Coordination Rights and Competition Law:
The European Union in Comparative Perspective

Chase Foster (TUM) and Kathleen Thelen (MIT)

Abstract: The modernization of European competition law is widely seen as challenging the institutional foundations of coordinated market economies (CMEs), as the rules governing competition policy have been rewritten in ways that ostensibly align them more closely with those of liberal market economies (LME). We develop a comparative coordination rights framework that disentangles changes in the rules governing horizontal coordination (between competitors in a market) and vertical coordination (involving dominant firms with substantial market shares or between firms at different levels in the production and distribution chain). Using this framework, we document significant continuities in EU rules regulating horizontal coordination, and sharp divergence from the US model on the vertical dimension. Our analysis challenges convergence narratives that characterize the expansion of EU competition law as a threat to CMEs. More broadly, we show how a comparative coordination rights framework can be used to conceptualize institutional change within contemporary capitalist systems.

I. INTRODUCTION

European competition law has undergone important changes since the 1990s. Once a relatively obscure office, the European competition authority now commands the attention of the world's largest companies. A centralized administrative system has been transformed into a multi-level enforcement network composed of 29 public regulators, each holding the power to enforce a wide range of competition rules. European regulators have embraced a 'more economic approach,' often associated with the current American antitrust regime, placing sophisticated economic modeling at the center of competition analysis. From international price fixing to abuse of dominance, competition enforcement has intensified, as regulators have pursued thousands of investigations and finalized almost as many judgments, many involving the most important global markets and players.

These developments have led a number of observers to speak of the 'Anglo-Saxonization,' 'privatization,' and 'judicialization' of European competition law (Kelemen, 2006, 2011; Wigger, 2007; Wigger & Nölke, 2007). These scholars have predicted that EU competition law would now undermine the institutions of coordination at the heart of the distinct European economic model. As Wigger and Nölke (2007) explain, by "giving much more emphasis to short-term consumer welfare and private enforcement, the Rhenish focus on long-term strategies and broader conceptions of economic efficiency will be difficult to maintain" (490).

In this article, we empirically assess this claim. Building on Sanjukta Paul's (2020) seminal reconceptualization of US antitrust law, we develop a framework for comparative analysis that disentangles two distinct dimensions of change, relating to the rules governing horizontal coordination (between competitors or potential competitors in a market) and those governing vertical coordination (involving dominant companies with substantial market shares or between firms at different levels in the production and distribution chain). Using this framework, we identify four ideal-typical competition models that reflect different combinations of horizontal and hierarchical coordination rights.

We show that while EU competition policy has moved closer to a liberal competition model in some areas such as the regulation of horizontal cartels, EU rules remain closely aligned with a coordinated competition model in many other areas. Unlike the United States, where almost all horizontal agreements are illegal under prevailing antitrust law, EU competition rules continue to permit and partially protect many of the institutions of horizontal nonmarket coordination that lie at the heart of CME advantage. Moreover, EU law has sharply *diverged* from the US model with respect to vertical coordination rights, placing stronger constraints on the ability of large companies to exploit their economic power through exclusionary agreements with suppliers and distributors or through unilateral practices that entrench their economic dominance. This stands in stark contrast to developments in the United States, where most restrictive vertical agreements are now permitted and anti-monopoly prosecutions have precipitously collapsed since the 1980's.

Our study challenges liberalization narratives that characterize the expansion of EU law as a threat to coordinated market economies (Buch-Hansen & Wigger, 2011; Höpner & Schäfer, 2010; Wigger & Nölke, 2007). Clearly, CMEs face a range of challenges, and some of these, including the decline of labor power and the liberalization of finance, are directly attributable to an overall bias toward negative rather than positive integration in the European Union (Höpner & Schäfer, 2012; Scharpf, 1998). However, when it comes to the issue of *employer coordination* that lies at the heart of VOC theory, we find that European competition law remains supportive. Not only does EU law continue to enable 'beneficial' forms of nonmarket coordination through extensive block exemptions, but it also now plays a more direct role preventing unproductive and often exclusionary arrangements such as price-fixing agreements. Furthermore, by restricting the exploitation of economic power by dominant firms, while simultaneously enabling smaller companies to pool their resources, EU law may help sustain coordinated market economies as they are forced to adjust to major shifts in the economic and technological spheres.

The paper is organized as follows. We begin our analysis by reviewing contemporary debates among legal scholars regarding recent changes in European competition law and suggest that the inconclusiveness of these debates can be traced in part to the failure to distinguish two distinct dimensions of competition rules: those governing horizontal coordination between small and medium sized companies (SMEs) that individually lack market power and those governing hierarchical controls by dominant players. Drawing on the scholarship of the legal scholar Sanjukta Paul, we then introduce our comparative coordination rights typology. Using this framework, we outline what has and has not changed in the EU, identifying more precisely which changes bring European competition policy closer to the liberal model, and which remain conducive for substantial nonmarket coordination. Furthermore, we show that the continuities we observe in the EU with respect to horizontal coordination, and especially the intensification of rules regulating dominant companies, contrast in important ways with the United States, which has increasingly moved away from a liberal competition model and toward an oligopolistic one. A final section summarizes and highlights the contribution of the framework we propose to the literatures in both political science and in legal studies.

II. The convergence debates

The dominant “varieties of capitalism” (VOC) framework famously distinguishes political economies according to the institutional features that support two distinct models of employer coordination. Liberal market-economies, or LMEs, are those in which “firms coordinate their activities primarily via hierarchies and competitive market arrangements,” and in which coordination outside of the firm primarily occurs via “arm’s-length exchange of goods or services in a context of competition and formal contracting” (Hall & Soskice, 2001, p. 8). Coordinated market economies, or CMEs, by contrast, are characterized by heavier reliance on non-market institutions, and where firms are often embedded in arrangements that involve “more extensive relational or incomplete contracting, network monitoring based on the exchange of private information inside networks, and more reliance on collaborative, as opposed to competitive, relationships to build the competencies of the firm” (Ibid).

Given the centrality within the VOC framework of different modes of coordination—whether through hierarchy and competitive market arrangements as in LMEs or through various nonmarket institutions as in CMES—it is astonishing that competition policy has not been a major focus of comparative capitalism scholarship.[1] While more historical treatments of capitalist development have pointed to competition laws as important in conditioning national market structures and corporate organization in the late 19th and early 20th centuries (Berk, 2009; Chandler & Hikino, 2009; Djelic, 2001; Fligstein, 1993; Thelen, 2020), the relationship between contemporary capitalist organization and competition law has simply not been a major

[1] The introduction to Hall and Soskice’s seminal volume mentions US antitrust policy in passing (2001: 31), and other chapters address the role of the law in structuring production regimes (Casper 2001; Teubner 2001), but competition law is not central to the framework and has been virtually entirely neglected by subsequent VOC scholars.

theoretical or empirical focus within the VOC literature – or for that matter, any of the literature on the contemporary political economies of the rich democracies.

Legal scholars, by contrast, have focused rather closely on exactly these institutions. Indeed, many law and political economy scholars view competition law as a core ‘constitutive’ institution within capitalism (Britton-Purdy, Grewal, Kapczynski, & Rahman, 2019; Deakin, Gindis, Hodgson, Huang, & Pistor, 2017). For instance, Pistor (2005) has shown that not only are all LMEs common law countries and all CMEs civil law countries, but that differences in the ‘legal ground rules’ of common law and civil law systems—including those that govern competition regimes—help explain variation in the predominant mode of coordination. Sanjukta Paul (2020), similarly, has emphasized how competition law (or “antitrust” in the unfortunate US parlance) plays a foundational role in allocating ‘coordination rights’ within capitalist political economies—in ways that shape both market and nonmarket forms of coordination.

Growing recognition of the foundational importance of competition law within capitalist systems has inspired a debate among scholars as to whether EU reforms adopted in the early 2000’s have undermined longstanding systems of coordinated capitalism in Europe. Wigger and Nölke (2007) argue that the decentralization of enforcement and the integration of econometric modeling into competition analysis constitutes a ‘radical break’ from earlier European competition law systems that were complementary to coordinated market economies. “Not only the substance of antitrust regulation,” they argue, “but also its mode has been attuned with the laissez-faire variety of capitalism, in which regulatory tasks are delegated to private (professional) actors” (505). They argue that competition law reforms will undermine Rhenish capitalism by “giving much more emphasis to short-term consumer welfare and private enforcement,” and thus make it more difficult and riskier for firms to pursue the long-term investments and commercial collaborations at the heart of CME comparative advantage. Their view is in line with research that emphasizes the growing similarity of EU regulatory paradigms to that of the United States, whether in terms of substantive policy (Gerber, 2007), or modes of implementation and enforcement (Kelemen, 2011).

Other scholars, however, have challenged the notion that European competition law has either abandoned its commitment to protecting SMEs or promoted convergence with the United States. Gifford and Kudrle (2015), for instance, suggest that despite the fact that EU competition law embraces the same goals – and even echoes some of the language – of the American antitrust regime, they find “substantial differences in practice” (3). They argue that the turn to law and economics in the United States (under influence of the Chicago school) opened up a “huge gap” between EU and US jurisprudence. While acknowledging more recent pressures for convergence and even some signs of movement in European antitrust practice, they insist that the process is slow and halting. In their view, different political traditions – anchored in differences in the role of the state and organized interests in the economy – play a large role in explaining the continued “profound difference in approach” in US and EU antitrust on a number of important dimensions. These observations have been echoed by legal scholars who emphasize continuities in European competition law since its founding in the 1960’s and 1970’s (Patel & Schweitzer, 2013).

As this summary itself already hints, this debate has been stuck in a glass-half-empty/ glass-half-full cul-de-sac for years. The debate as it has evolved has mostly conflated both the form and the substance of antitrust laws and the different targets of competition law—whether aimed at horizontal coordination or vertical restraints. Collapsing these important distinctions has effectively reduced the question of change to movement along a single continuum. So, any move by the EU on any dimension (whether procedural or substantive; whether relating to horizontal or vertical coordination; and whether the rules apply to large or small companies) is coded as signaling convergence. However, as closely connected as these different dimensions are on some issues and at some times (and in the minds of many scholars), nothing in the broader historical record suggests that they necessarily go together.

The legal scholar Sanjukta Paul provides us with an escape from this theoretical dead end. Instead of thinking about competition law as concerned primarily with the regulation of anti-competitive practices, she pushes us instead to consider how competition law allows, permits or even encourages certain kinds of coordination between firms and other producer groups, while preventing other kinds. As she puts it: “antitrust law’s core function is to allocate coordination rights to some economic actors and deny them to others” (382). Her key insight is that both coordination and competition are required in capitalism, but that the structure of coordination and competition—and in particular who gets to coordinate and who is forced to compete—will differ depending on the competition regime.

Paul notes three areas in particular where competition law allocates coordination rights: the first is the familiar Chandlerian coordination within the boundaries of the firm, but she then breaks out two further distinct dimensions; horizontal coordination beyond the boundaries of the firm; and vertical coordination beyond the boundaries of the firm (383). Horizontal coordination beyond the boundaries of the firm refers to relationships between competitors who lack market power operating in the same market. Vertical coordination beyond the boundaries of the firm refers to relations between dominant firms and actors in adjacent markets, the most common examples being supplier and distributor relationships (383). It also includes unilateral practices by dominant companies that monopolize or attempt to monopolize a market or otherwise erect significant barriers to market entry. In each of these areas "[a]ntitrust law decides where competition will be required and where coordination will be permitted" (382).

Opening up the analytic space to disentangle the complex (multi- not uni-dimensional) evolution of competition rules governing different types of market coordination allows us to move beyond the current terms of the debate, which is mostly organized around the question of whether Europe is becoming overall more Americanized. It forces us to think harder about *who* exactly is allowed to coordinate *with whom*, and *to do what,* and about how differences in the answers to these questions drive variation in the trajectories of change in competition law on both sides of the Atlantic. By distinguishing movement related to horizontal versus vertical coordination we can identify with more precision where EU competition law has converged on the liberal competition model, where it remains distinct (in degree if not in kind), and where it has even diverged from the US in new ways.

A Comparative Coordination Rights Framework

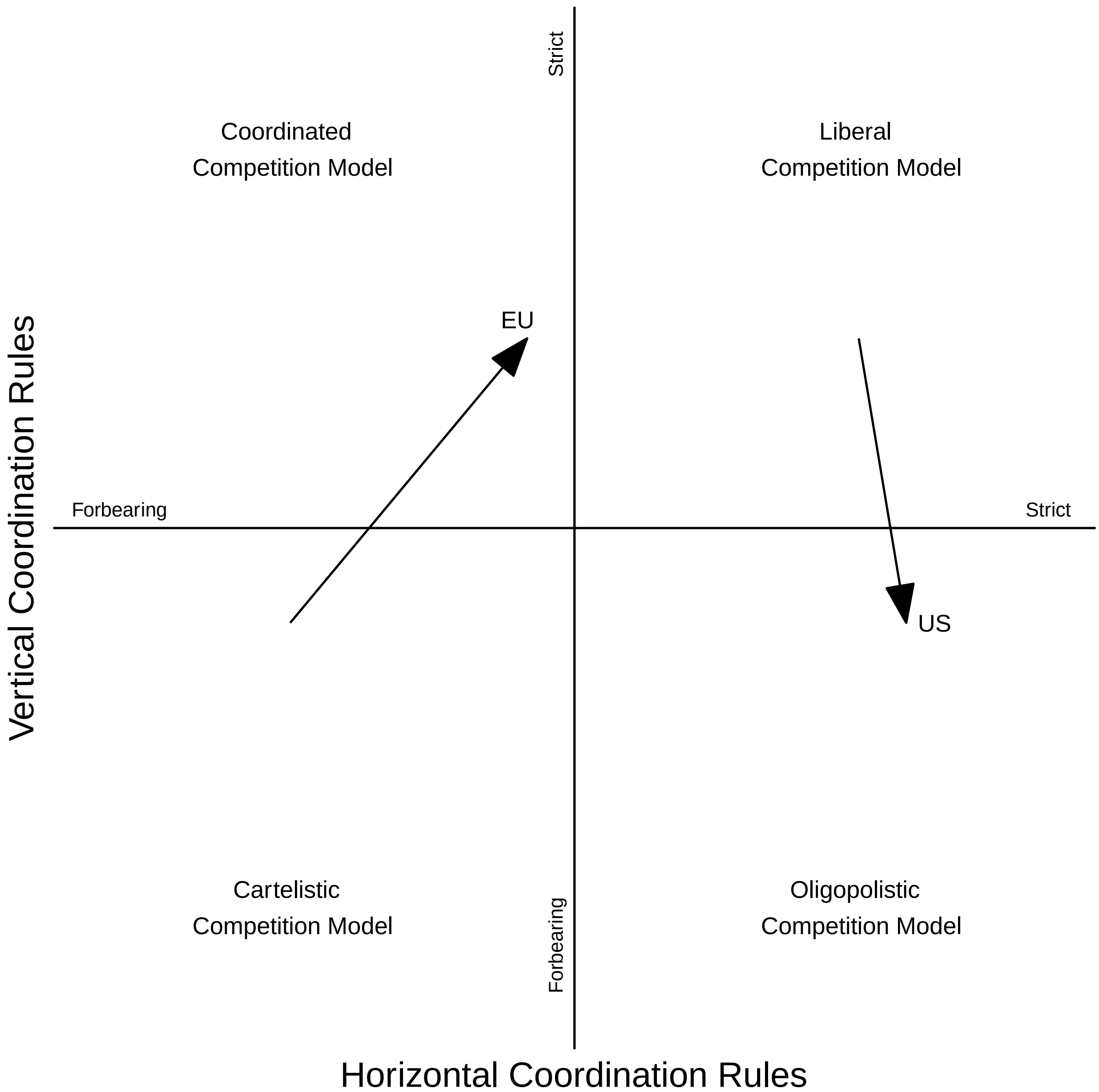
Although Paul did not conceive hers as a framework for comparative analysis, it can be fruitfully used to conceptualize four competition models that reflect different combinations of horizontal and vertical coordination rights. The horizontal dimension of Figure 1 refers to the extent to which firms have the right to use nonmarket forms of coordination in their 'horizontal' relationships with other firms, i.e., firms selling the same or similar products or services. On the left end of the continuum, horizontal coordination rights are extensive, while on the right end, horizontal coordination rights are narrow, and companies must interact with other firms primarily through arms-length market-based contracts. The vertical dimension refers to the extent to which dominant companies have the right to use exclusionary agreements or unilateral practices to structure the marketplace in their interests. At the permissive ("forbearing") end of the continuum, competition regimes enable hierarchical control by dominant firms, while on the other end, vertical coordination is subject to state regulation that limits or redirects it.

Taking each of these dimensions to their extreme form produces four ideal-typical competition regulatory models. The *cartelistic* competition model in the lower left quadrant of Figure 1 permits firms to coordinate on both the horizontal and vertical dimensions without being subject to state interference. This contrasts with the *oligopolistic* model in the lower right quadrant, where horizontal coordination is strictly prohibited, but dominant companies are permitted to impose hierarchical controls on suppliers and distributors as well as exclusionary practices vis-à-vis current and potential competitors. The *coordinated* competition model in the top left quadrant allows competing firms and workers to pursue extensive nonmarket coordination while also limiting the power of dominant companies to impose hierarchical controls from above. Finally, the *liberal* competition model in the top right quadrant imposes strict rules on both horizontal and vertical coordination, which forces companies to rely on arms-length markets to coordinate relationships beyond the boundaries of the firm.

The arrows in Figure 1 indicate the overall trajectory of institutional change in the European Union and the United States since the 1970's.[2] On the horizontal dimension, the EU has indeed moved in the direction of a liberal competition model, by developing stricter rules for cartel activity. Nonetheless, EU competition law continues to allow substantial horizontal nonmarket coordination, particularly for SMEs, workers, and cooperation agreements aimed at generating productive efficiencies – thus retaining significant elements that are historically characteristic of CMEs. On the vertical dimension, meanwhile, the US and EU have actually

[2] Our schematic diagram is based on a combination of qualitative assessment of rules (elaborated at length below) and a quantitative assessment of enforcement. More details are available in the online Appendix.

Figure 1: Typologies of Competition Regime Change in the EU and US



moved further apart, as the US has largely abandoned anti-monopoly and vertical restraints enforcement and the EU has intensified enforcement in both areas, particularly for dominant companies that control key infrastructures such as online platforms. In the EU, the strengthening of abuse of dominance enforcement has helped protect nonmarket coordination by smaller firms from the exploitative and exclusionary practices of larger companies. Meanwhile, the move in the US toward vertical forbearance has actually pushed antitrust policy away from a liberal competition model characterized by extensive anti-dominance and horizontal enforcement to maintain market contestability, and toward an oligopolistic model where horizontal coordination is aggressively policed, but large companies are given wide leeway to structure the marketplace through hierarchical controls.

In what follows, we analyze how and why the trajectory of change has proceeded in this way, examining developments in policy and law, as well as patterns of enforcement. Our analysis both builds on previous work that has identified links between EEC rules and CMEs (e.g. Wigger and Nölke 2011) while also expanding on this analysis by distinguishing changes across the horizontal and vertical dimensions, and contrasting these changes with those in the United States.

III. The Origins of European Competition Law and Economic Coordination Rights

EU competition law as originally formulated in the Treaties of Paris and Rome preserved a significant space for both horizontal and vertical coordination beyond the boundaries of the firm. U.S. government officials were heavily involved in designing the competition provisions of the European Coal and Steel Community (ECSC) and the U.S. experience with the Sherman Act provided a primary reference point (Djelic, 2001; Wells, 2001). Nonetheless, in many important respects, the design of the EU competition system reflected national competition models that developed in western Europe during the 1920's (Gerber, 1998). Under these early administrative systems, economics ministries were given wide legal discretion to directly intervene in cartel activity if it was deemed to endanger public welfare (Gerber 1998: 120). They also generally took a flexible as opposed to rigid approach to interfirm coordination, focusing their enforcement on cartel abuses rather than cartel suppression (Fellman & Shanahan, 2015; Lapidus, 2013; Richter, 2007).

During the negotiations over the Treaties of Paris and Rome, European delegates explicitly rejected proposals to create a judicial system of enforcement modeled on the U.S. antitrust system. The six founding governments also eschewed institutionalizing a hardline prohibition against all forms of horizontal coordination. Opposition to the U.S. model was particularly strong in Germany where antitrust was associated with the much-hated de-concentration policy that had been established in the American zone from 1945-1947, which led to the dissolution of thousands of cartels and the breakup of some of the most important German companies (Freyer, 1992; Gillingham, 2004). Yet, the strong opposition to anti-cartel legislation expressed by German producer groups —including associations of both employers and employees—was hardly exceptional. Across all six of the founding EEC countries, industry was organized through trade associations and labor unions that expressed opposition, to varying degrees, to the establishment of a 'Sherman Act' in Europe, which they saw as undermining their ability to pursue cooperative arrangements (Buch-Hansen & Wigger, 2011; Gillingham, 2004; Milward, 2003).

Member states chose instead to organize enforcement through administrative processes that provided Commission bureaucrats with primary control over the development and enforcement of competition policy (Gerber, 1998). One of the early laws enacted by the new EEC was Regulation 17/1962, which provided the Commission with the authority to initiate preliminary investigations, launch case proceedings, issue statements of objections to companies, conduct oral hearings, hand down decisions, and assess fines, all without recourse to courts (Kelleher, 1967). Additionally, the Commission was provided the power to "negatively clear," or confer legal immunity to, firms engaged in restrictive agreements that it deemed to be economically beneficial. A few years later, this power was expanded to include block exemptions, providing the Commission with a quasi-legislative role to determine what kinds of agreements were acceptable or unacceptable in the economy (Gerber, 1998, p. 351). The Commission's decisions were, of course, subject to judicial review. However, unlike U.S. courts, which have a long history of overruling antitrust regulators, the Court of Justice of the European Union (CJEU) has generally supported the Commission's substantive determinations, establishing the precedent of deferring to the Commission's expertise in questions involving "complex evaluations of economic matters" (Kalintri, 2016).

During the 1960's and 1970's, the European Commission used its quasi-legislative authority to develop rules and procedures that sought to distinguish between 'healthy' and 'unhealthy' forms of inter-firm cooperation. Unlike the United States at mid-century, the European Commission developed rules that were more permissive and sometimes even supportive of cooperation agreements (both horizontal and vertical) that were viewed as serving the purpose of either breaking down national barriers or increasing productive efficiency. As Hans von der Groeben, the first competition commissioner explained in an early policy document, the enforcement of European competition law should not be based on hard, inflexible rules such as the *per se* ban against horizontal cartels in the U.S.[3] Rather, the evaluation of restrictive agreements should be made on a case-by-case judgment, using administrative expertise. Whether considering a horizontal agreement between a group of small manufacturers, the marketing practices of a large company, or a member state government's industrial policy,

[3] von der Groeben, Hans (1961) *Policy on Competition in the EEC. Supplement to the Bulletin of the European Economic Community 7-8/61*. [EU Commission - Working Document]. Accessible at < http://aei.pitt.edu/32825/>.

the evaluation could not be determined by legal content alone, but instead required an "economic interpretation in each case" (13).

EEC Policy, Economic Coordination, and Regulated Competition

The Treaty of Rome's 'prohibition' of restrictive practices included a broad exception for any agreement "which contributes to improving the production or distribution of goods or to promoting technical or economic progress" and did not run afoul of other general principles (Article 85). As interpreted by the European Commission and CJEU, these exceptions came to include a wide range of horizontal inter-firm collaborations and joint ventures. Examining the pattern of negative clearance and block exemptions during the EEC's first two decades, we can see that the Commission generally approved horizontal coordination where agreements among firms were viewed as increasing productivity, fostering integration, or facilitating cooperation among SMEs. For instance, the Commission issued a block exemption for restrictive practices seen as beneficial to growth, including for research and development, standard setting, and certain licensing agreements (Hawk, 1972). The Commission also encouraged coordination and technology transfer between small- and medium-sized enterprises (SMEs) by exempting companies with a level of economic activity below a certain threshold, covering an estimated 90% of all companies (Buch-Hansen & Wigger, 2011, p. 67).

Indeed, the EEC competition authority actively sought to promote cooperation between SMEs as a way to allow them to more effectively compete against larger companies. As von der Groeben explained, "cooperation between SMEs of different Member States was not only irrelevant in terms of EC cartel law, but actually politically much desired." (Citation from Buch-Hansen and Wigger 2010: 67). By 1980, more than 4,000 cooperation agreements between

SMEs had been approved by the Commission (Ninth Competition Report: 16). Finally, the Commission explicitly exempted from EU competition law labor agreements between one firm and their employees as well as inter-firm collective labor agreements that apply to an entire sector (G. Monti, 2021).

Early EEC competition officials were also initially supportive of vertical coordination beyond the boundaries of the firm. In the 1960's, exclusive agreements between manufacturers and distributors, resale price maintenance, and price discrimination were not only commonplace but generally supported by national regulators and trade associations. (Buch-Hansen & Wigger, 2011; Harding & Joshua, 2014, p. 119). These policies initially reflected the dominant approach in most member states. In 1967, for instance, the Commission issued a block exemption for restrictive selling and purchasing contracts that involved two companies in different countries. This exemption was widely used by European companies in the 1960s and 1970's and directly contributed to a number of a number of successful economic collaborations such as the European Space Agency, the TGV, Airbus, and Concorde.[4]

But while the European competition directorate initially supported expansive vertical and horizontal coordination rights, as policy and case law developed, it more actively distinguished between 'beneficial' and 'harmful' restraints of trade in policy guidelines, and then used its enforcement authority to block restraints it deemed to be harmful (Büthe, 2007). The major focus of early EEC competition enforcement was vertical distribution and licensing schemes that fragmented the common market along national lines (Harding & Joshua, 2014, p. 111). In its first recommended enforcement decision in 1966, the competition directorate prohibited an

[4] More than 25,000 vertical agreements, most related to exclusive dealing were approved by the Commission through block exemptions and pre-clearance by 1980. See 1980 Commission report.

agreement between a German company, *Grundig GmbH*, and a French company, *Consten SaRL*, to exclusively distribute electronic goods in France. This precedent placed significant limitations on manufacturers' ability to avoid intra-brand competition through exclusive agreements (Buch-Hansen & Wigger, 2011, p. 68).[5]

In addition to restricting exclusive vertical agreements, the European Commission and Court also placed limits on the power of large companies to economically coerce less powerful ones: whether through trade associations, restrictive horizontal or vertical agreements, or unilateral practices (Büthe, 2007). In its first abuse of dominance investigation under Article 86 of the Treaty of Rome, which involved the American Continental Can Company, at the time the world's largest producer of metal cans, the Commission charged the company with distorting the competitive process by creating barriers to entry and restricting the liberty of its smaller European distributors. In developing the case, the Commission drew directly from the 'ordoliberal' school of competition that had crystallized in Germany in the post war period and which called for a strong regulatory framework that limited the exploitation of private economic power (Gerber, 1994).[6] The CJEU upheld the Commission's decision, establishing the precedent that abuse of dominance covered not only exclusionary practices that directly harmed consumers but also those that caused indirect harm through "their impact on an effective competition structure" (Schweitzer, 2008). Subsequent cases and jurisprudence reinforced the ordoliberal

[5] Following this decision, the Commission repeatedly challenged a range of vertical restraints, especially exclusive licensing and distribution arrangements as well as export bans that limited trade. Of the 16 prohibition decisions pursued under Article 85 from 1966-1977, nearly all related to vertical agreements between suppliers and distributors. See Commission of the European Communities 1978: 29.

[6] Ordoliberals believed that large companies, if left to their own devices, would destroy the conditions of competition, forming exclusionary agreements, blocking rivals from entering the market, and conspiring with the government for protection (Cerny 2016: 85). Consequently, they advocated a strong constitutionally inscribed competition law, administered by independent courts and regulators, and which set hard limits on the exploitation of private economic power (Bonefeld 2012; Gerber 1994).

paradigm, establishing a ‘special obligation’ on large companies not to exploit their economic power, and prohibiting a range of ‘unfair’ methods of competition.[7]

EEC Rules and Coordinated Market Economies

The combination of an administrative enforcement system with significant exemptions for horizontal coordination created important space for firms to continue to pursue a range of cooperative strategies that allowed them to more effectively compete against bigger firms. As long as firms, workers and the associations that represented them did not clearly discriminate against economic actors located in other EEC member states or violate a limited number of hard-core prohibitions, then they rarely faced a challenge from the Commission. Indeed, many forms of coordination were explicitly endorsed by the Commission, especially if they were seen as increasing economic productivity, facilitating economic cooperation across member states or achieving important social functions. The fact that these endorsed forms of coordination could be pre-cleared by the Commission—which exempted them from national and private legal challenges—arguably helped facilitate long-term relationships and specialization in high value-added products long seen as at the core of CMEs (Wigger & Nölke, 2007, p. 490).

At the same time, the EEC’s abuse of dominance rules provided SMEs with some protection from economic coercion by more powerful players. This included regulating exclusionary practices such as predatory pricing, the refusal to sell or buy products from competitors, and “squeezing” the profits of suppliers or distributors below a certain margin (Carree, Günster, & Schinkel, 2010). It also included rules that required dominant companies to

[7] The CJEU, for instance, has developed a distinction between meritorious methods of competition based on innovation or improved efficiency and unmeritorious ones that are designed to exclude rivals (Hoffman-LaRoche). It has emphasized the value of a rivalrous competition process and the need to preserve market access to competition. And it has articulated a concern for protecting the individual liberty of both competitors and consumers, particularly their “freedom of choice” in the marketplace.

provide access to core infrastructures (i.e., essential facilities), to license intellectual property, and to provide interoperability information if such access was deemed necessary for a company to effectively compete. By providing smaller companies with some protection from exploitative practices, the EU's abuse of dominance rules may have therefore helped to "stabilize ownership and control structures" in ways that reduced pressures for 'hostile takeovers' as well as other means of firm consolidation (Wigger & Nölke, 2007, p. 490). Thus, at least indirectly, the EU's restrictions on vertical coordination, particularly when directed by dominant players, may have also played a role in sustaining horizontal and coordinative non-market relations.

IV. Continuity or Change? A Balance Sheet

Beginning in the 1990's, European competition law underwent significant changes. As early as the 1980's, legal scholars associated with the 'law and economics' movement attacked the EU paradigm as "protecting competitors, not competition." Adherents to this so-called Chicago School urged the European Court of Justice and European Commission to adopt a competition paradigm closer to the American competition regime which combined stricter rules against horizontal coordination with more permissive rules for vertical coordination (Hawk, 1995; Korah, 1986). This position was echoed by business organizations such as UNICE, which expressed alarm about the EU's strict abuse of dominance and vertical restraints enforcement, as well as by the U.S. government, which sought to constrain the Commission's authority over American companies (Gerber, 2007). In response to these pressures, the European Commission adopted a "more economic approach" that requires "effects-based" analysis in most competition decisions (Patel & Schweitzer, 2013). In addition to intensifying enforcement, the European Commission reformed the organization of competition law. Most notably, in 2003, the European

Union adopted a regulation that removed the Commission's monopoly on enforcement and empowered national regulators and national courts to also enforce EU competition law (Gerber, 2007; Wilks, 2005).

The reforms in both policy and enforcement are significant, but what is equally striking (albeit less commented upon) is the extent to which policymakers also maintained and even reinforced core aspects of earlier arrangements that are conducive to CMEs. Competition Commissioners certainly did adopt the rhetoric of 'consumer welfare' (Kroes, 2005) and they sometimes celebrate rigid arms-length competition as a way to prepare for the competitiveness challenges of the future (M. Monti, 2002). However, as illustrated in Figure 1, the trajectory of change is also marked by significant continuity. On the horizontal dimension, rules that facilitate and protect long-standing non-market forms of coordination were never directly supplanted and sometimes even expanded. On the vertical dimension, core elements of the ordoliberal competition paradigm were maintained as was the administrative character of the enforcement system. Thus, even as the Commission articulated a "competition only vision" (Buch-Hansen & Wigger, 2010, p. 35) it maintained a number of policies and practices that continued to both permit and protect inter-firm coordination.

Elements of continuity – and continued divergence from the US – can be seen in the resilience of the administrative model and horizontal exemptions, while new elements of divergence can be seen in the EU approach to vertical restraints and abuse of dominance. We discuss each briefly in turn.

Administrative enforcement

The pattern of continuity can be observed most notably in the European Union's maintenance of an administrative model of enforcement. Although the preclearance system has now been retired, the new enforcement system preserves the longstanding bureaucratic legal model of administrative enforcement. The European Commission today holds many of the same administrative powers as in the past – to conduct preliminary investigations, launch case proceedings, issue statements of objections to companies, hold oral hearings, hand down decisions, and assess fines, all without recourse to courts (Riley, 2003; Wilks, 2005).

The Commission has also maintained its block exemption authority, including its ability to permit certain kinds of horizontal and vertical agreements. This administrative rulemaking authority – often called 'soft law' in EU parlance – means that the Commission still maintains the power to distinguish between 'good' and 'bad' restrictive agreements. Under the revised implementation system, the Commission no longer needs to tediously approve company agreements, but can instead use a "directly applicable exemption system" that empowers companies to make their own assessments of the legality of their agreements (Commission 1999). In certain other respects, the new competition system enhances the Commission's administrative authority, extending its remedial and investigative power and establishing new authority to impose structural remedies, to provide leniency to cooperative companies, and to enter settlements with parties under investigation (Parliament, 2016; Wilks, 2005, p. 434). While this administrative authority is reviewable by the European Court of Justice, empirical studies have found that the Court grants the Commission significant discretion to independently develop block exemptions and horizontal guidelines and to make economic determinations in competition enforcement actions (Georgieva, 2015).

Horizontal conduct

Examining the first dimension of coordination, we can see a mixed pattern of continuity and change. On the one hand, the Commission, along with the national regulators that are members of the European Competition Network, have tightened horizontal cartel rules and dramatically increased enforcement at both the European and national levels (Harding & Joshua, 2014; Ordóñez-De-Haro, Borrell, & Jiménez, 2018). On the other hand, the Commission has continued to provide significant exemptions for horizontal cooperation between competitors in areas such as research and development, specialization, joint production and distribution, information sharing, standard setting, and collective labor agreements that it deems to be economically or socially beneficial. Furthermore, unlike the U.S. where nearly all horizontal cooperation agreements can be challenged in court, EU horizontal enforcement is more narrowly targeted at blatant forms of price fixing, market sharing, bid-rigging and quantity restrictions that never provided much benefit in terms of reducing problems of free riding, resolving prisoner's dilemmas, or facilitating collective goods.

The pattern of policy and enforcement suggests that even as cartels have become increasingly delegitimized, the Commission has maintained and even expanded many of the longstanding exemptions for horizontal coordination that are complementary to coordinated market economies and supportive of SMEs. In its 2010 and 2022 reviews of the two Horizontal Block Exemption Agreements and the Horizontal Guidelines for Cooperation, the Commission repeatedly affirmed that horizontal cooperation between competitors is a necessary and important aspect of the European economy. In its block exemptions and guidelines, the Commission thus continues to permit and encourage a wide range of horizontal agreements between competitors viewed as promoting productive efficiencies. These include: (1) research and development agreements, where competitors pool their research efforts and jointly exploit research findings (2) specialization agreements, where firms with complementary assets agree to cease production of a certain product or service and instead purchase it from a competitor; (3) purchasing and commercialization agreements, which allow smaller firms to achieve economies of scale through cooperation; (4) standardization agreements, which lower production costs, improve quality, or ensure interoperability and compatibility; and (5) information exchange agreements about market conditions or best practices, which reduce information asymmetry, facilitate benchmarking, or economize production and distribution.

Furthermore, and contrary to predications of convergence theories, these block exemptions have if anything been widened not narrowed. The Commission continues to expand and clarify its policy in close consultation with industry groups.[8] For instance, over the past three decades the market share threshold for many types of horizontal agreements has gradually increased, allowing more companies to fall under the exemption. The Commission has also increased the range of permitted activities. For instance, the 2022 Horizontal Block Exemption Regulation (HBER) specifically seeks to adapt to "economic and societal developments of the last ten years, such as digitalization and the pursuit of sustainability goals." Toward this end, a 19-page chapter on sustainability has been added. Sustainability is defined quite broadly to include not only environmental concerns but also social objectives such as labor and human rights, giving companies substantial space to coordinate activities aimed at decarbonization and the green transition. The HBER also adds new guidance for companies operating in digital markets,

[8] Assessments of both the 2010 and 2022 revisions of the Horizontal Block Exemption Regulations suggest they have become more rather than less accommodating to industry concerns. See Ashurst. See also https://www.whitecase.com/insight-alert/new-draft-eu-horizontal-antitrust-rules-snapshot-overview

including rules for exchanging algorithms, sharing mobile infrastructure, and pursuing joint commercialization agreements within digital markets.

Finally, in the labor arena, the Commission continues a broader European tradition of overall greater support. Exemptions for both collective bargaining between workers and employers, and inter-firm collective bargaining agreements across sectors remain on the books (G. Monti, 2021). And in response to shifts in the labor market, policymakers and judges have made it clear that labor rights should sometimes be prioritized above competition concerns. For instance, in the sweeping 1995 *Albany* judgment, the ECJ explained: "the social policy objectives pursued by [collective labor] agreements would be seriously undermined if management and labor were subject to [EU rules barring restraints of trade] when seeking jointly to adopt measures to improve conditions of work and employment."[9] A subsequent court ruling (in 2014) expanded on the precedent set by *Albany* by extending protections to cover agreements with workers who are formally self-employed but in fact dependent on a shared employer (so-called "false [or "fake"] self-employed") (Šmejkal, 2015). This latter decision held that competition law "does not apply to arrangements [in this specific case, freelance substitute orchestra musicians] that aim to improve their working conditions if they can be qualified as 'workers.'"[10] Following on these decisions, the Commission adopted Guidelines in 2022 that further clarify that European competition law does not apply to independent contractors who seek to organize as long as they are "in a situation comparable to workers" and are in a "weak negotiating position" (Commission, 2022).

[9] *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (1999) C-67/96, [1999] ECR I-5751, [2000] 4 CMLR 446.

[10] See Laurens Ankersmit, "Albany Revisited: The Court Directs NCA to Carry a More Social Tune," *European Law Blog* (March 3, 2015), https://europeanlawblog.eu/2015/03/03/albany-revisited-the-court-directs-nca-to-carry-a-more-social-tune/.

At the same time, exemptions for horizontal cooperation are not approved unconditionally, but instead are subject to criteria that helps to address the risk that horizontal cooperation will be used as cover to instantiate market power or to establish exclusionary market structures. Where horizontal cooperation is seen as leveling the playing field for SMEs or workers, or contributing to efficiencies and innovation, EU rules are quite permissive; however, where horizontal cooperation create new forms of market power or ventures into cartel territory, European regulators are more prohibitive. In line with this distinction, exemptions usually apply more or less automatically for companies that hold less than one fifth or one quarter of market share; however, they are only applied on a case-by-case basis to larger companies. Horizontal agreements must also steer clear of terms that would prevent other firms from competing in a given market or foreclose the possibilities of new competition arising in the future. Both the European Commission and national regulators have repeatedly prohibited cooperation agreements that violate these principles (Commission, 2021). In this way, EU horizontal rules have directed interfirm cooperation away from the exclusionary and rent-seeking practices that often characterize cartelized markets and towards more productive forms of coordination seen in CMEs.

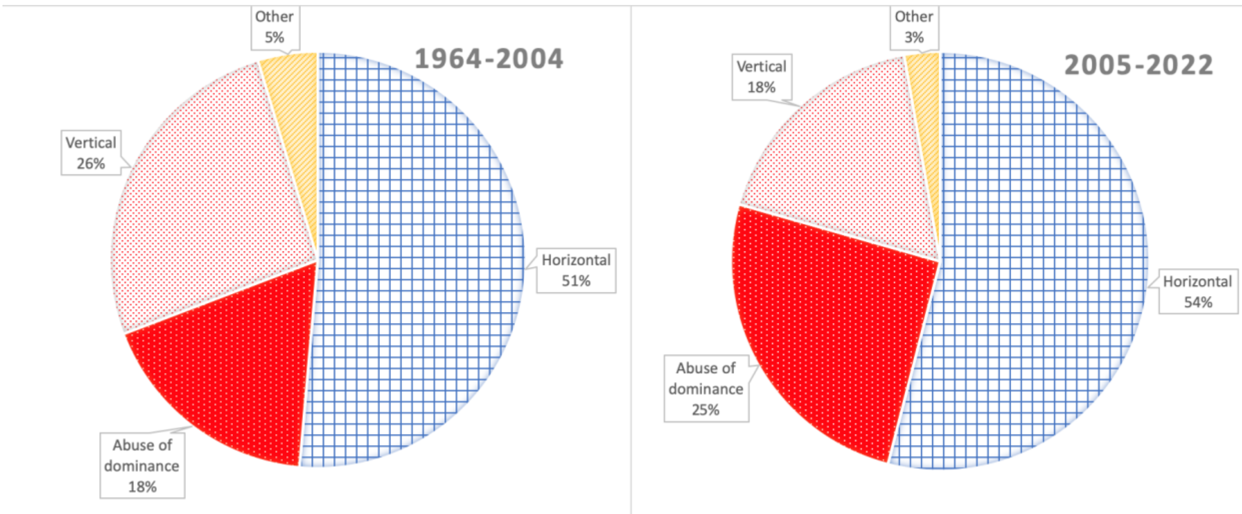
Vertical restraints

When we turn to the second dimension of competition policy—vertical coordination beyond the bounds of the firm—a different picture emerges, one that points toward *divergence* and movement *away* from the (post-1980's) US model. Vertical restraints have become increasingly important in the context of corporate strategies of fissurization, for as Callaci (2021) and others have pointed out, contracting outside the firm is most attractive if you can impose vertical constraints on other firms while at the same time escaping responsibilities, e.g. on labor issues. Yet even as many observers have pointed to the harmonization of vertical restraints rules (Gerber, 2007), the US and EU retain important differences. The United States, for instance, now treats most vertical agreements and unilateral practices as presumptively legal unless they lead to a demonstrable increase in short-term consumer prices. The European Union, by contrast, places more restrictions on vertical restraints involving dominant firms as well as hard limits on most territorial restrictions and resale price maintenance agreements regardless of economic effects (Nagy, 2016).

It is true that the EU has moved away from earlier precedents that prohibited certain kinds of exclusive vertical agreements in all cases (e.g., the *Grundig* case discussed earlier). The 'more economic approach' adopted in 1999 guidelines, and which now also shapes practices in most member states, permits a wide range of exclusive supplier and distributor arrangements between non-dominant companies. However, these exemptions are contingent on each of the parties to the agreement possessing less than a 30% market share. Moreover, in addition to barring hard-core restrictions such as resale price maintenance and territorial restrictions in nearly all instances, the EU also places significant limitations on certain franchising arrangements, parity requirements, and non-compete clauses involving dominant firms (Nagy, 2016).

In practice, the EU continues to vigorously enforce vertical restraints rules. Figure 2 reports the percentage of total cases 2005-2022, after the modernization of competition law, compared to 1964-2004, before the formal requirement for econometric modeling and effects-based analysis. We can see that vertical restraints enforcement as a percentage of total enforcement actions has declined as a percentage of all enforcement actions, from 26% to 18%.

Figure 2: European Commission Enforcement Before and After Competition Law Modernization



Source: Carree et al. 2010 and European Commission. Calculations by authors.

However, the number of vertical enforcement cases has increased, rising from an average of 1.66 decisions each year before 2005 to two decisions in the more recent period.

Additionally, national competition authorities now actively enforce EU vertical restraint rules. From 2010-2019, national regulators completed 391 investigations involving vertical agreements, 257 of which resulted in a judgment (Commission, 2020, pp. 46-48). A majority of these cases related to resale price maintenance agreements, while a significant number of investigations also dealt with exclusive or selective distribution, parity clauses that restricted price setting, or franchising/ single branding agreements.

Recent revisions to the Vertical Block Exemption Regulation (VBER) suggest that the EU is moving toward more restrictive rules for exclusionary agreements in some areas, particularly when one party to the agreement possesses market power. The revised 2022 VBER, for instance, tightens its definition of market power while imposing new restrictions on online intermediaries. Platform companies will face new limitations in the area of “dual distribution,” namely, the growing problem in the context of online retailing in which a supplier both sells services through independent distributors but also directly to end customers in competition with its own independent distributors.[11] They will also be prevented from imposing 'parity clauses' that require that a business selling goods or services on online platforms not offer its product or services at a lower price or with better terms on other competing platforms.

Antimonopoly/abuse of dominance.

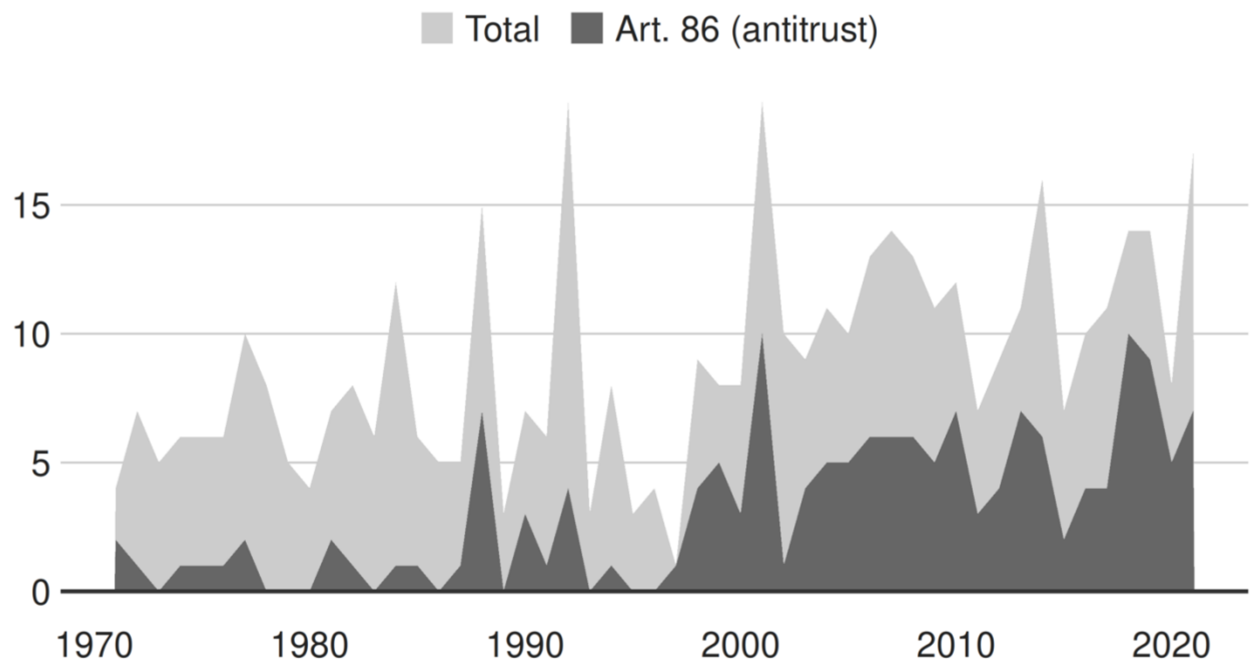
In addition to developing stricter rules for vertical agreements, the EU has also strengthened abuse of dominance enforcement, which applies only to firms with substantial market shares. Even as the EU has hired economists and pursued a more "effects-based approach," it has continued to employ an ordoliberal-inspired competition paradigm that places a 'special responsibility' on dominant companies not to abuse their power (Foster, 2022). This includes extensive rules, adopted into both hard and soft law, that prohibit dominant companies from engaging in a range of 'abusive' practices, including predatory pricing, margin squeezes, exclusive dealing, exclusive purchasing, exclusionary discounts, tying, refusals to deal, discrimination, and exploitative abuses.[12] It also includes extensive obligations for dominant companies to facilitate access to essential facilities, to provide interoperability information, and to license intellectual property.

Indeed, if anything, EU abuse of dominance rules have become stricter – and more intensely enforced – since the 1990's. As can be seen in Figure 3, the European Commission's emphasis on abuse of dominance enforcement has significantly increased during the 21st century.

---

[11] For a descriptive summary of the new rules, see https://www.whitecase.com/insight-alert/new-eu-competition-rules-distribution-agreements.
[12] See < https://thelawreviews.co.uk/title/the-dominance-and-monopolies-review/european-union..

Figure 3: Abuse of dominance enforcement by the European Commission, 1970-2021



Source: EU Commision Reports on Competition Policy

Since the year 2000, the European Commission has finalized more than 70 infringement and commitment decisions under this article across a wide range of industries. These decisions have generated more than EUR13B in fines and mandated sweeping behavioral changes to some of the world's most powerful companies. As can be seen in Figure 3, cases relating in some way to abuse of dominance now make up half of all Commission prohibition and commitment decisions – a significant increase from the 20% share of cases in the 1970's, 1980's, and 1990's. National regulators have also increasingly emphasized abuse of dominance enforcement. Since receiving the power to enforce EU abuse of dominance rules in 2004, national competition authorities have finalized more than 500 abuse of dominance decisions—or one third of all decisions— touching on many of the same concerns (European Competition Network 2023).[13]

[13] Between 2004-2021, national competition authorities finalized 505 decisions based exclusively or partially on Article 102 of the European Treaties (formerly Article 86). This represented 34% of the 1478 decisions finalized during this period.

Most of these cases have sought to address power inequalities between larger and smaller firms. Of the 39 Commission abuse of dominance decisions finalized between 2009-2019, nearly half involved facilitating access for a competitor to an 'essential facility,' resource, or other infrastructure controlled by a dominant player; 21% involved stopping a dominant company from leveraging its power in one market over another one in a way that limited opportunities for competitors to compete; and 15% involved preventing predatory behavior that was seen as foreclosing the competitive process (Foster, 2022). Perhaps most notably, the European Commission has pursued major cases against dominant online platform companies such as Google, Amazon, Apple and Meta (Facebook), which required them not only to pay large fines in some cases but also to make major changes to their business models.[14]

These previous interventions and ongoing investigations were and are of course *post hoc*. They stem from investigations that are initiated long after violations have occurred and which usually take years to investigate and finalize. Although fines are increasingly hefty and attached to significant behavioral changes, many companies can effectively manage such interventions by paying the fines and then moving on. But the new European Digital Markets Act (DMA) is clearly designed to confront abuses of power more proactively. This legislation designates a number of large online platforms as 'gatekeeper' firms and then subjects these firms to a range of stringent requirements designed to ensure market fairness and market contestability. Since it establishes hard, *ex ante* rules, many observers are hailing it as the world's most sweeping regulatory proposal (Boyer, 2022; Cioffi, Kenney, & Zysman, 2022; Larouche & de Streel, 2021). For instance, the DMA will obligate companies to apply fair and non-discriminatory

[14] The Amazon cases were closed after the company agreed to extensive commitments. See < https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777>. For the Commission's Statement of Objection against Meta see < https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7728>. For the Commission's statement of objection against Apple see < https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2764>.

conditions to the ranking of services and products, a principle that was first developed in the Google and other cases. The broader requirement for business users to receive the data that they generate on the platform and to be able to conclude contracts outside of the platform can be seen as an extension of the ordoliberal imperative to limit dependency relationships and preserve the freedom of all market players.

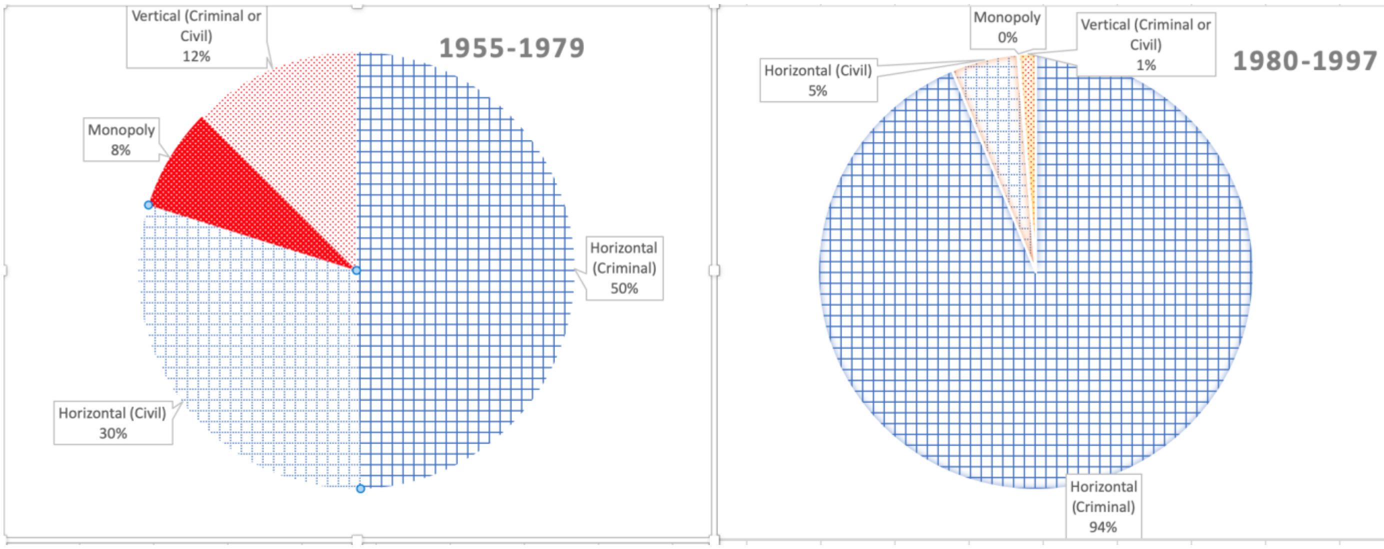
V. Comparing Developments in the United States

The EU's recent moves toward stricter controls on vertical restrains and dominant actors stand in sharp contrast to the trajectory of US antitrust, which has increasingly allowed large companies to pursue a range of vertical agreements and practices that reinforce their power while simultaneously maintaining—and even strengthening—prohibitions against horizontal coordination. For most of the 20th century, U.S. regulators imposed stricter rules than Europe on the vertical dimension. Following World War II, U.S. courts created a dozen 'per se' rules that made certain vertical restraints and exclusionary agreements presumptively illegal, shifting the burden to companies to demonstrate that restraints of trade were justified (Kovacic & Shapiro, 2000). Courts also showed broad deference to the government in its anti-monopoly cases, empowering regulators to initiate major anti-monopoly cases against some of the world's largest companies, including Exxon Mobile, Xerox, Goodyear Tires, and AT&T, among others. Dominant firms were successfully prosecuted for acting improperly in a variety of areas, from intellectual property to localized price cuts (Kovacic & Shapiro, 2000, pp. 9-12). The combination of active horizontal enforcement with active vertical enforcement helped to instantiate a liberal competition model that was characterized by active state policing of monopoly and exclusionary practices, whether imposed by dominant companies, or smaller competitors (Philippon, 2019).

However, beginning in the late-1970s, under the influence of the Chicago School of Antitrust, federal courts and regulators began to incrementally adjust existing precedents and policies in ways that, over the course of decades, led to more permissive vertical coordination rules. Most of the vertical ‘per se’ rules that had been established during the post-war period were slowly reversed and replaced with the more permissive ‘rule of reason,’ providing large firms with more autonomy to impose hierarchical controls on other firms across the supply chain (Khan, 2016; Kovacic & Shapiro, 2000). Additionally, courts developed new procedural rules and tests that made it more difficult to bring forward anti-monopoly cases: increasing standing requirements; demanding more extensive proof of market power in monopolization cases; and requiring more evidence of economic effects before a case could move forward (Kovaleff, 1994). The shift toward a permissive approach to vertical coordination has only intensified since the early 2000’s, as the US Supreme Court has ruled in favor of hierarchical controls by dominant firms – and against antitrust interventions – in almost all of its major cases (Wu, 2018).

Combined with the empowerment of economists relative to lawyers within US regulatory agencies (Berman, 2022; Ergen & Kohl, 2019), these court-led changes in coordination rights have contributed to a collapse in anti-monopoly and vertical restraint enforcement. As can be seen in Figure 4, which reports the pattern of DOJ enforcement before and after the adoption of the consumer welfare standard by courts in 1979, monopoly and vertical restraints cases made up only 1% of enforcement actions in the 1980’s and 1990’s. This is a dramatic decrease from the 1960’s and 1970’s when such actions represented nearly one in five DOJ prosecutions.

Figure 4: DOJ Enforcement Before and After the Chicago Paradigm



Source: Gallo et al. 2000

Even as U.S. regulators largely abandoned vertical enforcement, they intensified horizontal prosecutions, increasing both the number and proportion of horizontal enforcement actions (Gallo, Dau-Schmidt, Craycraft, & Parker, 2000; Kovacic, 2003). These prosecutions have often related to licensing arrangements, strategic alliances and joint ventures in research and development between small and medium sized businesses (Arslan, 2022)—forms of horizontal cooperation that would generally be exempt from competition law liability in the European Union.[15] A "not-insignificant proportion" of enforcement has targeted independent workers seeking to pool their bargaining power, including groups of low-paid attorneys, piano teachers, ice skating instructors and church organists (Paul, 2020, pp. 391-392). Regulators not only prosecuted smaller firms and relatively less powerful independent contractors more frequently,

[15] Partial antitrust immunity has been established in the US for exporters who pursue joint ventures and for large companies to pursue joint research and development endeavors under some circumstances; however, US policy does not provide companies with an exemption from antitrust prosecutions (Geroski 1993).

but they did so with criminal sanctions. From 1980-1997, horizontal criminal prosecutions constituted 94% of all non-merger antitrust enforcement, compared to just 50% prior to 1980.

The combination of weak enforcement against vertical restraints, with continued prohibitions on horizontal coordination rights for other actors has pushed US policy toward the oligopolistic competition model in the bottom right quadrant of Figure 1. The U.S. economy is increasingly characterized not by the competitive and contestable markets associated with LMEs, but by oligopolistic market structures, where a handful of entrenched firms predominate (Azar, Marinescu, & Steinbaum, 2022; Grullon, Larkin, & Michaely, 2019; Philippon, 2019). A competition regime that combines strict rules on horizontal coordination with permissive rules on hierarchical control beyond the boundaries of the firm allows dominant firms to effectively have their cake and eat it too. On the one hand, they are provided significant autonomy to structure the marketplace in their own interests, through extensive vertical contracting and exclusionary behavior. At the same, dominant firms are largely free from horizontally organized forms of countervailing power such as organized SMEs or workers, which might limit this autonomy or provide a significant competitive challenge. Put a different way, the largest firms in the United States are able to exploit the asymmetry in who has coordination rights in ways that lead to the predominance of vertical over horizontal forms of coordination (Paul, 2020).

VI. Conclusion

Competition law is a ‘constitutive’ institution in capitalism, helping determine where coordination is allowed and where competition is required. In this paper, we have built on Paul’s reconceptualization of U.S. antitrust to develop a comparative coordination rights framework organized around four ideal-typical competition models: cartelistic, oligopolistic, coordinated and liberal. Using this new typology, we have mapped the trajectory of change in the European Union and then compared these developments to the United States. While the EU has moved closer toward a liberal competition model in some respects, it has also retained important features of a more coordinated model. Examining the extensive exemptions established in EU hard and soft law, we have shown that the law continues to permit and encourage forms of interfirm horizontal coordination in areas such as research and development, licensing, specialization and labor relations that have long been at the heart of CME comparative advantage. Moreover, we have shown that EU vertical rules – which have increasingly emphasized abuse of dominance enforcement since the 1990's – provide protection for nonmarket coordination, particularly when smaller firms are involved. Although many scholars view the EU as a 'neoliberal' force that undermines coordinated market economies, we argue that EU competition law continues to enable, and in certain ways support, many of the forms of nonmarket coordination that are defining features of CMEs. By directing horizontal coordination away from the predatory and rent-seeking practices associated with cartels, and toward competition-enhancing activities such as innovation, standard-setting, technology transfer, research collaboration, and more cooperative labor relations, EU competition rules may have even played an important role in sustaining coordinated market economies in the face of many challenges and convergence pressures.

The fact that we have found that European competition rules do not pose a direct threat to coordinated market economies does not mean, of course, that other aspects of EU law are not contributing to their erosion. By removing national barriers to trade, European competition law has certainly contributed to the decline of labor unions through processes of 'negative integration' that remove national regulatory barriers that are only partially replaced through

European re-regulation (Höpner & Schäfer, 2010; Scharpf, 1998). In general, EU competition policy has been asymmetrically protective of (traditional) *employer* coordination rights, but overall less proactive in defending labor's coordination rights in the face of market and technological changes. However, in this study, we have provided evidence to suggest that EU law is not directly challenging the types of employer coordination rights that Hall and Soskice (2001) placed at the center of their analysis of varieties of capitalism and, in some ways, is even helping bolster them.

More broadly, our study points to the value of bringing competition law—and coordination rights— into comparative capitalism scholarship. Although many scholars recognize that competition rules must matter, few studies have sought to flesh out the concrete relationship between competition rules, coordination rights, and capitalist organization. This has led competition law to be addressed only fleetingly, if at all, in the varieties of capitalism literature. As we have sought to demonstrate in this comparative case study of the European Union, bringing competition law into the analysis of comparative capitalism can shed new light on the contemporary changes many systems are undergoing. By providing a tractable way to distinguish between changes in the coordination rights of competing firms and workers from changes in the rules regulating the hierarchical exploitation of economic power from above, a comparative coordination rights framework clarifies both differences in the rules across systems as well as the trajectory of institutional evolution over time. Such a framework, in turn, can help political economists better understand how the law structures relationships between producer groups in capitalist systems, with important implications for both market structures and inequality.

Works Cited

Arslan, M. (2022). Legal diffusion as protectionism: the case of the US promotion of antitrust laws. *Review of International Political Economy*, 1-24.

Azar, J., Marinescu, I., & Steinbaum, M. (2022). Labor market concentration. *Journal of Human Resources, 57*(S), S167-S199.

Berk, G. (2009). *Louis D. Brandeis and the Making of Regulated Competition, 1900-1932*: Cambridge University Press.

Berman, E. P. (2022). *Thinking like an Economist*: Princeton University Press.

Boyer, R. (2022). Platform capitalism: a socio-economic analysis. *Socio-economic review, 20*(4), 1857-1879.

Britton-Purdy, J., Grewal, D. S., Kapczynski, A., & Rahman, K. S. (2019). Building a law-and-political-economy framework: Beyond the twentieth-century synthesis. *Yale Law Journal, 129*, 1784.

Buch-Hansen, H., & Wigger, A. (2010). Revisiting 50 years of market-making: The neoliberal transformation of European competition policy. *Review of International Political Economy, 17*(1), 20-44.

Buch-Hansen, H., & Wigger, A. (2011). *The Politics of European Competition Regulation: A Critical Political Economy Perspective* (Vol. 32). New York: Routledge.

Büthe, T. (2007). The Politics of Competition and Institutional Change in European Union: The First Fifty Years. In S. Meunier & K. R. McNamara (Eds.), *Making history: European integration and institutional change at fifty* (pp. 175-193). New York: Oxford University Press.

Callaci, B. (2021). Control without responsibility: The legal creation of franchising, 1960–1980. *Enterprise & Society, 22*(1), 156-182.

Carree, M., Günster, A., & Schinkel, M. P. (2010). European antitrust policy 1957–2004: an analysis of commission decisions. *Review of Industrial Organization, 36*(2), 97-131.

Casper, S. (2001). The legal framework for corporate governance: the influence of contract law on company strategies in Germany and the United States. *Varieties of capitalism: The institutional foundations of comparative advantage*, 387-416.

Chandler, A. D., & Hikino, T. (2009). *Scale and Scope: The Dynamics of Industrial Capitalism*: Harvard University Press.

Cioffi, J. W., Kenney, M. F., & Zysman, J. (2022). Platform power and regulatory politics: Polanyi for the twenty-first century. *New Political Economy*, 1-17.

Commission, E. (2020). *COMMISSION STAFF WORKING DOCUMENT EVALUATION of the Vertical Block Exemption Regulation*. Brussels Retrieved from https://ec.europa.eu/competition/consultations/2018_vber/staff_working_document.pdf

Commission, E. (2021). *Evaluation support study on the EU competition rules applicable to horizontal cooperation agreements in the HBERs and the Guidelines*. Retrieved from https://competition-policy.ec.europa.eu/evaluation-support-study-eu-competition-rules-applicable-horizontal-cooperation-agreements-hbers-and_en

Commission, E. (2022). *Communication from the commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons 2022/C 374/02*. Brussels Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022XC0930%2802%29

Deakin, S., Gindis, D., Hodgson, G. M., Huang, K., & Pistor, K. (2017). Legal institutionalism: Capitalism and the constitutive role of law. *Journal of Comparative Economics, 45*(1), 188-200.

Djelic, M.-L. (2001). *Exporting the American Model: The Postwar Transformation of European Business*. New York: Oxford University Press.

Ergen, T., & Kohl, S. (2019). Varieties of economization in competition policy: institutional change in German and American antitrust, 1960–2000. *Review of International Political Economy, 26*(2), 256-286.

Fellman, S., & Shanahan, M. (2015). *Regulating Competition: Cartel registers in the twentieth-century world*: Routledge.

Fligstein, N. (1993). *The Transformation of Corporate Control*. Cambridge, MA: Harvard University Press.

Foster, C. (2022). Varieties of neoliberalism: courts, competition paradigms and the Atlantic divide in anti-trust. *Socio-economic review, 20*(4), 1653-1678.

Freyer, T. (1992). *Regulating big business: antitrust in Great Britain and America, 1880-1990*: Cambridge University Press.

Gallo, J. C., Dau-Schmidt, K., Craycraft, J. L., & Parker, C. J. (2000). Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study. *Review of Industrial Organization, 17*, 75-133.

Georgieva, Z. (2015). Soft law in EU Competition Law and its judicial reception in member states: A theoretical perspective. *German Law Journal, 16*(2), 223-260.

Gerber, D. J. (1994). Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe. *The American Journal of Comparative Law, 42*(1), 25-84.

Gerber, D. J. (1998). *Law and Competition in Twentieth Century Europe: Protecting Prometheus*. New York: Oxford University Press.

Gerber, D. J. (2007). Two Forms of Modernization in European Competition Law. *Fordham International Law Journal, 31*, 1235-1265.

Geroski, P. A. (1993). Antitrust policy towards co-operative R&D ventures. *Oxford review of economic policy, 9*(2), 58-71.

Gifford, D. J., & Kudrle, R. T. (2015). *The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy*: University of Chicago Press.

Gillingham, J. (2004). *Coal, steel, and the rebirth of Europe, 1945-1955: the Germans and French from Ruhr conflict to Economic Community*: Cambridge University Press.

Grullon, G., Larkin, Y., & Michaely, R. (2019). Are US industries becoming more concentrated? *Review of Finance, 23*(4), 697-743.

Hall, P. A., & Soskice, D. (2001). An introduction to varieties of capitalism. *op. cit*, 21-27.

Harding, C., & Joshua, J. (2014). Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency. In. New York: Oxford University Press.

Hawk, B. E. (1972). Antitrust in the EEC--The First Decade. *Fordham L. Rev., 41*, 229.

Hawk, B. E. (1995). System failure: vertical restraints and EC competition law. *Common Market Law Review, 32*(4), 973-989.
Höpner, M., & Schäfer, A. (2010). A new phase of European integration: Organised capitalisms in post-Ricardian Europe. *West European Politics, 33*(2), 344-368.
Höpner, M., & Schäfer, A. (2012). Embeddedness and regional integration: waiting for Polanyi in a Hayekian setting. *International Organization, 66*(3), 429-455.
Kalintri, A. (2016). What's in a name? The marginal standard of review of "complex economic assessments" in EU competition enforcement'. *Common Market Law Review 53*(5), 1283-1316.
Kelemen, R. D. (2006). Suing for Europe: Adversarial legalism and European governance. *Comparative Political Studies 39*(1), 101-127.
Kelemen, R. D. (2011). *Eurolegalism: The Transformation of Law and Regulation in the European Union*. Cambridge, MA: Harvard University Press.
Kelleher, G. W. (1967). The Common Market Antitrust Laws: The First Ten Years. *Antitrust Bull., 12*, 1219.
Khan, L. (2016). Amazon's Antitrust Paradox. *Yale Law Journal, 126*(3), 710-805.
Korah, V. (1986). EEC competition policy—legal form or economic efficiency. *Current Legal Problems, 39*(1), 85-109.
Kovacic, W. E. (2003). The Modern Evolution of US Competition Policy Enforcement Norms. *Antitrust Law Journal, 71*(2), 377-478.
Kovacic, W. E., & Shapiro, C. (2000). Antitrust Policy: A Century of Economic and Legal Thinking. *Journal of Economic perspectives, 14*(1), 43-60.
Kovaleff, T. P. (1994). *The Antitrust Impulse: An Economic, Historical, and Legal Analysis* (Vol. 1): Routledge.
Kroes, N. (2005). Preliminary Thoughts on Policy Review of Article 82. *Speech at the Fordham Corporate Law Institute, New York (September 23, 2005)//http://europa. eu/rapid/press-release_SPEECH-05-537_en. htm*.
Lapidus, J. (2013). Why Such a Permissive Attitude towards Monopolistic Associations?: social democracy up to the first Swedish law on cartels in 1925. *Scandinavian Journal of History, 38*(1), 65-88.
Larouche, P., & de Streel, A. (2021). The European digital markets act: A revolution grounded on traditions. *Journal of European Competition Law & Practice, 12*(7), 542-560.
Milward, A. S. (2003). *The reconstruction of western Europe, 1945-51*: Routledge.
Monti, G. (2021). Collective labour agreements and EU competition law: five reconfigurations. *European Competition Journal*, 1-31.
Monti, M. (2002). New Developments in European Competition Policy. *Competition and competitiveness in a new economy*, 43-50.
Nagy, C. I. (2016). *EU and US competition law: divided in unity?: the rule on restrictive agreements and vertical intra-brand restraints*: Routledge.
Ordóñez-De-Haro, J. M., Borrell, J. R., & Jiménez, J. L. (2018). The European commission's fight against cartels (1962–2014): A retrospective and forensic analysis. *JCMS: Journal of Common Market Studies, 56*(5), 1087-1107.
Parliament, E. (2016). *An Academic view on the Role and Powers of National Competition Authorities*. Retrieved from

https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578971/IPOL_STU(2016)578971_EN.pdf
Patel, K. K., & Schweitzer, H. (Eds.). (2013). *EU Competition Law in Historical Context: Continuity and Change*. Oxford, UK: Oxford University Press.
Paul, S. (2020). Antitrust as allocator of coordination rights. *UCLA L. Rev., 67*, 378.
Philippon, T. (2019). *The Great Reversal: How America Gave Up on Free Markets*. Cambridge, MA: Harvard University Press.
Pistor, K. (2005). Legal ground rules in coordinated and liberal market economies. *ECGI-Law Working Paper*(30).
Richter, K. W. (2007). Die Wirkungsgeschichte des deutschen Kartellrechts vor 1914. *Eine rechtshistorisch-analytische Untersuchung*.
Riley, A. (2003). EC Antitrust Modernisation: The Commission Does Very Nicely-Thank You! Part Two: Between the Idea and the Reality: Decentralisation under Regulation 1. *European Competition Law Review, 24*(12), 657-672.
Scharpf, F. W. (1998). Negative and positive integration in the political economy of European welfare states. In *The future of European welfare* (pp. 157-177): Springer.
Schweitzer, H. (2008). The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC. In C.-D. Ehlermann & M. Marquis (Eds.), *European Competition Law Annual: 2007 A Reformed Approach to Article 82 EC* (pp. 119-164). Oxford, UK: Hart Publishing.
Šmejkal, V. (2015). Competition law and the social market economy goal of the EU. *International Comparative Jurisprudence, 1*(1), 33-43.
Teubner, G. (2001). Legal irritants: how unifying law ends up in new divergences. *Varieties of capitalism*, 417-442.
Thelen, K. (2020). Employer Organization and the Law: American Exceptionalism in Comparative Perspective. *Law & Contemp. Probs., 83*, 23.
Wells, W. (2001). *Antitrust and the Formation of the Postwar World*: Columbia University Press.
Wigger, A. (2007). Towards a Market-based Approach: The Privatization and Micro-economization of EU Antitrust Law Enforcement. In H. Overbeek, B. v. Apeldoorn, & A. Nölke (Eds.), *The Transnational Politics of Corporate Governance Regulation* (pp. 120-140). New York: Routledge.
Wigger, A., & Nölke, A. (2007). Enhanced roles of private actors in EU business regulation and the erosion of Rhenish capitalism: The case of antitrust enforcement. *JCMS: Journal of Common Market Studies, 45*(2), 487-513.
Wilks, S. (2005). Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy? *Governance, 18*(3), 431-452.
Wu, T. (2018). The Supreme Court devastates antitrust law. *The New York Times*.