to codify "fair" competition rules, thereby implicitly authorizing price-fixing and other forms of anti-competitive behavior. More generally, it was claimed from various quarters that US antitrust legislation should be suspended and replaced by a more European approach to cartels, i.e., by an antitrust policy based on the bureaucratic control of abuses, rather than on judicial prohibitions (see below, §3). Finally, the associationalist vision also led to an infatuation with planning. Both direct and indirect government intervention in the economy were deemed necessary for the correct functioning and development of the US economy via a coordination of production and consumption decisions.[14]

It is hardly surprising that even the new piece of antitrust legislation, the 1936 Robinson – Patnam Act, reflected the new climate towards market processes. The Act's overall goal was clearly

[12] On which see Fiorito & Henry 2005.
[13] On Clark's influence on the Clayton Act also see Dorfman 1971.
[14] See Balisciano 1998, 155-169; Barber 1985. The 1931 Swope Plan was paradigmatic in this respect.

protectionist, namely, to defend small business – especially, small shops – from the competition of big ones – especially, retail chains. By negating the general idea of competition on the merits, such a goal openly contradicted the Supreme Court's principle of competition. Indeed, the Court itself seemed to conform to the new *zeitgeist*. A series of rulings (like *US Steel* 1920 and *Appalachian Coals* 1933) significantly restricted the application of the Sherman Act, via either the acquittal of market leaders enjoying a dominant position or the clearance of explicit inter-firms agreements aimed at output restriction. To top all that, no real antitrust activity was brought forward by the FTC in its first two decades of life. Hence, it is easy to understand why the years from 1920 to 1936 are generally considered "the era of neglect" for US antitrust.

What was the US economists' role in the period? Once more, the canonical narrative claims that they played a big part and, remarkably, that they did so by fielding on both sides. Several leading economists, such as Rexford Tugwell, Paul Homan, Adolph Berle and Gardiner Means, shared some form or another of the associationalist vision and of its implications, including the desirability of government planning. They acknowledged the inevitability of big business and thus supported both a wider use of administrative regulations and a more frequent recourse to concerted action between rival firms. Significantly, they all believed that traditional antitrust was outmoded, and possibly even deleterious in that particular economic situation.

Yet, the majority of the economics profession did not share those anti-competition, pro-planning beliefs. Their reaction materialized in 1932, when the American Economic Review published a statement signed by 127 economists, under the leadership of Frank Fetter. The statement turned the associationalist argument on its head and claimed that, far from promoting a more rapid economic recovery, cartels, trade associations and unabashed market power were among the culprit for the persistence of economic crisis: <<…the most competent economic opinion […] can be cited in support of the view that a strong contributing cause of the unparalleled severity of the present depression was the greatly increased extent of monopolistic control of commodity prices.>> (Fetter et al. 1932, 467). Policy measures aimed at the restoration of competitive market conditions were openly endorsed, first and foremost antitrust law. Thus, it may well be argued that the US economists' attitude towards the Sherman Act became much more sympathetic precisely as a reaction against all those initiatives, like the NIRA, which threatened to undermine the traditional, free-market structure of American economy.

That the associationalist menace was indeed felt as really serious is also demonstrated by the circumstance that even one of the champions of the old Chicago school, Henry C. Simons, did not refrain from calling the policy-maker to intervene in the market in order to preserve competitive conditions: <<The representation of laissez faire as merely do-nothing policy is unfortunate and

misleading. It is an obvious responsibility of the state under this policy to maintain the kind of legal and institutional framework within which competition can function effectively as an agency of control.>> (Simons 1948 [1934], 42). This led him to champion an active control over both business size and industry structure.[15] Simons's emphasis on structural features bears witness to the strength of the reaction in defense of competition and shows that the pendulum of antitrust enforcement was about to swing in a different – and tougher – direction with respect to J.B. Clark's conduct-based approach.

In 1935, the Supreme Court canceled the NIRA. This event marked a dramatic shift in Roosevelt administration's approach to economic matters (so-called Second New Deal). The new agenda included the rehabilitation of competition as the key for economic prosperity, as testified by the 1938 appointment of Thurman Arnold as head of the Department of Justice antitrust division with a clear mandate to pursue an aggressive antitrust policy (Mayhew 1998, 197). The swing was capped by the Supreme Court's effective revitalization of the Sherman Act via the introduction of new per se prohibitions in rulings such as *Interstate Circuit* (1939) and *Socony Vacuum* (1940). In short, starting from the mid-1930s a favorable combination of events led to the resurgence of antitrust in the US, thereby opening an era of aggressive contrast against monopolization and restraints of trade that was to last until the 1970s.

Once again, it is easy to remark that the 1930s were the very same years when new models of imperfect and monopolistic competition were proposed and, above all, the new structure-conduct-performance (SCP) approach was developed in Edward Mason's Harvard seminar.[16] As is well known, the SCP approach – which predicted anticompetitive outcomes as an inevitable consequence of non-perfectly competitive market structures – was to dominate industrial economics from the late 1930s to the early 1970s. From here it is just a small step to conclude that the remarkable and ever increasing consistency which for more than thirty years existed on competition matters between judicial decisions and economic thinking was achieved through the latter's influence on the former.[17] Exactly as dictated by the SCP approach, the focus in antitrust law shifted from conduct to market structure, while typical SCP notions like market shares and the various indexes of concentration became the basic tool of judicial analysis. Even Congress seemed to embrace the new approach. The 1950 Celler-Kefauver Act amended §7 of the Clayton Act by extending the discipline of merger controls to cases of asset consolidation short of full market dominance. The Act, which epitomized a market-share based, structuralist view of competition, is a

[15] See e.g. Simons 1948 [1934], 59; 1936, 70-71. On Simons's antitrust views, see de Long 1990.
[16] Mason 1939 is traditionally considered the manifesto of the SCP approach.
[17] See Kovacic and Shapiro 2000, 51-52

landmark in antitrust history, a perfect representative of the new philosophy of proactive control of market structure (Martin 2007a, 39).

The zenith of SCP-style antitrust law came in the 1960s. Three key rulings – *Brown Shoe* (1962), *Philadelphia National Bank* (1963), *Von's Grocery* (1966) – testified the Supreme Court's turn towards structuralism. At the heart of the Court's evaluation were market shares, their history and future, as well as their effect on market structure. As Congress itself had sanctioned with the Celler-Kefauver Act, the Court needed nothing else than market shares – and only economic analysis could provide the "technology" to handle them. The measure of success of the structuralist approach is given by the various dissolution proposals, like the Hart Bill, aimed at breaking up those industrial giants which had until then eluded antitrust law. Among the supporters of these deconcentration measures, together with the likes of Carl Kaysen and Donald Turner,[18] featured no less than George Stigler (Stigler 1952), a sign of how SCP had captured even the staunchest free-marketeers!

As it had already happened in the 1930s, the antitrust pendulum had swung too much. The time was ripe for its coming back to a more balanced position. The reaction against the excesses of structuralism again came – so the standard story goes – from the economists' community, or, more precisely, from one of its most influential sub-groups, the Chicago school. The Chicago counterrevolution in antitrust was founded on four pillars. First of all, a theoretical pillar, the so-called tight prior equilibrium, or "good approximation", hypothesis, i.e., the idea that any economic system exhibits a spontaneous tendency to reach a situation of Pareto-optimal equilibrium provided it is not disturbed by exogenous interferences, like those by government, antitrust authorities or courts (Reder 1982). Secondly, an empirical pillar. According to Chicago economists, the data and observations used to found and validate the SCP approach were simply wrong: for example, the structuralist claim that the causation went from the number of firms in a market to profit level had actually to be reversed since only the most efficient, i.e., most profitable, firms were those capable of surviving competition. The third pillar concerned how to evaluate competition and explain business conduct. Given that Pareto-optimality was the "natural" situation of markets, efficiency explanations of business behavior had to be privileged with respect to market power ones. Two corollaries followed. First, the focus of antitrust analysis should be on market performance, as well as on the conduct determining it, while the structuralist viewpoint had to be abandoned. Second, the measure of market performance had to be consumer welfare (<<…the only legitimate goal of antitrust…>> in the words of Bork 1978, 7), though it is easy to show that what Chicagoans really had in mind was not consumer welfare but *total* welfare, inclusive, that is to say, of producer

[18] Authors of the leading antitrust textbook of the time (Kaysen & Turner 1959).

surplus.[19] The fourth and final pillar was pragmatic (one might say, rhetoric): the special ability of Chicago scholars to translate their economic arguments into operational principles which courts and lawyers might easily understand and apply.

The combination of the four pillars proved irresistible. Starting from the early 1970s, and reaching their maximum influence about a decade later, Chicago arguments conquered US courts and, eventually, the Supreme Court. The pivotal event was the 1977 *GTE Sylvania* ruling,[20] when the Court rigorously applied a Chicago-style economic argument to overrule the previous per se prohibition of restrictive distribution practices and bring non-price vertical restraints back to the rule-of-reason realm. The general lesson of *GTE Sylvania* was simple, but epoch-making: reliance on competition (read: a competitive market structure) to deliver good market performance had to be abandoned and replaced by a case-by-case evaluation of the net welfare impact of every single business practice. Many other rulings, covering the other areas of antitrust, from collusion to dominance, from mergers to predatory pricing, followed and consolidated this crucial principle.

At the end of the 1980s Chicago economists could well be satisfied: several business conducts had been declared per se *legal*, while a case-by-case evaluation was warranted for almost all the remaining types of behavior. Once again, a revolution in economic thought had caused a major swing in antitrust law. But: was it really a revolution, in the first place? Indeed, the extent of Chicago success in the field of antitrust is puzzling if we only consider that Chicago views have never achieved the same success in economics[21] and that the mid-1980s rise to dominance in industrial economics of game-theoretic methods has led to what is customarily called a *post-Chicago* approach to antitrust. Yet, for the last three decades legal scholars have considered Chicago views as representative of the *whole* economists' community – and they still do, as is testified by the several US courts which continue to endorse a static, non-strategic view of markets.[22] How to explain this? Was it all due to Chicago rhetorical ability? An alternative answer is given in the next section, namely, that the endorsement by US courts and legal scholars of Chicago economic theory has been just instrumental to the prevalence, and consolidation, of one of the two contrasting views of antitrust that have been facing each other since 1890 within the American legal community. Remarkably, the very same answer may also help explain the other periods, and the swings between them, of US antitrust history.

[19] See Martin 2007a, 45-46.

[20] Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[21] This point is forcefully made by Martin 2007, 2007a.

[22] For a couple of instances (like *Kodak* 1992) where the Supreme Court has followed a post-Chicago rationale in its decisions see Page 2007, 24-25, who whoever underlines that these rulings have had limited effects on lower courts and that the Court itself has quickly returned to a Chicago-style way of reasoning.

The goal of the present section has been to sketch the economists' canonical narrative of American antitrust law and policy. This story bears strong support to the opinion which considers economic ideas – some would say, ideology[23] – the main engine behind antitrust steady evolution and occasional U-turns. Those sharing a more Whiggish inclination in historical reconstructions might even ignore all the ebbs and flows of the almost twelve decades of US antitrust and draw the general conclusion that such a history offers a perfect, handbook example of an economics-driven progress from darkness to light, from ignorance to science.[24] However, a different narrative is possible, one that places more emphasis on strictly legal arguments (and their ideological underpinnings, too) and on the temporary prevalence of one or the other of the two general – i.e., not strictly economic – meanings of the word "competition".

§2. A counter-history of US antitrust

The principle of competition, affirmed by the Supreme Court in *Northern Securities* (1904), states that free competition is the most desirable mechanism for resource allocation. The principle has been the leading light for the next 100 years of US antritrust. Yet, we can follow Peritz (1990, 264) and ask what is "free competition". More specifically, "free" from what? Two answers are possible: either that competition should be set free from *government* power or that it should be freed from *market* power. These solutions mirror what Page (2007, 2-3) has called the two ideologies of the market.[25]

The first is the *evolutionary* vision: the market is a mechanism, framed by legal rules of property and contract, for facilitating free exchanges among individuals, each pursuing her best interest. The outcome of market processes – *any* outcome – is basically legitimate and unintended by any individual agent. Monopolies do exist, but they are rare and, provided they are not created and sustained by some form of legal privilege, they tend to be eliminated by market forces. Hence, government interference in the market should only be of a negative kind, namely, be limited to removing obstructions to the unfettered working of market forces, in particular the freedom to contract. The second is the *intentional* vision: the market is a mechanism almost always affected by

[23] Cf. Martin 2007, 45-46; Page 2007.
[24] Somehow more extremely, it has even been claimed that much of recent industrial economics is demand-driven – the demand being that of the parties involved in antitrust litigations for theories supporting the favored court outcomes (Kovacic 1992, 296). Hence, <<[t]he economist's research and publications become vehicles for advertising positions that the economist will endorse for litigants in antitrust cases.>> (ibid., 297, fn.9). In such a view courts (and Congress as well) are confined to the improbable role of passive recipients of *à la carte* economic theories.
[25] Where by the term "ideology" we mean any non-scientific <<…system of beliefs that shapes perceptions of social policy…>> (Page 2007, 2).

the presence of powerful interests which may coerce powerless agents, such as consumers, workers and small business. Monopolies are the inevitable outcome of real world market structures. Hence, the outcome of market processes can and should be corrected by government interventions, which may take the form of regulation, prohibitions and even forced divestures.

This dichotomy effectively captures the US economists' different attitudes towards antitrust law and policy, Chicago being closer to the pure evolutionary vision and Harvard being sympathetic with the intentional one. Such an easy matching naturally leads to the narrative of the previous §, that is to say, an antitrust history focusing almost exclusively on the chronology of economic theories, on the latter's influence upon competition law and on the normative implications thereof. In short, a history of how economics has affected, either directly or indirectly, both the legislative and the judiciary, by swinging the pendulum between the two poles of per se prohibitions and the rule of reason, i.e., between a stricter and a looser application of the "principle of competition".

It is precisely here that Rudolph Peritz's counter-history of antitrust comes into play.[26] According to Peritz, the standard, economics-centered narrative suffers from several limitations on account of its relative neglect of purely legal issues. For example, the fact that the rule of reason has always represented an open-ended and basically inconsistent notion in Supreme Court's jurisprudence is a very well-known feature for legal scholars which has been overlooked by antitrust historians. Indeed, a full comprehension of the Court's application of the rule of reason often requires that secondary policy goals and implications, different from those related to the principle of competition, be taken into account. As a second example, Peritz mentions the customary, but historically groundless, idea that free competition has always represented the sole normative benchmark for competition law. This is related to a third limitation of the traditional narrative, namely, the habit of conflating competition with neoclassical price theory, and, consequently, competition policy with the latter's logical structure and results. As noted above, this is too restricted a representation of 20th-century economics. Peritz shows that an alternative logical structure and normative ground for antitrust have always existed and been highly influential on both the US Congress and the Supreme Court.

Let's go back to the dichotomy between two kinds of freedom: freedom from government power and freedom from market power. It is customary to read the principle of competition as synonymous of the latter. The underlying logical structure is that of the market as ideally atomistic and anonymous, were it not for the presence of agglomerates of *power*, i.e., monopolies and oligopolies. It follows that the normative impulse behind antitrust law must be towards the promotion and preservation of atomistic competition among powerless agents, i.e., towards the

[26] See Peritz 1990; 1996.

implementation of *equality* in the marketplace. Alternatively, it is possible to read the principle of competition as freedom from government power. This requires that we modify both the logical structure and the normative impulse. In the new logical structure the market is characterized by the agents' *freedom to contract* and to exploit their property rights. Such a freedom would be complete were it not for government interferences. The normative impulse behind antitrust law must now be towards the promotion and preservation of individual property rights, i.e., towards the implementation of *individual liberty* in the marketplace. While the traditional narrative of US antitrust history has conflated the principle of competition with freedom from market power, Peritz argues that such a history may be more satisfactorily described in terms of a permanent tension between the two logical catchwords of power and contract, or, equivalently, between the two normative goals of atomistic competition and property rights (Peritz 1990, 265).

The tension between an intentional competition policy and an evolutionary defense of property rights is indeed perennial in US antitrust history. Each of its different phases (see above, §1) may in fact be explained – especially as far as the Supreme Court's jurisprudence is concerned – in terms of this tension, of the ensuing disagreement over the goals and the limits of antitrust law, and of the temporary prevalence of one vision or the other. And while there seems to be no real conflict between the two normative goals – the defense of property rights being the obvious necessary condition for the existence of competitive markets – it is quite easy to show that such a conflict did, and does, exist.

Consider for instance the theme of "fair profit". Looking at the Congressional debate on the Sherman Act (1888-1890), Peritz shows that the idea that competition might eventually destroy a very specific individual right, namely, the common-law-based "right to earn a profit" from one's own business, was a persuasive argument which led to the eventual correction of the Act's actual wording – in particular, to the otherwise inexplicable elimination of Senator Sherman's original reference to "full and free competition".[27] Almost 90 years later, the same tension would arise in the Supreme Court's assessment of *GTE Sylvania*. Rather than representing the triumph of Chicago-style efficiency economics, the anti-free-riding rationale of such a landmark ruling descended from the Court's acknowledgment of the retailer's "right to earn a profit" from its promotional activity and after-sale services, and, consequently, of the legitimacy of the manufacturer's efforts to protect such a right via the imposition of vertical restraints aimed at avoiding its infringement by the retailer's free-riding rivals.

Reading antitrust history through the lenses of Peritz's "competition versus property rights" dichotomy has momentous consequences. First, the evolution of neoclassical price theory and of the

[27] See above, fn.9.

welfare maximization logic ceases to be the privileged explanation of the different phases of antitrust law and policy. Second, we may gain a different perspective of those so-called "anti-competitive" impulses – such as the concern for scale economies or for distributional issues or for the survival of small business – which have always been present in antitrust debates, but which have also been almost invariably considered undeserving of real attention by antitrust historians on account of their being based on non-economic – i.e., non-price theoretical – arguments. It turns out that several of those impulses have just been the outcome of the permanent tension between promoting competition and defending property rights.[28]

Among the modern cases Peritz considers exemplary of the "competition versus property rights" dichotomy, one deserves particular attention because of its close resemblance with *Grundig*, the first big antitrust case dealt with by the European Court of Justice (see below, §6). In *Broadcast Music Inc.* (*BMI*, 1979)[29] the Supreme Court applied a property rights rhetoric to absolve the defendants of one of antitrust's gravest sins, i.e., price-fixing among competitors. The plaintiff CBS had argued that the bundling of copyrighted musical compositions into indivisible blocks (so-called blanket licenses) by BMI and ASCAP, the two dominant firms in the business of music licensing, constituted illegal price fixing. Applying the rule of reason, rather than a per se logic, to a price-fixing case, the Court's majority referred to a classic antitrust case, *Appalachian Coals* (1933), where the acquittal verdict had been motivated on the grounds that, in a situation of industry distress like that following the Depression, the preservation of the economic value of the defendants' business (i.e., the value of their property rights) deserved to prevail over the defense of free competition. In *BMI* the Court followed a similar reasoning and held that blanket licenses did not constitute an unreasonable restraint of trade because they enabled the copyright holders to enforce their property rights under the 1976 Copyright Act. Absent the license system, the rights would be subject to multiple use even without the owner's knowledge and this would clearly deprive her of the possibility to earn a remuneration from the use of her property.

The property rights logic also supported a second argument in favor of the blanket license system. The Court characterized the repertoire of music created by the blanket license as an entirely different product, of which the individual compositions were just the inputs. This gave rise to a brand new property right independent of, and additional to, the statutory copyright entitlements. Hence, no restraint among competing composers originated from the license agreement in the first

[28] Peritz's dichotomy is not entirely alien to some of the best narratives of US antitrust history. Take e.g. Martin's 2007a survey. While emphasizing J.B. Clark's role in the process leading to the Clayton Act, Martin also recognizes that the new Congressional approach to antitrust was founded on a legal, rather than economic, argument which turned upon the necessity to reconcile the two contrasting goals of protecting property rights and dissolving market power.

[29] Broadcast Music Inc. v. CBS, 441 U.S. 1 (1979). Here I follow Peritz 1996, 255-256.

place, since the bundled music was new property owned by a new owner, the licensing agencies BMI and ASCAP.

The tension between these arguments and the traditional competition rhetoric is testified by Justice Stevens's dissenting opinion. Stevens claimed that the blanket license created neither a new product nor new owners, as it was just the tying together of old products augmented by an agreement illegally restraining competition among the products' individual owners. Yet, even the dissenter agreed that this form of price fixing should not be treated as per se illegal and deserved a rule of reason scrutiny. Hence, the *whole* Court believed that in such a case only the rule of reason might warrant the required balancing of the two opposing commitments to competition and property rights. Of course, Stevens insisted that competition law required the Court to strictly limit the value of copyrights to nothing more than the statutory monopoly privileges, i.e., what the individual holder might obtain under the Copyright Act. The bottom line of this reasoning was that the statutory entitlement of copyright holders need be assessed within the larger context of competition policy. The holders' freedom to contract could therefore be limited in view of the superior benefits of avoiding anti-competitive agreements. This was exactly the case with blanket licenses which, according to Stevens, produced so large a negative effect, in terms of higher prices and harms to non-participating composers, that it far exceeded the value of the statutory privileges granted to copyright owners.

Two lessons may be drawn from *BMI*. First, both opinions turned on the allocation and extent of property rights, rather than on some more or less refined price-theoretical model. This is a feature that is usually neglected in economists' analysis of antitrust cases, and even more so in historical reconstructions. Second, no clear cut conclusion may be drawn by merely looking at the allocation and extent of property rights since both answers, the Court's majority and Stevens's dissent, were plausible and convincing. Hence, a second element must be called into play and this cannot be other than an "ideological" feature, that is to say, each Justice's inclination towards one or the other of the two poles of Peritz's dichotomy. It is time to ask whether these two lessons and, more generally, the same dichotomy may apply to the history of European antitrust law.

§3. Importing a legal tradition: the canonical narrative of postwar European antitrust

The received version of the history of antitrust law in Europe goes as follows.[30] Before WWII, European economists and policy-makers shared two common wisdoms. First, that, due to the Old

[30] See e.g. Martin 2004; Djelic 2002, 2005; Gerber 1998; Thorelli 1959.

Continent's tradition of government interference in the economy, the main goal of competition and free trade policies had to be the protection of business from government, rather than market, power. Second, that competition itself was a wasteful and chaotic process and that there existed other, more efficient systems of resource allocation in society, such as cartels, government-driven business coordination and planning (the latter having been partially adopted by several European countries during WWI). The combination of these two, seemingly inconsistent, beliefs produced a specific European approach to competition law, which began to spread during the interwar years, following intense legal and academic debates on the pros and cons of cartelization, and then rose to dominance immediately after WWII, when several of the same scholars involved in prewar discussions came to occupy key positions in European governments, judicial systems or administrations. The approach consisted of the two pillars of publicity and administrative controls. Cartels and trade-restraining agreements were not per se illegal; indeed, they could well be allowed, provided, first, that they had been made public and, second, that the government bureaucrats in the Cartel Office monitoring their impact on market performance detected no abuse of market power – the term "abuse" being taken quite loosely as synonymous with "contrary to public interest" and concretely applied in different ways depending on the given circumstances.

The gap between the European system and US antitrust law could hardly be wider. As we know (see §1), post-1914 competition law in the US had somehow overcome the ambiguity of the Sherman Act by clearly embracing an *ex-ante, judicially-enforced, conduct-based, prohibition approach*. No European country followed the US either before or after WWII. Indeed, with the only remarkable exception of Germany (see next §), they all embraced some form or another of an *ex-post*, *administratively-enforced*, *performance-based, abuse approach*. In view of the movable definition of the key notion of "abuse", the European system granted a large amount of discretion to its enforcers, including, as it happened, the possibility of a very soft, politically-negotiated application of anti-abuse rules.

That this was the approach most compatible with Europe's *zeitgeist* may be appreciated by looking at the 1930 resolution on the control of international trusts and cartels adopted by the Inter-Parliamentary Union (IPU). In the resolution we read that <<…cartels, trusts and other analogous combines are natural phenomena of economic life towards which it is impossible to adopt an entirely negative attitude.>> However, since <<…those combines may have a harmful effect both as regards public interests and those of the State…>>, it is deemed <<…necessary that they should be controlled.>>. Yet the control should just seek to <<…establish a supervision over possible abuses and to prevent those abuses.>>. As a means to fighting the abuses and allowing control, a publicity regime should be adopted, requiring <<…cartels and similar combines to announce their existence and to register in the books of the State.>>. For the supervision of registered cartels each State should create <<…a Committee on Trusts and Cartels…>> which <<should be entitled to institute proceedings for the punishment of abuses and in certain cases obtain that treaties should be declared void before the competent courts.>> (IPU 1931). This was precisely what most European countries did, or had already done, as the combination of vague rules, discretionary use of administrative power and soft enforcement envisioned by the IPU resolution suited Europe's taste for competition.

While there is a consensus among historians that such a reconstruction faithfully describes the evolution of European competition law in the first half of the 20th-century, a key, though very simple, question remains unanswered. Given that European countries followed an abuse-based approach to competition, how could it happen that in their first institutional experience of economic integration, namely, the European Community for Steel and Carbon (ECSC), the founding countries adopted a prohibition-based antitrust law? The ECSC, established with the 1951 Treaty of Paris, has been the forerunner of the European Community, which was born just six years later. Thus, the question gains even more importance, on account of the fact that the ECSC rules on competition have been the blueprint for the antitrust articles of the 1957 Treaty of Rome, i.e., for the very rules which for the last half century have been governing European competition policy at both the Community and, since the mid-1980s, the national level.

The standard answer may be dubbed "the Americanization of European antitrust". According to it, the prohibition approach to competition first entered Europe with the 1947 law imposed by the US Military Government to achieve the decartelization and deconcentration of German industry. The law reflected the tradition of American antitrust, at least as far as the prohibition of cartels, trusts and restrictive practices was concerned. The new approach gained further strength with the beginning of the Cold War, as the US government changed its plans about the future of the German economy. In view of the Communist challenge, Germany's industrial structure had to be preserved as much as possible. Yet, at the same time, an institutional framework had to be created to ensure that Germany itself would never again threaten its Western European neighbors. The solution to reconcile these two conflicting goals was found in exporting to Europe in general, and to Germany in particular, the American economic model. A model which, under the general belief in the superiority of the free market system, was concretely based on an oligopolistic, rather than perfectly competitive, market structure, with firms large enough to exploit the gains of size and technological efficiency but, at the same time, unable to undertake anti-competitive conducts due to the aggressive enforcement of strong antitrust rules. The combination "oligopoly plus strong antitrust" – which effectively captures the reality of US postwar economy as shaped by business history, on the one side, and the SCP-style Supreme Court interpretation of competition law (see above, §1), on the other – was the explicit benchmark for the German economy set by the US Office of Military Government for Germany (OMGUS).[31]

The canonical narrative goes on describing the two fights that the US government had to win to impose this benchmark first in Germany and then in Europe. The German battle ended only in 1957, after ten years of controversy and resistance,[32] with the approval of the Federal Antitrust Law which basically embraced an American-style prohibition approach. The European battle was quicker, but even more complicated. The standard story begins with the 1950 Schuman Plan, whose goal was the achievement of European integration via the preliminary integration of Europe's coal and steel markets. Then it calls into play the role of the few, but very well connected, European individuals, like Jean Monnet and Ludwig Erhard, who supported an American approach to antitrust. A fundamental congruency existed between the US and France during the negotiation phase of the ECSC Treaty (Lovett 1996): the former's intention to decartelize the German industry suited the latter's desire to favor French firms by getting rid of Germany's vertically-integrated – and highly efficient – coal and steel complexes. Add to this the US government's fear that the ECSC project might favor a European-wide cartel in such a key, and politically sensible, pair of industries:[33] this provided an additional motive for the Americans to increase the pressure towards the addition of explicit antitrust measures. The story has a happy end, though, in that after months of struggles and negotiations some competition rules were eventually added to the ECSC Treaty. Indeed, the relevant articles were drafted by Harvard Law School professor and antitrust specialist Robert Bowie, who had been "borrowed" by Jean Monnet for this task from his job as legal counsel of John McCloy, the US High Commissioner for Germany. Being based on the prohibition approach, these rules did represent a drastic innovation in European antitrust history, as well as a clear sign of the American influence on it.

The main provisions were contained in Articles 65 and 66.[34] Article 65 prohibited all kinds of agreements, combines and concerted practices which might allow firms to <<…prevent, restrict or impede the normal operation of competition within the common market.>> (Treaty of Paris, Art.65.1). Exceptions were however allowed, conditionally on the agreement being both capable of and necessary to improve market performance, as well as incapable of conferring excessive power to its participants (Art.65.2). Article 66 imposed that any merger or other concentration of market

[31] In an OMGUS document we read that <<…oligopolies, when policed by the vigorous enforcement of antitrust and anticartel laws as in the United States, yield pretty good results.>> (quoted by Djelic 2005, 59).

[32] On which see Gerber 1998, Ch.8.

[33] This was indeed the implication of the initial proposal discussed at the ECSC conference, according to which the prices of coal and steel had to be fixed by national governments and producers' association: see Witschke 2001, 7.

[34] Note however that other articles dealt more or less directly with competition issues, such as Article 60 which forbade unfair practices, like predatory or discriminatory pricing.

power be authorized by the ECSC High Authority, though the authorization could be denied only when the merger or concentration led to "excessive" market power. Note that in the language of US antitrust law, the latter provision may be paraphrased as saying that only "unreasonable" mergers and concentrations had to be forbidden. Hence, Article 66 effectively established an anti-abuse principle, rather than a per se prohibition.[35] Yet, this was precisely the way US Supreme Court had until then dealt with merger and concentration cases, so much so that even this article looked fully consistent with American antitrust tradition.

Thus, it seems legitimate to conclude that with the Treaty of Paris a brand new antitrust tradition, based on the prohibition, rather than the abuse, approach, entered Europe. That it was the outcome of a political, more than economic, logic, or that it aimed at a peculiar mix of "oligopoly plus strong antitrust", rather than at the neoclassical ideal of perfect competition, should not conceal the fact that this new tradition, and the EEC antitrust rules which were soon to originate from it, wore Stars & Stripes on their sleeves.

Against this canonical narrative, David Gerber has proposed an alternative story, which places more emphasis on Europe's interwar tradition of antitrust policy, while at the same time downplaying the American influence.[36] A key question left unanswered is for instance why the Germans accepted the ECSC and, later, EEC competition rules. Obviously, they found a big incentive in the US occupation authorities' promise to relinquish their regulatory competence over the German steel industry in case the ECSC did come to life.[37] Yet, Gerber underlines that the common "philosophical" background of the German negotiators and policy-makers must have been at least as important. Remarkably, this shared background happened to be the Freiburg School's Ordoliberalism – a school of thought that, though dating back to the interwar years, became after 1945 the main intellectual force shaping Germany's economic constitution and policy-making.

The leading figure in the German delegation at the ECSC negotiation was in fact Walter Hallstein, a keen supporter of ordoliberal ideas and, later, the first President of the European Commission. Moreover, Germany's Economics Minister at the time was Ludwig Erhard, who also headed an informal group of lawyers and economists – the so-called "social market economy group" – which largely shared ordoliberal views on several issues, including competition policy. Just one year before the beginning of ECSC talks, Erhard had been presented the first draft of Germany's

[35] For the details of the negotiations leading to the approval of Article 66, including the replacement of an earlier draft, which included a stricter, per se prohibition rule, with the final, softer, version, see Witschke 2001, 7-18.
[36] A third reconstruction is that by Witschke 2001, who has used archival sources to show that the driving force behind the ECSC competition rules was the struggle between France and Germany to protect national coal and steel industries. Witschke also agrees that American antitrust tradition – as different from American geo-strategic interests – had little to do with that struggle, if only because, as far as mergers (the topic of ECSC Article 66) were concerned, US competition law was at the time still in the pre-Celler-Kefauver Act era. Note however that, while Witschke's rebuttal of the canonical narrative is quite convincing, far less so is his quick denial of Gerber's alternative story (see ibid., 6).
[37] On the details of Germany's position during the ECSC negotiations, see again Lovett 1996.

competition law, which largely reflected the ordoliberal approach to antitrust. It seems therefore legitimate to argue that Germany's official position on the Treaty of Paris was, at least with respect to competition issues, significantly influenced by Ordoliberalism.[38] It is to this school of thought that we have to direct our attention in order to grasp the whole picture of the events and motivations leading to EEC antitrust law.

Before investigating the ordoliberal approach to competition, a few words may be of order about the next step in Europe's antitrust history, namely, the competition rules contained in the 1957 Treaty of Rome, if only because it is in relation to them that Gerber's argument on the decisive role played by the Old Continent's interwar antitrust tradition may be best appreciated. Gerber claims that EEC antitrust rules came out as a hardly fought compromise between the ordoliberal approach – embodied by Germany's Competition Law, also approved in 1957 – and the traditional administrative approach, supported by France and the other member countries. One of the EEC Treaty's general goals was, and still is, <<…the institution of a system ensuring that competition in the common market is not distorted.>> (Article 3.f). To accomplish it, the Treaty contains a number of provisions: Articles 85 and 86, which pertain to private restraints on competition, and Article 90, which relates to government interferences.[39] Hence, the Treaty explicitly deals with *both* kinds of interference on competition and freedom to trade, namely, market power and government power. More importantly, it does so at a "constitutional" level, i.e, by prescribing a few general principles, with no immediate practical applicability, rather than by imposing a set of ready-to-use administrative norms. This was another major innovation for Europe's antitrust policy, one of even greater import than the already-mentioned shift from abuse to prohibition. And still, both innovations were fully consistent with, and possibly inspired by, ordoliberal ideas.

More in detail, Article 85 follows the structure of Article 65 of the ECSC Treaty and forbids all kinds of agreements and concerted practices <<…which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market…>>. The Article also contains a list of instances of agreements that have been singled out as having such an anti-competitive effect. Yet, in the same spirit of ECSC Article 65.2, the third section of Article 85 allows the exemption from prohibition of those agreements which meet two criteria, namely, that of being productive of positive effects, in particular for consumers, as a consequence of the restraint (because, say, it helps exploit scale economies) and that of causing no unnecessary harm to the competitive process. Article 86 prohibits the abuse of a market-dominating position. No exemption is allowed. This article is more detailed than the "equivalent" Article 66 of the ECSC (for example, it includes specific instances of

[38] See Gerber 1998, 271-273.
[39] Again, I keep the articles' original numeration.

abusive conduct), but it does not contain an explicit merger control provision: this is one of the biggest differences between the ECSC and the EEC treaties.[40] This circumstance reinforces Gerber's argument because, if the canonical, American-centered narrative were correct, it would be curious that the specific area where the influence of US antitrust tradition should have been felt the most – i.e., the control on mergers and concentration where no European forerunners existed – would also turn out to be the one which simply *disappeared* in passing from the ECSC to the EEC.

§4. The Freiburg School and the constitutional dimension of competition law

Any history of European antitrust law failing to take into account the influence of Freiburg Ordoliberalism would be seriously incomplete. Indeed, such an omission would impair not only a faithful historical reconstruction, but also, and perhaps even more importantly, a full understanding of the driving forces behind the concrete application of competition rules by the EEC Commission and the Court of Justice. In particular, it would be impossible to tell whether, and to what extent, Peritz's dichotomy between competition and property rights – the perennial force pushing the legal pendulum of US antitrust – has also affected European competition law. This in turn would make it arbitrary any claim as to the relative weight of economic versus purely legal arguments in EEC antitrust cases, past and present.

So what was Ordoliberalism?[41] In brief, it was a school of thought which agreed with earlier conceptions of liberalism in considering a competitive economic system as necessary for a prosperous, free, and equitable society. Yet, its members were also convinced that such a society could only come into existence if the market were constrained by a "constitutional" framework aimed at protecting the process of competition from distortions and abuses, at warranting the equitable distribution of the benefits of the market, and at minimizing government intervention in the economy. This intertwining of legal and economic arguments was indeed typical of the Freiburg School of law and economics, from which Ordoliberalism originated.[42]

[40] The first such rule in the EEC dates to no earlier than 1989.
[41] The main reference here is Gerber 1998, Ch.7.
[42] Note that the term "Ordoliberalism" is typically applied to a broader set of ideas than those of the Freiburg School. For instance, authors like Wilhelm Röpke are usually considered ordoliberals, though they lacked direct connections with Freiburg. An even broader notion is that of "social market economy", a term coined in 1946 by Alfred Müller-Armack (see Goldschmidt 2004). Social market economy supporters – of whom Ludwig Erhard was the most famous – agreed on most points of ordoliberal economic policies, but placed greater emphasis on equity goals. Vanberg (2004, 2) argues that social market economy was outcome-oriented, while ordoliberalism was strictly procedural and rule-oriented. As a consequence, while ordoliberals believed that market order had an ethical value per se – namely, that of being a privilege-free order – the supporters of the social market economy viewed the market as simply the most efficient wealth-producing instrument, devoid of any inherent ethical quality. To turn the market into an ethical order, some supplementary policies were needed, in particular, social policies. The latter need not be constrained by market

The founding members of the Freiburg School were an economist, Walter Eucken, and two lawyers, Hans Grossman-Doerth and Franz Böhm.[43] Starting from the mid-1930s, the three became the leaders of a well-defined group of scholars who shared a basic set of objectives, methods and attitudes, and who constituted one of the few centers of intellectual opposition to the Nazi regime.[44] The latter feature proved crucial for the propagation of Freiburg ideas in post-WWII Germany. The first and foremost of these ideas was the belief that private economic power had been the main cause of Germany's economic and political disintegration during the interwar years. Hence, the ordoliberals' goal was to revive German people's faith in the market mechanism by turning it from a despised source of social division and inequality into a necessary tool for social integration. Necessary but, as already said, not sufficient: social integration could only be achieved by embedding the economy into a well-defined legal framework centered on competition law.

Freiburg scholars envisioned a society where democratic institutions warranted that individuals be free from both government and private power. The latter could be either political or economic. Hence, the necessity that freedom from government and political interference be complemented by freedom from private economic power. In other words, competition was deemed necessary for social well-being as much as democracy itself. While all this was well inside the classical liberal tradition, a first original element of Ordoliberalism came from the idea that a *strong state* be required in order to protect individuals from private economic power. By this expression ordoliberals meant neither an authoritarian nor a discretionary state, but rather a state which could resist the pressure of private power and interests. To foster such a resistance, governments' discretionality had to be constrained by a properly designed *legal framework*, or *constitution*, capable of preventing all kinds of rent-seeking activity (Vanberg 2004, 17). But even more necessary was the dispersion of private economic power in the first place. The instrument to do that was *competition*. As Böhm put it in 1960, <<…competition is by no means only an incentive mechanism but, first of all, an instrument for the deprivation of power […] the most magnificent and most ingenious instrument of deprivation of power in history.>>.[45] Yet, competition could fulfill its promise only within a legal framework created and maintained to protect its correct functioning. The economic and the legal sides were therefore necessarily interrelated in a properly working, prosperous society. This was the basic intuition behind the ordoliberals' call for the integration of legal and economic knowledge: law determined the rules of the economic game, so

order rules. Here, according to Vanberg, lay an important difference with respect to ordoliberals who stressed that no social provision should ever contradict the privilege-free nature of the market order.

[43] The three wrote the manifesto of Ordoliberalism in 1936: see Böhm, Eucken & Grossmann-Doerth 1989 [1936].

[44] On this aspect of Ordoliberalism, see Rieter & Schmolz 1993.

[45] Quoted by Vanberg 2004, 12. In terms of Page's distinction (see above, §2) ordoliberals clearly embraced an intentional vision of the market.

much so that it was simply impossible to understand economic processes without a comprehension of legal rules.

Eucken's specific methodological innovation was the so-called "thinking in orders" (*Denken in Ordnungen*), i.e., the idea that beneath the complexity and heterogeneity of the various economic systems some fundamental patterns – or *orders* – could be identified (Eucken 1992 [1939]). He claimed that recognizing these patterns was the only way to penetrate this complexity and understand the dynamics of economic phenomena. The two fundamental orders were, as Eucken called them, the "transaction economy" and the "centrally administered economy" (ibid.).[46] In the former, economic activity was driven by the free and independent decisions of private agents, each guided by her own incentives. In the latter, it was up to the government to organize and direct economic activity. The Freiburg School unanimously believed that, at least in the case of Germany, the transaction order was the best one for achieving economic prosperity.

A key principle of Eucken's "thinking in orders" was that all the elements constitutive of an order were mutually consistent and actually reinforced each other. It followed that "pure" economic orders could achieve a superior performance than real economic systems which were always "impure" due to the inevitable mixing of both orders' components – hence, the ordoliberals' refusal of any compromise in the construction of a transaction economy, in particular as far as the proper functioning of competitive markets was concerned. Indeed, competition turned out to be the essential element of the transaction order: Freiburg scholars took it as an axiom that competition be the main engine of economic prosperity and that its intensity be directly correlated to systemic performance. Eucken actually used the term "*complete competition*", meaning competition without coercive power[47] – the kind of competition which exists when no agent in the marketplace has the possibility to force, or constrain, the behavior of any other agent.

Another original element of Ordoliberalism was the constitutional dimension of economic issues, deemed necessary to achieve the required integration between the legal and the economic side of the analysis. Freiburg scholars claimed that a society's constitution had also to establish the characteristics of its economic order. In the definition of the ordoliberal manifesto, the *economic constitution* is <<…a general political decision as to how the economic life of the nation is to be structured.>> (Böhm, Eucken & Grossmann-Doerth 1989, 24). The main idea was that

[46] Little surprise at that: those were the years of market socialism debates and Eucken himself had close personal and intellectual ties with Friedrich von Hayek.
[47] See Möschel 1989, 157, fn.16.

<<[e]conomic systems did not just "happen"; they were "formed" through political and legal decision-making. These fundamental choices determined a nation's economic constitution.>>.[48]

Yet, the economic constitution could not suffice to warrant the achievement of the desired economic order. Constitutional choices had in fact to be made effective by a legal system and government policies specifically designed to implement them. In other words, the principles enshrined in the economic constitution should represent at the same time the source and the constraint for the specific decisions made by governments and legislators. The set of policies aimed at creating and maintaining the order envisioned by a society's economic constitution was called by Freiburg scholars *Ordnungspolitik*, or *order-based policy* – the third and last pillar of Ordoliberalism. In particular, whenever the economic constitution devised a transaction economy, order-based policies should be such as to configure a legal system capable of creating and maintaining "complete competition", i.e., the necessary condition for the most effective functioning of such an order. From a practical viewpoint, these policies could be implemented only after the economists' description of the essential features of "complete competition" had been translated into normative guidelines for legislators and policy-makers. Bridging the information gap between economic theory and actual law- and policy-making was precisely the task ordoliberals had assigned themselves.[49]

As to the objection that attributing too large a role to government intervention might led to an over-regulated economy, ordoliberals replied that the economic constitution warranted that policy-makers decisions about the market's legal environment be rigidly constrained. The essence of *Ordnungspolitik* was exactly that constitutionally-bounded laws should provide the basic principles of economic conduct, while governments should act just to enforce these principles, with no room left for discretional choices. In other words, *Ordnungspolitik* amounted to answering time and again the question: "is this law or government action in conformity to the economic constitution?". This was ordoliberals' original way out from the usual liberal dilemma of calling for government action to defend competition, on the one side, and recognizing that government itself may interfere with market processes, on the other. The constitutional dimension of their analysis, paired with the notion of *Ordnungspolitik*, allowed them to reconcile the requirement for the legal foundation and defense of the market economy with the refusal of government discretionary interventions.

The ordoliberal notion of *Ordnungspolitik* – or "indirect regulation", as they also called it – may be further appreciated by referring to Eucken's distinction between *constitutive principles* and

[48] Gerber (1998, 245). This amounted to turning classical liberalism on its head: rather than requiring the economy to be independent of the legal and political system, ordoliberals argued that both the characteristics and the performance of an economy *depended* on such a system: see ibid., 246.
[49] See Böhm, Eucken & Grossmann-Doerth 1989, 24-25.

regulative principles. The former were the fundamental principles establishing an economy's order and upon which indirect regulation had to be based: in a transaction economy, these were the principles of, say, private property, contractual freedom, open markets or monetary stability. Regulative principles flowed from constitutive ones and were bound by them; they were more specific and aimed at supporting indirect regulation and warranting the effectiveness of constitutive principles. A key example was competition law: a set of regulative principles descending from the constitutive postulates of contractual freedom and open markets. Ordoliberals defended an integrated view of economic policy, one where both kinds of principles should be taken into account. Indeed, Eucken explained the ambiguities of American antitrust with the failure to embed competition law within the broader framework of a specific economic constitution. We may reword this critique by saying that, absent a clear definition of the constitutive principles underlying it, any antitrust law is bound to generate policy decisions which would inevitably clash with side or the other of the "competition versus property rights" dichotomy.

It is hardly surprising that the keystone of the ordoliberal program towards a transaction order was *competition law*. History had taught ordoliberals that economic freedom tended to be self-destructive: competition collapsed, first, because firms always preferred the private, i.e., *contractual*, regulation of business to the market, i.e. competitive, one, and, second, because firms were o able to gain so much economic power that they could just get rid of competition. In both cases, the problem was *private economic power* and the primary goal of competition law had to be the elimination of such power or, at least, the prevention of its harmful effects.

A broad conception of economic power and the idea of employing it as the primary structuring device of competition rules is one of the features of German and EEC antitrust law which most clearly distinguish it from its US analogue.[50] It is therefore essential to understand that the root of the distinction may be found in the Freiburg School. Indeed, Eucken's "complete competition" (i.e., absence-of-coercion) standard demanded that competition law be used to prevent the creation of monopolistic power, to wipe out existing monopolistic power whenever possible, and, when impossible, to control the way monopolies used their power. Yet, it is crucial to remark that such a no-coercion standard led ordoliberals to propose a kind of competition law closer to the American tradition than to the usual European approach. Freiburg scholars, in fact, rejected the administrative (that is, discretionary) controls on competition abuses which had been popular in various European countries since the late 1920s and embraced in their stead a prohibition approach. Hence, by following an independent and highly original intellectual trajectory, ordoliberals came to formulate an antitrust law whose provisions – though not its enforcement setup: see below – closely

[50] Referring again to Page's terminology, the intentional vision supporting antitrust law, though always influential, is more transparent in the German and EEC case than in the American one.

resembled those of US law. This may explain why most historians have just conflated the two and concluded that postwar Europe simply "imported" American competition rules (see §3).

Specifically, ordoliberals believed that the legal prohibition of monopoly had to be primarily directed against cartels and all other kinds of power-creating agreements between competitors. More controversial was the attitude that competition law should adopt with respect to other, non-agreement-based forms of monopoly, such as natural monopoly, legal monopoly or monopoly achieved on the merits. Some ordoliberals, Böhm among them, supported a very aggressive approach: whenever market power existed, it had to be eliminated by any means, including forced divestures. Others preferred a gentler approach to non-agreement-based monopolies, one where law was called to prescribe a standard of conduct. One such standard was formulated in 1937 by another ordoliberal, Leonhard Miksch, who argued that economically powerful firms should be required to behave *as if* they were subject to competition, i.e., as if they had no such power.[51] By limiting a firm's behavior to conduct consistent with "complete competition", Miksch's "as if standard" provided an objectively applicable measure for the control of monopolies.[52] The standard was in turn founded upon a distinction already existing in German jurisprudence, namely, that between *performance competition*, i.e., conduct directed at achieving quality improvements or lower prices for a firm's products, and *impediment competition*, i.e., conduct designed to hinder a rival's capacity to perform. The goal of the "as if standard" was to forbid the latter and allow the former, regardless of the specific market structure. This clearly amounted to a conduct-based view of antitrust, quite distant from the structural approach so popular in postwar US competition law. Again, the fact that the distinction between performance and impediment competition would provide one of the intellectual pillars of modern German antitrust is a tribute to Freiburg influence, as well as a further reminder of the limits of the simplistic narrative based on the sheer borrowing of the American antitrust tradition.

Finally, Freiburg scholars also devised a new institutional framework for the application and enforcement of competition law. Generally speaking, *Ordnungspolitik* required that the constitutional model of "complete competition" dictate the general antitrust principles, that these principles be turned into enforceable law and that an independent office be in charge of applying and policing them. More specifically, ordoliberals envisioned a system where:

- The legislative power should enact a *competition law* based on the economic constitution of a transaction order. This just requires translating into legal terms the constitutive principles embodied in the "complete competition" model. Hence, legislators have little discretion in writing the law.

[51] See Goldschmidt & Berndt 2003, 2-4.
[52] And of oligopolies too: see Gerber 1998, 253.

- An independent *monopoly office* should be responsible of enforcing competition law. The office should enjoy complete autonomy from the executive power and its status should be quasi-judicial. The office should apply legal norms according to objective standards, so, again, little room remains for discretionary behavior.

- The *judiciary* should review the decisions of the monopoly office for their conformity to competition law and the economic constitution. Given the office's limited discretionary power, the reviewing task should pertain to regular courts, rather than administrative tribunals.

Before moving on to assess the extent of ordoliberal influence on EEC antitrust law, a few words must be added on Freiburg success in homeland Germany. Even without questioning the validity of the canonical narrative, the previous paragraphs show that ordoliberals had the right plan to reconcile the two seemingly conflicting goals of the US military administration in postwar Germany, namely, the dismantlement of industrial cartels and the promotion of market-driven economic development. If the US really sought to use Germany as a laboratory to prove the superiority of the free market system, ordoliberals methods, values and ideas were perfectly suited for such a task. Moreover, it turned out that Freiburg scholars were among the few qualified Germans who had no ties with the Nazi regime. Thus, it is hardly surprising that ordoliberals occupied key posts in government or as advisors: for example, more than 50% of the members of the Academic Advisory Council formed in 1947 to support government policy were ordoliberals (Gerber 1998, 257). Miksch himself joined the "office for the administration of the economy", the predecessor of today's German Ministry for Economic Affairs, where he authored the so-called "Guiding Principle Law" which was to play a key role in Germany's economic recovery.[53] Ordoliberalism also found support in political parties. Here the main vehicle was the social market economy program presented by Müller-Armack. Albeit embedded in a language that emphasized social values and concerns, the program featured some of the central elements of the ordoliberal view, such as the concepts of economic constitution and *Ordnungspolitik* and the necessity of a competition law. Müller-Armack's program became no less than the political program of the CDU, that is to say, of the party which was to rule Germany from 1949 to 1966. To cap all that, the director of the "office for the administration of the economy" was Ludwig Erhard, a CDU member and ardent supporter of ordoliberal and social market economy ideas. It was Erhard who in 1948, in violation of instructions from the military administration, decided to use Miksch's "Guiding Principle Law" to eliminate almost overnight most rationing and price controls. Economic historians have long recognized that this brave choice kicked-off Germany's economic miracle. Hence, it also represented a superb vehicle for the popularity of the ordoliberal ideas underlying it.

[53] See Goldschmidt & Berndt 2003, 2.

§5. The influence of Ordoliberalism on European competition law

Outside of Germany, ordoliberal views have spread mainly through the process of European unification. Freiburg influence in the process emerged at its earliest stages and its highest levels. The leading German representatives in the founding of the EEC were closely associated with ordoliberalism. For example, the first European Commission president, Walter Hallstein, had been a fervent ordoliberal since the 1940s. Also Hans von der Groeben, one of the two main drafters of the Spaak Report (the document on which the EEC Treaty was based) and later the first competition Commissioner for the European Commission, had strong ties with Ordoliberalism. The creator of the social market economy, Müller-Armack, was himself responsible, as a representative of the German government, of the early stages of the EEC economic policy. But beyond personal contributions, it was ordoliberal ideas themselves which proved consistent with the goal of pursuing European integration through the creation of a common market. Two of the central ingredients of the EEC – its being based on the voluntary agreement of the Member Countries and its basic faith in the market economy – were in perfect harmony with the Freiburg notion of an economic constitution based on the transaction order.

The influence of Ordoliberalism has been particularly important in relation to European competition law. First of all, the Germans were the keenest supporters of the inclusion of antitrust provisions in the Treaty of Rome. Moreover, the Director General of the competition office has customarily been German during the first decades of the EEC. The content itself of Articles 85 and 86 closely reflected ordoliberal thought and its support for a prohibition approach. In particular, while the cartel prohibition had clear analogues in US antitrust rules, forbidding the abuse of a market-dominating position was a totally new concept, of apparent Freiburg derivation (see previous §) and quite alien to American antitrust tradition.

Traces of the ordoliberal influence actually transcend the Articles' prohibitions. Take for example the exemptions contained in the third section of Article 85 (so-called "section 3 exemptions"). The Article lists the conditions which have to be met if an agreement, or concerted practice, is to be granted an exemption from the general anti-cartel prohibition. The conditions are four, two positive and two negative. The positive conditions are, first, that the agreement must contribute to improve either technical efficiency or the production or distribution of goods and, second, that a "fair share" of the resulting benefits must go to consumers. The negative conditions are, first, that the agreement must impose no restrictions which are unnecessary from the viewpoint of the mentioned benefits and, second, that it should not grant firms the power to "substantially" eliminate competition. While it might be legitimate to interpret "section 3 exemptions" as a compromise which eventually turned the per se prohibition of Article 85 into a US-style rule of reason, the truth is that what we have here is a sort of *codified* rule of reason,[54] that is to say, a rule imposing very specific and detailed standards in order to tightly constraint the Commission's decision of granting, or denying, an exemption. Such a rule is totally unknown to American antitrust tradition, while it fits well with Ordoliberalism in that, by properly restricting an otherwise too ample discretionary power, it only leaves to the "monopoly office" the task of applying the established principles.

Yet, the clearest demonstration of the ordoliberal impact on European antitrust may be found in what happened *after* the approval of the EEC Treaty, and in particular in the outcome of two crucial fights. First of all, what was the interpretation to be given to Articles 85 and 86? Were they fully-fledged law or just guidelines for administrative decision-making? Not surprisingly, the Germans tended to see the Articles as legal norms that had to be interpreted and applied according to juridical methods. Their ordoliberal perspective led them to view the Treaty as the EEC economic constitution, from which more specific regulative principles were to be derived. Delegations from other Member States, in particular the French one, were on the contrary inclined to view Articles 85 and 86 not as enforceable law, but rather as programmatic policy statements for guiding the Commission's administrative behavior. This position was an apparent heritage of the interwar administrative approach to antitrust.

The second fight was on the actual relevance of competition law. Were the two Articles to be taken seriously and forcefully enforced by the Commission? The German answered "yes", but the other countries disagreed. Following their national tradition, where competition rules had historically played a very marginal role, these countries tended to believe that the two Articles should be applied only in exceptional cases, involving very large firms.

The two fights went on for many years, but ordoliberal-inspired Germans eventually won both, so much so that none disputed anymore that EEC competition law deserved a juridical approach, nor that it should play a central role in the process of European integration. The key to the German success lay in the circumstance that the EEC first and fundamental goal was the achievement of an *integrated market*. On the one side, integration would allow European firms to gain sufficient size to fully exploit their scale economies and effectively compete at a global level. On the other, an integrated market might also promote consumer welfare. The latter turned out to be crucial for competition law, because the idea that more competition would lead to greater benefits for European consumers was easily reworded in integration jargon. Market integration, i.e., the elimination of obstacles to the free flow of goods, services and capitals, might actually be seen as instrumental to enhancing competition via the increase in the number of actual and potential

[54] See Fulda 1965, 643.

competitors in every European market. Hence, to the extent that competition law helped eliminate those obstacles, it directly and indirectly served both the cause of market integration and that of European consumers. The bottom line was that competition law should be viewed as an essential tool to promote the EEC Holy Grail, market integration.[55,56]

The piece of legislation which most clearly reveals Germany's success is the fundamental Regulation 17 of 1962 (Reg.17/62 henceforth), namely, the text which fixed the institutional structure and specific procedures for applying the antitrust rules of the Treaty of Rome. The importance of Reg.17/62 can hardly be overestimated, so much so that it may well be said that the actual starting date for EEC competition policy was not January 1, 1958, but rather March 13, 1962, when the Regulation came into effect.[57] The Regulation was drafted by – guess whom? – a German lawyer, professor Arvid Deringer, and the draft was then subjected to intense negotiations.

The so-called Deringer report contained a careful analysis of three possible approaches which the Commission could adopt for implementing Articles 85 and 86.[58] The Articles, being just constitutive principles, were in fact open to different solutions in terms of their actual enforcement, i.e., with respect to the required regulative principles. The Dutch approach prescribed that all restrictive agreements be notified to the Commission as a necessary and sufficient condition for their presumptive validity; it should then be up to the Commission to prove that an agreement need be made void *ex nunc* because it abused competition. The French approach was even softer in that it left to firms to decide whether an agreement was legal, while the Commission maintained the power to challenge each agreement and, in case, make it retroactively void. Finally, the German approach stuck to Ordoliberalism and coherently called for a system based on preventive controls, a general prohibition rule and the granting of immunity only to agreements which had, first, been notified to the Commission, and, then, declared by the Commission as deserving a "section 3 exemption".

Germany won this battle too. The outcome, i.e., Reg.17/62, canceled any remaining doubt that competition law be given full juridical status, and at the same time devised a very original institutional framework fully consistent with the ordoliberal design (Gerber 1998, 349-351).

[55] Remarkably, this reasoning was already present in the 1956 Spaak Report, where price discrimination was singled out as an instance of a private barrier to trade which would not survive the tougher competition following market integration (Spaak 1956, 54). One of the authors of the Report was the German ordoliberal H. von der Groeben.

[56] Martin (2004, 10-11) observes that the mutual consistency between the goals of integration and efficiency should not be taken for granted outside the ideal case of perfectly competitive markets. If, despite integration, a market remains non-perfectly competitive (as it should if the source of market power is not in the geographical separation of markets), the possibility of, say, price discrimination would remain intact. Yet, it is also true that it is precisely in non-perfectly competitive markets that integration may bring the most significant improvement in performance by increasing the number of competitors, ejecting from market the least efficient firms and allowing the surviving firms to enjoy scale economies The point is what the source of market power is. For example, in the case of industries with large sunk costs like coal and steel it was highly debatable that integration might bring the desired benefits.

[57] For a detailed analysis of Reg.17/62, see Goyder 2003, 34-40.

[58] See Goyder 2003, 32-33.

Antitrust enforcement was centralized in the hands of the Commission and away from those of national competition authorities. To this aim, the Competition Directorate was granted a high degree of autonomy, unparalleled by any other Commission directorate. Though the system relied heavily on the initiatives and decisions of the Commission, the latter's discretionary power was nonetheless rigidly constrained within the limits set by the economic constitution (i.e., the relevant Articles in the Treaty of Rome) and the regulative principles of Reg.17/62.

The other key body in the application of European competition law was the Court of Justice, whose main task was to review the Commission's decisions. The Court has traditionally played a leadership role in the EEC integration process. This entails that antitrust *case law* has been developed primarily as a tool to promote European integration in the form of a Common Market: <<…the Court made teleology the cornerstone of its interpretive strategy […] the Court interpreted the treaty's competition law provisions according to its own conceptions of what was necessary to achieve the integrationist goals…>> (Gerber 1998, 353). Thus, in contrast to national competition laws, whose primary objective is, or should be, the maximization of the economic benefits generated by a market economy, EEC competition law has been shaped by the Court according to a very different goal: the elimination of all kinds of private restraints to trade across national borders. To put it differently, the Court has singled out integration as the main principle and objective of the EEC economic constitution, and thus has consistently privileged in its rulings those interpretations of competition rules deemed more conducive to the Common Market goal. Moreover, the Court's behavior has influenced the Commission in its early years because cooperating with the Court and accepting its intellectual leadership with respect to the integration goal was the only way a weak Commission could ensure that its own interpretations and applications of antitrust rules be granted authoritativeness.

In the first years of enforcement of EEC competition law, the centrality of the integration goal and the teleological interpretation endorsed by the Court led to an enormous disparity in the attention given to vertical restraints, on the one side, and horizontal agreements and abuse of dominance, on the other. The reason is simple: while vertical restraints constituted an obvious obstacle to transborder trade, and thus directly impaired integration, horizontal agreements were not so clearly against the Common Market since it could legitimately be argued that transborder cooperation between rival firms might actually favor integration and, in any case, foster the other Community goal of creating European industrial champions. The same "pro-size" reasoning drove the Court's and Commission's enforcement of Article 86, at least until the Commission issued in 1966 a Memorandum on Concentration which first established a framework for giving content to the anti-abuse provision. Hence, for about a decade EEC antitrust policy almost exclusively consisted of a fight against vertical agreements in defense of the paramount integration objective.

Such a defense has also led both the Court and the Commission to give explicit primacy to competition rules with respect to other crucial provisions of the Treaty of Rome, like the freedom to contract or the protection of trademarks and other intellectual property rights. Thus, Peritz's "competition versus property rights" dichotomy has caused far less troubles to European competition law than to the US one. Indeed, EEC antitrust enforcers have had little doubts in privileging "competition" over "property rights" whenever such a choice might favor the pursuit of the leading principle of EEC economic constitution, namely, the Common Market. In short, the eventual outcome of the ordoliberal influence on European competition law has been a system that, though largely faithful in its institutional design and actual working to the dictates of the Freiburg School, is driven by neither the ideal of "complete competition" nor any of the other typical constitutive principles for a transaction economy (like, say, the principle of private property or freedom to contract), but rather by an "exogenous" – albeit still constitutional – goal such as market integration.

§6. The first EEC antitrust case: the *Grundig* decision

It is hardly surprising that, in a judicial environment where any kind of contract or business practice capable of dividing the Common Market into separate zones was viewed as a cardinal offense against the Treaty's integration goal, the first truly important antitrust decision by the Commission and the Court came from a case of vertical restraint, the 1964 *Grundig-Consten* case.

The German producer of radios and televisions Grundig had stipulated in 1957 an exclusive distribution agreement with a French firm called Consten. As a Grundig representative, Consten was committed to bearing the costs of local advertising and to ensuring after-sales services; moreover, it could neither sell products from Grundig competitors nor export Grundig products to other European countries. In return, Grundig agreed to sell its products in France only through this sole distributor, thereby granting Consten absolute territorial protection from the "parallel imports" of Grundig products into France. Moreover, for the duration of the contract Consten was authorized to use the trademark "Grundig", though it could not register it in France. However, Consten registered in its own name the trademark "GINT" (for Grundig International), under the agreement with Grundig that it would cancel this registration or assign the GINT trademark to Grundig if and when Consten ceased to be Grundig's exclusive distributor in France.

Contracts with similar clauses – including the national registration of the GINT trademark – had been concluded by Grundig with distributors in the other EEC Member States. Yet, despite the existence of such a contract, several distributors began to deliver Grundig products outside the distribution zones they had been assigned. In 1961 a French company called UNEF started buying in Germany from one of those resellers and thus became a "parallel importer" of Grundig products in France. Consten took legal proceedings in France against UNEF, but the latter brought the case to the EEC Commission asserting that exclusive distribution rights violated Article 85. Both the Commission and the Court eventually backed UNEF's thesis and declared the agreement between Grundig and Consten void and unenforceable, thereby setting a key precedent for many other similar cases involving vertical restraints.

The Court's decision is particularly telling.[59] Despite overruling the Commission on two points (namely, that exclusivity alone in a distribution system was sufficient to raise artificial barriers to trade between Member States and that the clauses of the agreement unrelated to restrictions on the parallel import of goods should also be annulled), the Court supported its verdict. In particular, the Court agreed on the Commission's interpretation of the words "affecting trade" in Article 85.1 as meaning "capable of endangering, directly or indirectly, in fact or potentially, freedom of trade between Member States in a direction contrary to the objective of a single, integrated market". Hence, for both the Commission and the Court the article should be read as prohibiting the exploitation of EEC borders as privately-built barriers to trade. Thus, even if the agreement might favor an increase in Grundig's trade through Consten, it still had to be canceled if it prevented other firms, like UNEF, from importing Grundig products into France or if it impeded re-exportation by Consten. More generally, invoking the increase in inter-brand competition between Grundig and other manufacturers could never make for the lack, or reduction, of intra-brand competition between Grundig dealers caused by this and similar agreements.

There is an additional lesson that *Grundig* may teach us, more directly pertaining to the "competition versus property rights" dichotomy. The Court also approved the Commission's choice to take into account, and condemn, the assignment of the GINT trademark to Consten as an ancillary restriction reinforcing the exclusionary agreement. According to the Court, trademarks and other intellectual property rights should never be used to circumvent competition law, even when a Member State's domestic law might allow that.

Two articles of the Treaty of Rome might actually be quoted in support of the Grundig-Consten trademark deal. Article 36 (now Article 30) of the Treaty stated, in fact, that "The provisions of

[59] See Goyden 2003, 43-44; Gerber 1998, 355; Fulda 1965, 631-637. For a critical assessment of the Grundig case, see Neri 2007. The ruling is in EEC JO 161/1964, pp. 2545–2553 (French version).

Articles [28 and 29][60] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of… […] …the protection of industrial and commercial property", while Article 222 (now Article 295) contained the general principle that "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership". A broad interpretation of the two articles might have led to the clearance of the Grundig-Consten agreement, at least as far as the trademark clause was concerned. The forced cancellation of the clause might in fact be viewed as an arbitrary interference in the parties' freedom to contract and a limitation of Grundig's full enjoyment of the property rights over its own brand name. Yet, the Court decided for a narrow interpretation of Articles 36 and 222. In striking a balance between the opposing requirements of EEC competition law and of national property rights legislations, the needs of the Community were given priority. Faced with the tough question of how far the owner of a property right should be allowed to exercise it, and whether the right's extension should be such as to admit the possibility of exercising it as an obstruction to transborder trade, the Court ruled that the EEC Treaty did not allow the "improper" use of rights under any national trademark law, where "improper" should be taken to mean "such as to frustrate the Community's competition law".[61] Thus, the *Grundig* ruling established the principles that the *exercise* of the right, not its existence, might be abusive with respect to the Treaty's integration goal and that, if this was actually the case, no protection could be granted.

If we recall that in the *BMI* case the US Supreme Court had concluded that only a rule of reason assessment might warrant the required balance between the two opposing commitments to competition and property rights (see above, §2), the contrast with the *Grundig* case is apparent. In *BMI* there was no a priori reason to decide one way or the other: the defense of competition and that of property rights stood on equal footing and the Supreme Court simply had to carefully ponder the weights of the two arguments. On the contrary, an a priori criterion did exist in *Grundig*: the constitutional standing of the Common Market principle constituted a decisive reference point for both the Commission and the Court of Justice, so much so that the pendulum between competition and property rights had necessarily to shift in the direction more conducive to the integration goal. Hence, comparing *BMI* and *Grundig* highlights a key difference between the two antitrust traditions – one whose relevance may hardly be overestimated but which is usually neglected in the literature.[62] It is all the more remarkable that, according to the present reconstruction, such a

[60] Originally, Articles 30 to 34. These were the articles prohibiting quantitative restrictions between Member States on, respectively, imports and exports.
[61] See Goyder 2003, 249-251.
[62] Think, for example, of the room for a *pure* efficiency goal in the two traditions. While the American one might well accommodate it (think e.g. of the Chicago school), this would be much harder for EEC competition law, at least as long as the paramount goal of Europe's economic constitution remains integration (or, better, *integration guided* – some

difference should be attributed to the decisive role played in the building of EEC competition law and institutions by the Freiburg school of lawyers and economists.

Conclusion

The stated goal of competition policy – as declared in, say, the Commission's official brochure explaining to the general public the activity of the Competition Directorate (European Commission 2004) – is to avoid that harm be caused to consumers by those instances of business behavior capable of undermining the competitive process. Accordingly, one of the best contemporary handbooks defines competition policies as: <<…the sets of policies and laws which ensure that competition in the marketplace is not restricted in such a way as to reduce economic welfare.>> (Motta 2004, 30). This paper has shown that, historically speaking, the equation "competition policy = protection of consumer welfare" is highly debatable both in Europe and the US.

First of all, the history of US antitrust law shows that several motives, other than the maximization of consumer welfare, may explain why competition deserves being protected. Motives such as the defense of small business or the concentration of too much economic, and possibly political, power in the hands of few firms have been used to justify the introduction of antitrust provisions. Hence, it is simply false to claim that either the Sherman or the Clayton Act were approved in the consumers' supreme interest.

Secondly, it is still the US experience that reveals the limits of an approach to antitrust history too narrowly focused on the evolution of economists' thoughts on competition. Indeed, whatever the reason for the legal protection of competition, this motivation has always been contrasted, especially in courts, by an opposite, and equally strong, impulse to defend property rights and the freedom to contract – what I called the "competition versus property rights" dichotomy. The ebbs and flows of twelve decades of American antitrust may thus be explained in terms of the temporary prevalence of one or the other of these impulses, rather than by the sequence of economic doctrines which have occasionally risen to dominance in the marketplace of ideas.

Third, and most important, the canonical narrative explaining the birth of EEC antitrust law only in terms of the postwar importation of the American tradition fails to take into due account two crucial features of the European experience of clear non-American origin, namely, the constitutional

would say *forced – from above*). The neglect of such a difference may lead the pro-*laissez-faire* critics of *Grundig* and other similar Court's decisions to miss the point: it may well be true that, by denying French consumers the opportunity to get adequate marketing information or enjoy reliable after-sale services (cf. Telser 1960; Motta 2004, 313-315), the Grundig ruling eventually destroyed social welfare, rather than created it, but as long as the ruling increased the amount of transborder trade between Germany and France, it fully met its constitutional goal.

standing of competition and its rather peculiar goal. That competition and the necessity of its defense be enshrined in Europe's "economic constitution" reveals the influence of the Freiburg School of law and economics, the intellectual background of many key German representatives during the ECSC and EEC negotiations. By openly shifting the balance of the above-mentioned dichotomy towards the "competition" pole, this feature has provided European antitrust enforcers with clear behavioral directions to be followed in controversial cases. These directions have been reinforced by the second feature, namely, the idea that competition is instrumental to the achievement of the truly fundamental EEC goal, the Common Market. Though never mentioned in the Commission's 2004 brochure, economic integration turns out to be the most important motivation behind Europe's defense of competition – surely more important than the simple maximization of consumer welfare. This entails that, for instance, many of those decisions by either the Commission or the Court of Justice which seem open to criticism as contrary to the interest of consumers may well be rescued if we take into account that they may nonetheless promote the Common Market.

To sum up, EEC antitrust law and policy emerge as the outcome of the peculiar combination between the ordoliberal call for a constitutional foundation of economic policy-making and the integration goal. Such a combination clearly differentiates the EEC competition tradition from its American counterpart. Moreover, it shows that some economists did have a significant influence on the building of that tradition, although not, as it might be expected, via their ever-improving modeling of imperfect competition, but rather via their conceiving of a highly original approach to the interconnection, and mutual dependence, of law and economics. In a nutshell, as far as Europe is concerned, it was neither Cambridge nor Columbia nor Chicago, but Freiburg plus (the Treaty of) Rome.

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