

# A LEGAL-HISTORICAL REVIEW OF THE EU COMPETITION RULES

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**Abstract** This article aims to review EU competition rules by undertaking a historical purposive interpretation of the drafting process of the Treaty of Rome. It reveals new insights based on a consideration of several historical archives starting with the Schuman plan, the Founding Treaty establishing the European Coal and Steel Community and the negotiations of the Treaty of Rome. Questions of contemporary relevance are explored, relating to the goals of competition law, the historical distinction between ‘object’ and ‘effect’ under Article 101 TFEU, the possibility of an enforcement gap under Article 102 TFEU, the relationship between unfair competition and the prohibition of discrimination and, finally, the broader meaning of competitive distortions.

**Keywords:** abuse of a dominant position, discrimination, distortion of competition, goals of competition law, object and effect restrictions, oligopolies, unfair competition.

‘Reason is sovereign of the World; that the history of the world, therefore, presents us with a rational process’.<sup>1</sup>

## I. INTRODUCTION

The purpose of this article is quite straightforward: it is to understand the reasons and intention of the legislator when drafting EU competition rules and, by undertaking a holistic rather than exhaustive review of these rules, to answer a number of problematic contemporary questions from a historical-legal

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<sup>1</sup> GWF Hegel, *The Philosophy of History* (Kitchener 2001) 22; DE Gans (ed), *Georg Wilhelm Friedrich Hegel's Vorlesungen über die Philosophie der Geschichte* (Duncker & Humblot 1837) 48; see eg WN Lucy, ‘The Common Law According to Hegel’ (1997) 17 OJLS 701, with the perception that Hegel’s history is ‘driven by the desire to reveal reason independent of the actions of particular, historically situated agents’. This sense of reason, ie objective evaluation of historical facts and correlations, is indispensable in understanding the drafting history of this article.

perspective. These questions are: Is economic efficiency the primary goal of EU competition law? What is the distinction between object and effect under Article 101 TFEU? How does discrimination relate to EU unfair competition? Is there really a gap under Article 102 TFEU? What is the true meaning of a competitive distortion? What lessons can we learn from history for future amendments?

Some of the above questions have been extensively and controversially debated in the literature, but the results have not been entirely satisfactory. By revisiting the genesis of EU competition rules and looking again at the original political statements, declarations and negotiations, this article will shed some light on present misunderstandings and offer a historical understanding of EU competition law.

There is a blurred distinction between historical truth and reality. Law is not an exact science, and neither is history because there may always be something new to be revealed. There will always be a sense of evolutionary relativism, ie what is true today may be false tomorrow. In considering the question of what the goals of competition law actually are, European courts have been wise to follow a teleological interpretation in line with the objective of safeguarding ‘undistorted’ competition.

EU competition law is well known for its use of soft-law guidelines. Therefore, taking inspiration from Hegel’s *Philosophy of History*,<sup>2</sup> it seems useful to set out the methodology that will be used here when addressing the questions which are to be considered. Current understandings and misunderstandings will be reviewed in the light of the historical narrative concerning the drafting of EU competition rules—that is, a reflective historical interpretative approach will be adopted. During the discussion a pragmatic orientation will be maintained because of the need to be alert for contradictions in previous historical findings and to verify their plausibility. Next, a conceptual analysis based on historical findings will help us understand the current reality, even if these origins raise some troubling questions. In providing this historical review the aim is to challenge future enforcement and reveal possible legislative gaps that are the result of a lack of detail or precision in the legal provisions. Standing on the edge between history and contemporary reality, it falls to European courts to fill the gaps which currently exist and, with reason and wisdom, to reshape the future enforcement of EU competition law.

#### *A. What Is the Primary Goal of EU Competition Law?*

Seemingly simple questions—such as ‘*what is the primary goal of EU competition law*’—are often the most difficult to answer. Recently, a

<sup>2</sup> For a critical commentary on Hegel see eg W Kaufmann, ‘The Hegel Myth and its Method’ in *From Shakespeare to Existentialism: Studies in Poetry, Religion and Philosophy* (Beacon Press 1959) 88; J Steward (ed) *The Hegel Myths and Legends* (North-Western University Press 1996).

comprehensive study of the goals of competition law has demonstrated the plurality of goals, depending on jurisdictions and normative values, their intersection and political dimension.<sup>3</sup>

Misunderstandings among lawyers and economists are only one side of the coin. It has been said that jurisdictional ideologies do not always allow for similar goals to be pursued; for example, within the spirit of German ordoliberalism, some previous writers have claimed a clash between economic freedom and consumer welfare.<sup>4</sup> In contrast, a leading representative of German ordoliberalism contradicts the widespread belief that economic freedom cannot coexist with welfare.<sup>5</sup> The origin of the clash lies in the fact that the ordoliberal school of thought has been mostly linked to the early 1930s, rather than the 1980s' social market economy and neo-liberalism.<sup>6</sup>

Economic freedoms are mostly embedded in a 'constitutional' dimension,<sup>7</sup> which forms the public law foundation of competition law. Once economic freedom to compete is institutionally established at a constitutional level it needs its own private law foundation, namely the freedom of contract, the objective of which is to achieve welfare and prosperity. Economic efficiency obviously serves this purpose and there is nothing to prevent both objectives from coexisting in unity. However, misunderstandings between 'ends' and 'means' create endless conflicts.

<sup>3</sup> See eg the contribution of the ASCOLA (Academic Society for Competition Law) in D Zimmer (ed), *Goals of Competition Law* (Elgar 2012).

<sup>4</sup> See eg L Lovdahl Gormsen, 'The Conflict between Economic Freedom and Consumer Welfare in the Modernization of Article 82 EC' (2007) 3 *European Competition J* 329, where economic freedom and consumer welfare are mutually exclusive. It is argued that for ordoliberalism economic freedom is the primary goal of competition law, economic efficiency being merely derived from the free interaction of individuals in the market place which is well known as 'freedom of action'. Similarly, Akman attempted to prove that Art 82 EC is not ordoliberal; if it were, it would not be able to accommodate efficiency, see P Akman, 'Searching for the Long Lost Soul of Article 82 EC' (2009) 29 *OJLS* 269. By contrast, German economists support economic efficiency as the primary goal of competition, see M Neumann, 'Wettbewerbspolitik' in H Albach (ed), *Die Wirtschaftswissenschaften* (Gabler 2000) 1; I Schmidt, *Wettbewerbspolitik und Kartellrecht eine interdisziplinäre Einführung* (Lucius & Lucius 2005) 178; K Herdzina, *Wettbewerbspolitik* (Lucius & Lucius 1999) 125; G Knieps, *Wettbewerbsökonomie* (Heidelberg 2005).

<sup>5</sup> See eg EJ Mestmäcker, 'Wettbewerbsfreiheit und Wohlfahrt' Max Planck Hamburg Private Law Research Paper no 12/2 (2012).

<sup>6</sup> See the *ORDO Yearbook of Economic and Social Order (Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft)* first published in 1948 by Böhm and Eucken. This publication established a long-standing tradition of excellence in competition law from a broader economic, sociological, philosophical and political perspective, having as contributors Nobel laureates such as Buchanan, Friedman, von Hayek or Stigler.

<sup>7</sup> H Schröter, 'Institutioneller Rahmen' in H Schröter, T Jakob and W Mederer (eds), *Kommentar zum Europäischen Wettbewerbsrecht* (Nomos 2003) 66; W Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr 1952) 292; for institutional economics, see M Wohlgemuth, 'The Present Relevance of Ordnungstheorie for the Politics and the Economics of the Social Order' in A Labrousse and JD Weisz (eds), *Institutional Economics in France and Germany: German Ordoliberalism versus the French Regulation School* (Springer 2001).

One commentator has suggested that productive efficiency is the original goal of EU competition law,<sup>8</sup> based on the Spaak Report of Foreign Ministers. In sharp contrast, but based on the same historical archive in Florence, Forrester had previously identified many other goals alongside that of efficiency, such as market integration and consumer welfare (2000).<sup>9</sup> Thus, two opinions based on the same archive do not really converge on the same issue and this suggests that something must have been overlooked<sup>10</sup> or misinterpreted; or as one leading author<sup>11</sup> put it, the conflict of goals is mirrored by the development of a new agenda, namely the ‘more economic approach’, which aims to match previous legal objectives with economic ones. Previously, the same author suggested that ordo-ideology had influenced EU competition law.

What previous historical studies have missed is that legal historians had already published a three-volume collection of the historical archives on EU law (1999 and 2000), showing that the Treaty of Rome cannot be judged on the basis of the Spaak report only, which is a small piece of the preparatory work (*travaux préparatoires*). Furthermore, the Treaty of Rome has to be analysed through the lens of its predecessor, the Founding Treaty establishing the European Community of Steel and Coal (ECSC),<sup>12</sup> famously inspired by Robert Schuman and Jean Monnet.<sup>13</sup> Elsewhere, Freyer mentions that two treaty Articles were drafted by Robert Bowie (formerly professor at Harvard Law School and legal counsel to the High Commission in

<sup>8</sup> Akman (n 4) 269. On neo-liberalism see F Maier-Rigaud, ‘On the Normative Foundations of Competition Law—Efficiency, Political Freedom and the Freedom to Compete’ in Zimmer (n 3) 151; doubtful U Adolffson, ‘Article 102, Aimed at Serving the Ordoliberal Agenda or European Consumers?’ 21. On history as a heuristic tool by non-historians see L Warlouzet, ‘The Rise of European Competition Policy, 1950–1991: A Cross-Disciplinary Survey of a Contested Policy Sphere’ EUI Working Papers RCAS 2010/80, 2.

<sup>9</sup> I Forrester, ‘The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security’ in CD Ehlermann and I Atanasiu (eds), *European Competition Law Annual: Modernisation of EC Antitrust Policy* (Hart 2000) 75. Elsewhere, the objective of market integration (*la fusion des marchés*) has been translated as: ‘To achieve these aims, the markets should be merged’ see Akman (n 4) 279. For a similar claim with regard to the difference in translations by Akman of ‘exploitation’ instead of ‘abuse’, see the insightful contribution of R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 21, note 91.

<sup>10</sup> In this vein see Adolffson (n 8) 22.

<sup>11</sup> D Gerber, ‘The Goals of European Competition Law: Some Distortions in the Literature—Comment on Parret’ in Zimmer (n 3) 86. Previously, Gerber suggested that the ORDO ideology had influenced EU competition law, eg Gerber, *Law and Competition in Twentieth Century Europe Protecting Prometheus* (OUP 2001). Thus, Gerber is not the only leading author arguing that German competition law has strongly influenced EU competition law, see eg I Maher, ‘Competition Law Modernization: An Evolutionary Tale?’ in P Craig and G De Búrca (eds) *The Evolution of EU Law* (2nd edn, CUP 2011) 725; W Kerber and U Schwalbe, ‘Economic Principles of Competition Law’ in G Hirsch, F Montag and FJ Säcker (eds), *Competition Law: European Community Practice and Procedure* (Sweet & Maxwell 2008) 211; I Kokkoris and R Olivares-Caminal, *Antitrust Law amidst Financial Crisis* (CUP 2012) 26.

<sup>12</sup> ECSC was established by the Treaty of Paris and signed in 1951; it came into force on 23 July 1952, but expired on 23 July 2002.

<sup>13</sup> See D Chalmers, G Davies and G Monti, *European Union Law* (2nd edn, CUP 2010) 10; P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (4th edn, OUP 2008) 5; J Goyder and A Albers-Llorens, *Goyder’s EC Competition Law* (5th edn, OUP 2009) 26.

Germany).<sup>14</sup> The edited collection published in Berlin<sup>15</sup> provides an opportunity to consult these documents. In addition, the collection covers the documents found in the European institutions' archives, as well as those found in the national archives of the founding member states and, most importantly, of the Foundation Jean Monnet in Lausanne.<sup>16</sup>

The present understanding is that the founding treaties were generated by European ideas of economic integration and that they were designed to serve European citizens.<sup>17</sup> Any modelling of Europe based on *one* particular national influence is said to be dangerous<sup>18</sup> and counter-productive for European integration.

The history of competition law must briefly look at the Robert Schuman Declaration of 9 May 1950. The proposal that the production of coal and steel in both France and Germany be placed under a High Authority, with the participation of other European countries, has served as a basis for economic development and as a first step in a 'European political federation'.<sup>19</sup>

<sup>14</sup> Notably, historians have written extensively on possible US inspirational sources during its drafting. See TA Freyer, *Antitrust and Global Capitalism 1930–2004* (CUP 2006) 275, confirmed by ML Djelic, 'Does Europe Mean Americanization? The Case of Competition' (2002) 6 *Competition & Change* 245, including the key role of McCloy; G Bossuat and A Wilkens (eds), *Jean Monnet, l'Europe et les chemins de la Paix* (Publications de la Sorbonne 1999); FJ Fransen, 'Monnet's Europe, 1943–1954' in *The Supranational Politics of Jean Monnet: Ideas and Origins of the European Community* (Greenwood Press 2001) 82. Fransen mentioned that Bowie inspired Monnet but the text was reworked; see also L McGowan, *The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy* (Edward Elgar 2010).

<sup>15</sup> R Schulze and T Hoeren *Dokumente zum Europäischen Recht: Kartellrecht (bis 1957)* (Springer 2000) vol 3. Professor Reiner Schulze is Director of the Institute for the History of Law – German and EU History of Private Law, Münster University; Thomas Hoeren is Professor of Civil and Economic Law at the Westfälische Wilhelms-Universität Münster in Germany.

<sup>16</sup> This volume covers material from the following archives: the Federal Archive Koblenz, including the Federal Ministry of Economics, the Political Archive Bonn, the National Archive Paris, the state archive Rome (*Archivio Centrale dello Stato*), the archive of the Foreign Ministry of Luxembourg, the historical archive Florence (on the Treaty of Rome), the historical archive of the European Parliament (Luxemburg) and of the European Commission (Brussels) and the archive of the Foundation Jean Monnet pour l'Europe in Lausanne (for the ECSC treaty).

<sup>17</sup> This does not exclude beneficial US influences during the various drafting stages see eg B Leucht, 'Transatlantic Policy Networks in the Creation of the First European Anti-Trust Law: Mediating between American Anti-Trust and German Ordo-Liberalism' in W Kaiser, B Leucht and M Rasmussen (eds), *The History of the European Union. Origins of a Trans-and Supranational Polity, 1950–72* (Routledge 2009) 56; more recently see W Kaiser, B Leucht and M Gehler (eds), *Transnational Networks in Regional Integration: Governing Europe, 1945–83* (Macmillan 2010).

<sup>18</sup> Leucht (n 17).

<sup>19</sup> Schulze and Hoeren (n 15) 1: Robert Schuman Declaration, 9 May 1950, *Fondation J Monnet pour l'Europe Lausanne (Fondation Monnet)* AMG 17/8/61; *ibid* 130 on a future 'European political community' (*Europäische Politische Gemeinschaft*): 'Arbeitsunterlage über die Faktoren, die geeignet sind, den Wettbewerb zu beeinflussen' Brussels 2 August 1955, private archive of Groeben MAE 139 d/55 ell/ip; 139 d/55 sell/lg; 139 d/55 hr; *Conseil des Communautés européennes, Archives Historiques, Commission du Marché Commun des Investissements et des problèmes sociaux* CM3 no 36 MAE f/55 oc; 139 f/55 mw. See also M Rasmussen, 'Constructing and Deconstructing "Constitutional" European Law: Some Reflections on How to Study the History of European Law' in H Koch, K Hagel-Sorensen, U Haltern and J Weiler (eds), *Europe. The New Legal Realism* (DJØF Publishing 2010).

In particular, the declaration advanced the future implementation of a plan of production and investments with a price mechanism and the creation of a reconversion fund to help facilitate the rationalization of production.<sup>20</sup> The future European community (ECSC) was devised to counter an ‘international cartel aimed to divide and exploit national markets through restrictive practices and to maintain high profits’, thereby ensuring the integration of markets<sup>21</sup> and increasing production of coal and steel.<sup>22</sup> It was believed that conditions would gradually emerge which would ensure ‘the most rational distribution of production and the highest level of productivity’ by means of the ‘pooling of resources’.<sup>23</sup>

Competition goals were integrated into an international dimension of the fight against pernicious cartels. In a subsequent note, the objectives of the community, namely, the expansion of markets<sup>24</sup> and rationalization of production,<sup>25</sup> are further detailed, together with the means of action to be taken against cartels. It is in this particular context that the word ‘competition’ is first mentioned, as a means to counteract price-fixing, the attribution of production quotas and the division of markets. Cartels were associated with a ‘permanent elimination of competition resulting in the exploitation of markets by a particular profession’ and essentially secret agreements serving professional rather than the public interest.<sup>26</sup> In the fight against cartels, the High Authority was called to ensure that the same market conditions which existed under perfect competition would prevail, without which the establishment of competition would face an insurmountable hurdle.<sup>27</sup>

<sup>20</sup> Schuman (n 19) 2: ‘l’application d’un plan de production et d’investissements, l’institution de mécanismes de péréquation des prix, la création d’un fonds de reconversion facilitant la rationalisation de la production (du charbon et de l’acier)’.

<sup>21</sup> In the original the word used is ‘fusion’.

<sup>22</sup> Schulze and Hoeren (n 15) 5: ‘Note de reflexion de Jean Monnet’ 28 April 1950, *Fondation Monnet* AMG 5/1/3; *ibid* 21: ‘Observations sur le Mémorandum du 28 Septembre 1950’, National Archives Paris AJ 81/132, where the fight against cartels and the emerging competition is said to benefit consumers (*utilisateurs*) of coal and steel. *ibid* 99 for how the fight against cartels in the Schuman Plan would affect previously approved mergers under German Law no 27/1952: ‘Vermerk zum Verhältnis Schumanplan und Entflechtung nach Gesetz Nr 27’ Bonn 1 February 1952, Bundesarchiv Koblenz B 102 60650.

<sup>23</sup> *ibid* 5: ‘Progressivement se dégageront les conditions assurant spontanément la répartition la plus rationnelle de la production au niveau de productivité le plus élevé.’ So as to compare this, see the near identical art 2(2) ECSC: ‘The Community shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity’.

<sup>24</sup> In the original the word used is ‘élargissement’.

<sup>25</sup> *ibid* 3: ‘Note anti-cartel, jointe à la déclaration du 9 May 1950’, *Fondation Monnet* AMG 17/8/62.

<sup>26</sup> *ibid*: ‘En termes économiques au rebours d’un cartel elle tend à faire prévaloir les effets mêmes qui résulteraient d’une parfaite concurrence, mais en ménageant les étapes nécessaires, faute desquelles l’établissement de cette concurrence se heurterait à des résistances insurmontables’. A contemporary translation of this historical recognition reads as follows: ‘In contrast to international cartels, which tend to impose restrictive practices on distribution and the exploitation of national markets, and to maintain high profits, the organization will ensure the fusion of markets and the expansion of production’ (July 2013) <<http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration>>.

It suffices to say here that the same great fight against international cartels was at the heart of the negotiation behind the Treaty of Rome.<sup>28</sup> The tone was slightly different in that the context was the free global trading of goods, where not only did inter-state trade barriers have to be eliminated, but private restraints on competition also had to be controlled internationally through the establishment of an international trade organization with provisions on competition.<sup>29</sup> Obviously, this served the very ambitious goal of the World Trade Organization (WTO) of international cartels being controlled by an international trade chamber.<sup>30</sup> Over the years since the Havana Charter, such an international agreement on competition rules has become a 'dead letter'.<sup>31</sup> Additionally, the Spaak Report at the Messina conference in 1955 acknowledged that the Common Market should benefit consumers through both quality and price competition due to different production costs being borne by undertakings.<sup>32</sup>

Greater similarities with a general catalogue of goals in future treaties, but significantly specialized to serve competition goals, are revealed by the role of the High Authority in the pricing of coal and steel.<sup>33</sup> A factor underlying the shaping of competition policy was the lack of price elasticity in the production of coal. Briefly, competition law was called upon to:

- (a) safeguard the normal 'game' (*jeu*) of competition
- (b) ensure the stable supply of both coal and steel within the Common Market

<sup>28</sup> Schulze and Hoeren (n 15) 150: 'Das Kartellproblem in internationaler Beleuchtung' Bonn 19 July 1956 (sent to Professor Erhard and state secretary Dr Westrick), *Bundesarchiv Koblenz B 102 22118*. The fight against cartels is by no means unknown in the UK. On the cartelization of British industry see P Atiyah and S Smith, *Atiyah's Introduction to the Law of Contract* (6th edn, Clarendon Press 2005) 12: 'between 1870 and 1950 the British economy became a network of restrictive practices (ie cartels and monopolies), including the history of price-fixing agreements, lack of consumer choice and standardized contracts. Therefore, the aversion to cartels cannot be simplistically synthesized as solely a German problem. On the US fight against 'loose networks and agreements in the form of cartels, pools, or trusts' between the 1870s and 1880s, see Djelic (n 14) 239–41 where the original intent of the US Sherman Act was to prohibit drastically all inter-firm collaboration.

<sup>29</sup> *ibid*. It is worth mentioning that the UN also provided a forum for discussion when drafting an international agreement to control international trade restrictive practices (1953) but later ECOSOC (1955) postponed discussions *sine die*.

<sup>30</sup> See eg Roebling, 'International Aspects' in Hirsch, Montag and Säcker (n 11) 123.

<sup>31</sup> Previous unfortunate attempts to establish an international competition agreement were made in Singapore (1986) with a Working Group on the Interaction between Trade and Competition Policy (WGTCIP), Seattle (1999), Doha (2001) with a Working Group on hardcore cartels, procedural fairness and non-discrimination. On Hard Core Cartels see WTO-Secretariat, Provisions on Hard Core Cartels 2002 (WT/WGTCIP/W/191) Cancun (2003). Finally the July Decision of 2004 WT/L/579, adopted on 1 August 2004, closed the door to any further negotiations. A more recent revival of international competition law is made by Gerber (n 11).

<sup>32</sup> Schulze and Hoeren (n 15) 155.

<sup>33</sup> *ibid* 18: 'Rôle de la Haute Autorité en matière de prix pendant la période permanente' 2 October 1950, *Fondation Monnet AMG 17/8/57* para 2, 2/3. Comparatively art 3(a)–(g) ECSC maintains a heavily modified version of (a), (c) and (i).

- (c) identify optimal conditions for growth and expansion
- (d) maintain a competitive industry in order to benefit consumers with regard to both price and quality
- (e) ensure that pricing conditions within the Common Market did not discriminate against buyers, especially in a country other than that of the provider, while maintaining free choice for consumers in respect of suppliers or place of delivery
- (f) ensure that export prices remained within equitable limits for both buyers and producers
- (g) protect producers against practices of unfair or artificial competition<sup>34</sup>
- (h) ensure that the normal mechanism of competition was not *distorted* by discriminatory practices against producers by certain buyers or groups of buyers<sup>35</sup>
- (i) possibly consider a policy of rational exploitation and conservation of the natural resources of the Common Market.

This brief account of the huge role of the High Authority clearly demonstrates that some of the emerging goals of competition law were rooted in economics: competition as a game of supply and demand servicing consumers and their freedom of choice. With unfair competition, including the protection afforded to producers, this image reflects a total welfare standard. Even the meaning of distortion receives modest recognition.

This historical review of goals highlights the methods of intervention by the Authority.<sup>36</sup> Indirect production methods demand combined action involving both natural resources and consumption, eventually followed by direct governmental intervention to align prices with demand.<sup>37</sup> The latter was by no means excluded as a means of price control, though experts warned it would not be possible to determine price levels due to a lack of (economic) criteria.<sup>38</sup> Within the context of industrial concentrations, we are reminded that the primary goal of the Schuman Plan was to establish a Common Market and to create the conditions capable of attaining the highest possible level of productivity and the lowest price for two relevant products.<sup>39</sup> The future Article 60 was intended to prevent price-fixing, and the control of production, technical development and the division of markets by agreements

<sup>34</sup> *ibid.*: 'protéger les producteurs contre les pratiques de concurrences déloyales ou artificielles'.

<sup>35</sup> *ibid.*: 'veiller à ce que le mécanisme normal de la concurrence ne soit pas faussés par les discriminations susceptibles d'être exercées à l'égard des producteurs par certain acheteurs ou groupement d'acheteurs'.

<sup>36</sup> *ibid.* 19; see also Ch IV Production, art 57 ECSC on indirect means of action.

<sup>37</sup> *ibid.*

<sup>38</sup> On the role of the High Authority as a price regulator see art 61 ECSC.

<sup>39</sup> Schulze and Hoeren (n 15) 46: 'Note sur les dispositions proposées en ce qui concerne les concentrations industrielles' (art 42) December 1950, Fondation Monnet AMG 17/8/81.



between producers.<sup>40</sup> This explains why market integration has been at the heart of EU competition policy and how the drafting of the treaty reflected the secondary goal of productive efficiency.

The essential economic goal of the Schuman Plan (1950) was to satisfy the needs of the community by creating a market within which undertakings are stimulated to increase their productivity.<sup>41</sup> The way to achieve this ambitious objective was thought to be to develop competition.<sup>42</sup> This finally explains the endless debate over ends and means and why competition policy (the Schuman Plan) had to be the *means* to an end.

An original draft working paper on the Treaty of Rome (1955) reveals that competition was again the means 'to the establishing and the normal functioning of the Common Market' insofar as 'it requires the elimination of those measures and practices which alter competition or which are unfair'.<sup>43</sup> The way forward during its progressive establishment was the natural 'game of competition'; in special cases, however, a rational specialization of production could be sought.<sup>44</sup> The prohibition of horizontal concentrations which threatened to create monopolies was a fundamental condition for attaining the objectives of the Schuman Plan.<sup>45</sup>

An extremely interesting revelation concerns the risk of market domination, probably in the spirit of the US *monopolization* of markets,<sup>46</sup> and the fact that this should not be predetermined by absolute criteria, nor placed under any rigid rule determining the total market percentage of a product (1950).<sup>47</sup> The US influence of restraints in trade is supported by Article 66(6) ECSC, points 1 to 4 of which concern fining economic concentrations, referring to any natural person, ie individuals. Distortions of competition were thought possible within coal and steel or their consumer industries.<sup>48</sup> The Spaak Report (1955) mentioned that monopolization through the absorption or domination of the product market by one single undertaking takes away the benefits of technical advance.<sup>49</sup>

A draft working paper of the Common Market Commission argues that the establishment of 'expanding' competition throughout the Common Market is necessary in order to attain the 'most rational distribution of production at the

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid* 41: *Mémorandum* (on meeting the goals of the Schuman Plan) 7 December 1950, *Bundesarchiv Koblenz* B 102 3235.

<sup>42</sup> *ibid*: 'Le moyen d'y parvenir est de développer la concurrence'.

<sup>43</sup> *ibid* 134: 'Arbeitsunterlage über die Faktoren, die geeignet sind, den Wettbewerb zu beeinflussen' Brussels 2 August 1955 MAE/CIG 97, 'Ausschuss für den Gemeinsamen Markt für Investitionen und Sozialfragen': 'Die Verwirklichung und das ordnungsgemässe Funktionieren des gemeinsamen Marktes erfordern die Ausschaltung solcher Massnahmen und Praktiken, die den Wettbewerb verfälschen oder unlauter sind'; *ibid* 136: 'Arbeitsunterlage über das Problem des Wettbewerbs, Vorlage des Sekretariates' Brussels 5 August 1955 MAE/CIG 134, 'Ausschuss für den Gemeinsamen Markt für Investitionen und Sozialfragen', private archive Groeben MAE 182 d/55 arz/mw.

<sup>45</sup> *ibid* 49.

<sup>46</sup> *ibid*: 'domination des marchés'.

<sup>47</sup> *ibid* 49.

<sup>48</sup> *ibid* 51: '*industries consommatrices*'; see art 61(2) ECSC.

<sup>49</sup> *ibid* 147.

highest possible level of productivity'.<sup>50</sup> It states that this cannot be achieved solely through the elimination of exchange barriers such as custom rights, quantitative restrictions and measures having equivalent effect; it also requires the introduction of provisions which will ensure that 'the game of competition would not be distorted'.<sup>51</sup>

What does this review of thinking between 1950 and 1955 tell us about the present? In recent years, productive efficiency has moved to a strategy of making the Union one of the most dynamic and competitive 'knowledge-based' economies<sup>52</sup> and, as a result, dynamic efficiency receives greater recognition.<sup>53</sup> One of the goals of the Treaty of Paris was to achieve productive efficiency to better serve coal and steel consumers, but this prevalent factor in the development of society in the 1950s did not impede a shift to dynamic efficiency, capturing high technology markets and dynamic competition, thus further progressing towards achieving all the envisaged fundamental freedoms of the internal market found in the Treaty of Rome and beyond.

Recently, the Commissioner for Competition, Joaquín Almunia, placed a highly competitive 'social market economy' at the heart of competition policy and, more recently, contemplated the potential of competition law as a means of supporting innovation policy regarding renewable energies.<sup>54</sup> His mandate regards competition policy 'as a *means* of strengthening our social market economy, and enhancing its efficiency and fairness'.<sup>55</sup> Competition policy is once again being seen as a means of delivering some policy aims other than efficiency and is emphasizing that, putting aside competition jargon, capitalistic competition and the social market economy should sit easily alongside each other. Therefore, it is clear that in the Lisbon Treaty a new goal of EU competition policy is to be highly competitive 'outside' the EU, while being 'social' within it.<sup>56</sup>

<sup>50</sup> *ibid* 138: '*Commission du Marché Commun des investissements et des problèmes sociaux document de travail*' Brussels 3 October 1955 MAE/CIG 301. By contrast, it was said that competition could be distorted through state intervention having as an objective the influence of competition through discriminatory or restrictive practices by undertakings and subsequently through differences among existing or recently introduced general provisions, taxation and social laws, 139. <sup>51</sup> *ibid*.

<sup>52</sup> Presidency Conclusions, Lisbon European Council 23 and 23 March 2000. Unfortunately, the 2010 target was not realistic.

<sup>53</sup> See LH Röller, 'Challenges in EU Competition Policy' (2011) 38 *Empirica Journal of European Economics* 289: 'most economists agree that investment, innovation and more generally dynamic efficiencies are most important for Europe's economy, and ultimately Europe's welfare'.

<sup>54</sup> Commissioner Almunia refers to the social market economy as 'mission accomplished' see European Commission, Complete speech, plenary session of the EECS, 23 February 2012: statement by Joaquín Almunia, Ref I-072443-INT-1.

<sup>55</sup> (June 2012) <[http://ec.europa.eu/commission\\_2010-2014/almunia/about/mandate/index\\_en.htm](http://ec.europa.eu/commission_2010-2014/almunia/about/mandate/index_en.htm)> (January 2014) (emphasis added).

<sup>56</sup> On goals of competition after Lisbon see AD Chiriță, 'Undistorted, (Un)fair Competition, Consumer Welfare and the Interpretation of Article 102 TFEU' (2010) 33 *World Competition Law and Economics Review* 415.

*B. What Is the Distinction between ‘Object’ and ‘Effect’ under Article 101 TFEU?*

Recently, the distinction between object and effect has been extensively discussed in the European literature.<sup>57</sup> However, this question needs a deeper historical review in order to identify how it was shaped in the early 1950s. In this context ‘object’ is a synonym for ‘purpose’. The Schuman Plan envisaged that agreements between undertakings ‘having as an object’ the limitation of the production of coal and steel, the division of markets or the fixing of prices should be prohibited.<sup>58</sup> Monnet, however, argued that such agreements should be permitted where they encouraged production and the most efficient use of existing tools. In such cases the High Authority could have authorized agreements between undertakings which had as their object (ie purpose) their merging or specialization.<sup>59</sup>

*1. The original drafting proposals (ECSC)*

Except for Article 101(1)(e), Article 101 refers generally to ‘agreements’, not to legally enforceable contracts.<sup>60</sup> The original German proposal used the term ‘contracts’ instead of ‘agreements’, in particular ‘contracts that undertakings conclude in pursuit of a common purpose and which influence production or market relations for trade in goods in restraint of competition’.<sup>61</sup>

The High Authority had to authorize ‘only those contracts and decisions which are likely to increase the performance and efficiency<sup>62</sup> of the

<sup>57</sup> The distinction between object and effect has been questioned by looking at Professor Whish’s famous ‘object box’ see R Whish and D Bailey, *Competition Law* (7th edn, OUP 2012) 124 and for past case law see S King, ‘The Object Box: Law, Policy or Myth?’ (2011) 7 *European Competition J* 269; for possible legal presumptions see MR Mahtani, ‘Thinking outside the Object Box: An EU and UK Perspective’ (2012) 8 *European Competition Journal* 1. For an attempt to seek some clarity in ‘object’ restrictions in cartel cases see D Bailey, ‘Restrictions of Competition by Object under Article 101 TFEU’ (2012) 49 *CMLR* 559; A Jones, ‘Left Behind by Modernisation? Restrictions by Object under Article 101(1)’ (2010) 6 *European Competition Journal* 658; on object as subjective intention see O Odudu, ‘Interpreting Article 81(1): Object as Subjective Intention’ (2001) 26 *ELRev* 379; for the economic context of ‘object’ restrictions see A Jones and A Turati, ‘The UK Tobacco Case: Restrictions by Object in Vertical Agreements’ (2012) *Journal of European Competition Law & Practice*.<sup>58</sup> Schulze and Hoeren (n 15) 21.

<sup>59</sup> *ibid.* An Advisory Committee was said to include producers, trade unions’ representatives and consumers.

<sup>60</sup> The reference to contracts in the context of restraints of competition is more clearly explained in Schulze and Hoeren (n 15) 101: ‘*Memorandum der deutschen Delegation über die Ausschaltung wettbewerbsbeschränkender privater Praktiken*’ (Memorandum) Paris 10 February 1954, *Bundesarchiv Koblenz B 102 12608*.

<sup>61</sup> *ibid* 23: ‘Bestimmungen zum Schumanplan’ Bonn 21 October 1950, *Bundesarchiv Koblenz B 102 3235*: ‘Beschlüsse von Vereinigungen von Unternehmen und Verträge, die Unternehmen in Verfolgung eines gemeinsamen Zweckes schliessen, die die Erzeugung oder die Marktverhältnisse für den Verkehr mit Waren durch Beschränkung des Wettbewerbs beeinflussen.’

<sup>62</sup> Note that the word efficiency (*Effizienz*) does not occur in the original, but it is logically implied from ‘*Wirtschaftlichkeit*’.

undertakings involved as regards their technical, business administration<sup>63</sup> and organizational relations, thereby improving the meeting of demand without any unjustified modification of prices and terms and conditions in dealings with the respective goods and commercial services'.<sup>64</sup> Therefore, the High Authority was stipulating that contracts ought not to be prohibited per se where there is the likelihood of increasing economic efficiency as regards existing technology, business administration and the organization of the undertakings concerned. This means that the micro-economics of industrial organization are at the core of this drafting proposal. However, undertakings were not required to contribute to technological and economic advance. Rather, the draft suggested meeting the demand of customers of coal and steel without any unjustified modification of trading terms and conditions, including pricing.

In the original draft there is also no mention of consumers sharing the benefits resulting from any resulting enhancement in economic performance or efficiency. A French proposal had suggested that the rules envisaged by the Schuman Plan should stimulate undertakings to increase their productivity steadily so as to benefit consumers of coal and steel. The proposal suggested prohibiting those practices, namely, commercial deals and 'any' agreements, which had as their purpose<sup>65</sup> or had the direct or indirect 'result'<sup>66</sup> of preventing,<sup>67</sup> restraining or altering free competition and, in particular, of fixing prices, limiting or controlling production in any manner, or of dividing markets, production, customers or sources of supply.<sup>68</sup> This change from the

<sup>63</sup> In the original the word used is '*betriebswirtschaftlich*'.

<sup>64</sup> Schulze and Hoeren (n 15) 23. In the original the wording is:

solche Verträge oder Beschlüsse ... , wenn sie geeignet sind, die Leistungsfähigkeit und Wirtschaftlichkeit der beteiligten Unternehmen in technischer, betriebswirtschaftlicher oder organisatorischer Beziehung zu heben und dadurch die Befriedigung des Bedarfs zu verbessern und Preise und Geschäftsbedingungen im Verkehr mit den von der Regelung betroffenen Gütern oder gewerblichen Leistungen nicht ungerechtfertigt verändert.

<sup>65</sup> In the original the word used is *Ziel*.

<sup>66</sup> In the original the word used is *Ergebnis*.

<sup>67</sup> In the original the word used is *verhindern*, which also means 'to hinder'.

<sup>68</sup> See the French proposal on the entry into force of the Schuman plan with regard to agreements and practices having a restrictive nature or which aim to establish monopolies, eg Schulze and Hoeren (n 15) 26: '*Vorschläge über die Inkraftsetzung des Schuman-Plans in Hinblick auf Vereinbarungen und Praktiken, die einschränkender Natur sind oder die zur Errichtung von Monopolen tendieren (Vorschlag der französischen Delegation)*' 27 October 1950 *Bundesarchiv Koblenz B 102 3235*:

zu verbieten, daß irgendein ... unterliegendes Unternehmen nur gemeinsam mit einem anderen Unternehmen handeln kann, oder irgendeine Vereinbarung schließen kann, deren Ziel, oder deren direktes oder indirektes Ergebnis auf dem gemeinsamen Märkte darin bestehen würde:

- (a) auf irgend Weise den freien Wettbewerb zu verhindern, zu beschränken oder zu verändern und insbesondere die Preise festzusetzen;
- (b) auf irgendeine Weise die Produktion zu beschränken oder zu kontrollieren;
- (c) die Märkte, Erzeugnisse, Kunden oder Materialquellen aufzuteilen.

initial German proposal concerning *contracts* to the French proposal concerning *agreements* resulted in Article 101 becoming more restrictive.

It appears that the German proposal came to be influenced by the French terminology of legal acts,<sup>69</sup> according to which, in order to be legally enforceable, agreements had to have a valid object and a legitimate cause in order to have legal effect.<sup>70</sup> Similarly, under English contract law, agreements that are unsupported by the intention to create legal relations might not be legally enforceable, even if they are supported by economic consideration, ie economic value.<sup>71</sup> However, in the context of commercial agreements, a strong legal presumption operates whereby the courts presume that the parties to the agreement do indeed intend to create legal relations.<sup>72</sup> The onus of rebutting the presumption lies with the undertaking seeking to do so.

## 2. *The French distinction between cause/effect and object*

In order to understand the legal implications of the sudden shift from the use of the term 'contract' to 'agreement', which subsequently triggered the shift from the German term 'result' (*Ergebnis*) to the French term 'effect' (*effet*), it is necessary to examine the distinction between the 'cause' and 'object' of legal acts under French civil law. The distinction between legitimate cause and valid object concerns issues of illegality and public policy. Thus the purpose of the contract must exist, be determined or determinable and be lawful.<sup>73</sup> The cause of a contract includes both an objective aspect (the cause of the obligation to pay, similar to consideration under English law, which is derived from Roman

<sup>69</sup> In the French the words used are *acts juridiques*.

<sup>70</sup> In the original, the words used are *effet utile*. This means an agreement in the sense of an '*accord de principe*' which is not yet a contract. The remaining issues to be negotiated are not essential, but purely formalities. See below Beale (n 74) 359 'An agreement under which the parties would qualify as essential certain elements of the contract and would put aside, as ancillary, all other elements, including those traditionally qualified as essential, cannot amount to the conclusion of the final contract'.

<sup>71</sup> See J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (29th edn, OUP 2010) 70; on letters of intent or comfort, see E Peel, *Treitel on the Law of Contract* (13th edn, Sweet & Maxwell 2011) 179; C Cauffman, 'The Impact of Voidness for Infringement of Article 101 TFEU on Related Contracts' (2012) 8 *European Competition Journal* 104.

<sup>72</sup> E McKendrick, *Contract Law Text, Cases and Materials* (4th edn, OUP 2010) 287; for commercial agreements, see N Andrews, *Contract Law* (1st edn, CUP 2011) 179, where there is a very interesting discussion about a long-term supply agreement abruptly terminated by a trading partner enjoying considerable economic power. In this case no written contract had been put into place; there were simply existing long-standing business relations, 181 in *Baird Textile Holdings Ltd v Marks and Spencer plc* (2001) Civ 274 (EWCA); (2002) 1 All ER (Comm) 737. In contrast, see Joint Cases C-468/06 to C-478/06 *Sot Lelos kai Sia EE and Others v GlaxoSmithKline* (2008) ECR I-7139, on a refusal by a dominant undertaking to meet the orders of an existing customer.

<sup>73</sup> See arts 1126–30 French Civil Code; this prohibits with absolute nullity any involvement, convention or contractual clause. See art L420-3 Code de commerce: '*Est nul tout engagement, convention ou clause contractuelle se rapportant à une pratique prohibée par les articles L 420-1 et L 420*', which prohibit cartels and abuse of a dominant position.

law) and a subjective aspect (concerning its morality, and, which is derived from canon law).<sup>74</sup>

Basically, object and cause are the classical civil law criteria which determine if an agreement is legitimate or not. If it is illegitimate or illicit, then the agreement is either null or void. Obviously, competition agreements do not exist in a vacuum and may be entered into in a commercial context without fulfilling certain legal formalities such as the exchange of written contracts. Briefly, the form of such agreements is irrelevant as long as there is an illegal cause (purpose or aim) which falls under Article 101(a)–(e). Otherwise, any discrete agreements such as arrangements, exchanges or collaborations—even if concluded orally—would be strictly prohibited as a sort of illegality or ‘conspiracy’ to it.

Initially, the ‘object’ of an agreement was to be identified by having a specialization or merger as its subject-matter. Thus, the current distinction between the same ‘object’ as purpose and ‘effect’, ie legal effect of an agreement, namely, civil or criminal sanctions, can only be properly understood on the basis of the French proposal, which embraces a broader range of legal acts. By contrast, an earlier German proposal referred only to contracts,<sup>75</sup> instead of agreements. This is one of the reasons why Article 101 is so broad in scope, since in addition to formal contracts it covers those agreements which might have the same effect as legally enforceable contracts. Otherwise, loose agreements, informal quasi-contracts such as cartels, gentlemen’s agreements, inter-firm collaborations,<sup>76</sup> exchanges of confidential information<sup>77</sup> or disclosures would have remained outside its scope. What really matters is whether there are restrictive practices as described under Article 101(1).

In conclusion, the distinction between object and effect needs to be placed in its general civilian context, whereas the restrictive practices in (a)–(e) relate to the special economic/commercial context. Current controversies are due to the different legal traditions which influenced the drafting of the founding treaties.

<sup>74</sup> See P Malaurie, L Aynès and P Stoffel-Munck, *Les obligations* (4th edn, Paris Répertoire Defrénois 2009) para 692; H Beale, B Fauvarque-Cosson, J Rutgers, D Tallon and S Vogenauer (eds) *Cases, Materials and Text on Contract Law* (2nd edn, Hart 2010) 171; P Simler, F Terré and Y Lequette, *Les obligations* (10th edn, Dalloz 2009) para 312. An illegitimate cause may lead to unjustified enrichment.

<sup>75</sup> This shift from ‘contracts’ to ‘agreements’ is also incorporated in subsequent German drafts: *irgendeine Vereinbarung*.

<sup>76</sup> For commentary on various forms of agreements in the US and Germany see Djelic (n 14) 240.

<sup>77</sup> See the disclosure of confidential information by five Dutch mobile operators at a single meeting on a highly concentrated oligopolistic market in Case C-8/08 *T-Mobile Netherlands and Others* (2009) ECR I-9291 para 31; European Commission, Horizontal Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (2001) OJ C11 para 61; specifically on information exchanges see eg O Odudu, ‘Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion’ (2011) 7 European Competition Journal 205.

### 3. A refined French proposal

Another French draft<sup>78</sup> prohibits any undertaking from taking concerted<sup>79</sup> action with another undertaking to conclude ‘any agreement whose purpose<sup>79</sup> or direct or indirect result within the Common Market was: a) to prevent, restrain or alter, in any manner, the natural game of competition and in particular the price; b) to restrict or control production in any way; and c) to divide markets, products, clients or sources of supply’.

This proposal focuses on coordinated behaviour, irrespective of the existence of any agreements. It distinguishes clearly between purpose and particular consequences, following the German proposal, except for a subtle change, resulting from translation challenges, to the effect that the German expression ‘free competition’ was replaced by the French ‘game of competition’. The German proposal strongly encouraged free competition for both coal and steel, according to which it stated that market participants should not act in ways which run counter to the principle of competition based on performance, which it can logically be concluded refers to efficiency.<sup>80</sup> Therefore, restrictive practices are prohibited in order to prevent the creation and exploitation of a dominant economic position to the disadvantage of producers or consumers.<sup>81</sup>

In contrast, the German proposal refers to the decisions of associations of undertakings and contracts which would be prohibited if capable of influencing production and market conditions for free trade with coal and steel. The exception to this prohibition envisages the authorization of those agreements that are capable of improving the functionality of the Common Market or of contributing to the increase in economic performance and efficiency of the undertakings involved as regards their technology, business administration and organization, and thereby helping to meet demand (for coal

<sup>78</sup> Schulze and Hoeren (n 15) 29: French Proposal of Article 41, 9 November 1950, *Fondation Monnet* AMG 17/8/66:

Aucune entreprise ... ne peut agir de concert avec une autre entreprise, conclure aucun accord, dont le but ou le résultat direct ou indirect serait dans le marché commun: a) d'empêcher; restreindre ou altérer de quelque manière que ce soit le jeu normal de la concurrence et notamment de fixer le prix; b) de restreindre ou contrôler la production de quelque manière que ce soit; c) de répartir les marchés, produits, clients ou sources d'approvisionnement.

<sup>79</sup> In the original the words used are *but* and *résultat* respectively.

<sup>80</sup> In the original the word used is ‘*Leistungswettbewerb*’. This has been translated variously as ‘efficiency contest’ in T van Bernem, *Wirtschaftsenglisch Wörterbuch* (6th edn, Oldenburg 2001) 76; as ‘the only road to business success is through the narrow gate of better performance in service of the consumer’. See W Röpke, *A Humane Economy – The Social Framework of the Free Market* (Chicago 1960) 31; as ‘competition based on performance’ in H Wagenaar (ed) *Government Institutions: Effects, Changes and Normative Foundations* (Kluwer 2000) 139.

<sup>81</sup> Schulze and Hoeren (n 15) 31: Memorandum to the Proposals on the coming into force of the Schuman-Plan with regard to agreements and practices of a restrictive nature or which aim to establish monopolies (German delegation) Paris 10 November 1950, *Bundesarchiv* Koblenz B 102 3235. This proposal is in accordance with the principles of Ch 5 Havana Charter 24 March 1948.

and steel).<sup>82</sup> The same balancing of economic advantages against the resulting disadvantages following the restriction of competition is required to prove the agreement falls under this exception.

#### 4. *Eventual errors in legal translation*

Interestingly, the French proposal prohibits all agreements or decisions by ‘associations of producers’ and all concerted practices aimed, directly or indirectly, at preventing, restricting or altering the natural game of competition.<sup>83</sup> It refers to the same particular practices, such as price-fixing, restriction or control of production or technology, but also introduces mention of investments. However, an exception to the prohibition is foreseen for those ‘agreements by undertakings having as an object the specialization of their production or the joint purchase or sale of the above products,’<sup>84</sup> where:

- (a) such specialization or joint purchase/sale increases substantially productive efficiency or product distribution (of coal and steel);<sup>85</sup>
- (b) the agreement in question is essential in order to achieve the above result and it does not restrict the undertakings’ initiative more than is necessary for that purpose;
- (c) the undertakings in question are not likely to be able to control or limit production or a substantial portion of the particular products within the Common Market;

<sup>82</sup> *ibid*:

Marktabreden ... wenn die geeignet sind a) die Funktionsfähigkeit des gemeinsamen Marktes zu verbessern, oder b) zu einer Erhöhung der Leistungsfähigkeit und Wirtschaftlichkeit der beteiligten Unternehmen in technischer, betriebswirtschaftlicher oder organisatorischer Beziehung und dadurch zu einer Besserung der Befriedigung des Bedarfs an Kohle and Stahl zu führen.

<sup>83</sup> *ibid* 33: Proposal of art 41 19 November 1950, *Fondation Monnet* AMG 17/8/71.

<sup>84</sup> *ibid*. See also Ch VI art 65(2) (a)–(b) ECSC on joint-buying or joint-selling agreements.

<sup>85</sup> In the original the wording is:

autoriser les entreprises à conclure des accords ayant pour objet la spécialisation de chacune de ces entreprises dans la production de produits déterminés, soit l’achat ou la vente en commun de produits déterminés, si la Haute Autorité reconnaît:

- a) que cette spécialisation ou ces achats ou ces ventes en commun accroîtront d’une manière substantielle l’efficience de la production ou de la distribution en ce qui concerne les produits visés; et
- b) que l’accord en cause est essentiel pour obtenir ce résultat et ne restreint pas l’initiative des entreprises au-delà de ce qui est nécessaire pour l’atteindre;
- c) que les entreprises visées par l’accord ne sont pas susceptibles d’avoir la possibilité de contrôler ou de limiter la production d’une partie substantielle de produits visés dans le marché commun; et
- d) que l’accord en cause et qu’une telle spécialisation ou que de tels achats ou ventes en commun ne tendront pas à empêcher ou à entraver la concurrence effective sur le marché commun en qui concerne les produits visés. (Emphasis added.)



- (d) the agreement, specialization or joint purchase/sale does not prevent effective competition in the Common Market in respect of the products in question’.

This text makes far more sense than Article 101(3) itself, in particular in exempting *specialization* or *joint* agreements which increase productive efficiency<sup>86</sup> or product distribution, but without requiring a ‘fair share of the resulting benefit’ to be passed on to consumers. On balance, commercial freedom or freedom of action is preserved and whilst the last two conditions are less restrictive than Article 101(3) (b), they do ‘afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question’.

On the whole, the proposal is less restrictive as it only places under scrutiny certain types of agreements the purpose (object) of which is specialization or joint purchase or sale, rather than all agreements which aim to restrict competition. As we have seen, when the proposal was translated into German,<sup>87</sup> it substituted the word ‘undertakings’ for that of ‘producers’, and changed the word ‘game’ to refer to normal competition,<sup>88</sup> while adding to price-fixing the alternative of ‘influencing’. Finally, it left out four cumulative conditions because it saw these as being identical.

Suetens’s personal draft proposal (1950) maintains this subtle change of associations of producers to associations of undertakings.<sup>89</sup> It refers to concerted practices capable of influencing, through an unjustified restriction of competition, either the production or the functioning of the Common Market for coal and steel. This draft then firmly prohibits ‘any’ agreements, decisions or practices, which in an artificial or abusive manner would limit production or impede technical progress, maintain or lower prices, or reserve markets or sources of supply for certain producers.<sup>90</sup> In this draft too, and for the first time, technical advance is mentioned. However, it is unclear what kind of technical advance is envisaged. It was only during the negotiations of the Treaty of Rome (1956)<sup>91</sup> that elements of intellectual property (IP) become part of the balancing needed for a specialization agreement, namely, that the intellectual

<sup>86</sup> In the original the wording is: ‘*l’efficience de la production*’.

<sup>87</sup> Schulze and Hoeren (n 15) 34: the German proposal of 20 November 1950, *Bundesarchiv Koblenz* B102 3235.

<sup>88</sup> Memorandum (n 60) 102, which refers to the free game of competition on the common market (‘*das freie Spiel des Wettbewerbs*’).

<sup>89</sup> *ibid* 38: Project of a new draft of art 41, 21 November 1950 ‘Rédaction tout à fait personnelle de M. Suetens’ sent to Mr Hallstein, Fondation Monnet AMG 17/8/72: ‘une mention explicite que les accords de spécialisation, de vente ou d’achat en commun, s’ils n’ont pas d’effets restrictifs, ne tombent pas sous le coup de l’interdiction des accords de pratiques restrictifs’.

<sup>90</sup> *ibid*.

<sup>91</sup> *ibid* 158: ‘Regierungskonferenz für den Gemeinsamen Markt und Euratom, Arbeitsgruppe für den Gemeinsamen Markt’ Brussels 4 September 1956, private archive Groeben MAE 233 d/56 mp; 233 d/56 arz/hn; 233 d/56 arz/aw.

property creator proves that the agreement actually improves the production or distribution or that it promotes technological *and* economic advance.

### 5. Relative versus absolute nullity?

An important feature<sup>92</sup> of the prohibition in Article 101 worth highlighting is that agreements which have certain conditions ensuring that specialization and joint agreements will not have restrictive effects are not subject to absolute prohibition. Article 101(3) provides an exception to absolute nullity, in that restrictions by effect would need further consideration (ie they are a 'relative nullity') and are not automatically void. Bearing in mind the previous distinction between written contracts and loose agreements, Article 101(1) triggers absolute nullity for any restriction by object from Article 101 (a)–(e). Innumerable other changes are included in ECSC's Article 60.<sup>93</sup> Most notable is a sudden change of perspective concerning the authorization of specialized agreements or joint purchase/sale agreements by including as an alternative 'other similar agreements'<sup>94</sup> if such agreements contribute to a 'significant'<sup>95</sup> improvement of production or distribution.<sup>96</sup> In one of the four cumulative conditions<sup>97</sup> the word 'effects' replaces 'result', which changes the previously moderated approach to one which covers the initiatives of all types of undertakings. This change reads as follows: 'the agreement in question is essential to reach the above effects (namely, significant improvements), without being more restrictive than is demanded by its purpose'.<sup>98</sup> The next condition<sup>99</sup> is the requirement not to impede effective competition within the Common Market.

However, thereafter, the situation became even more complicated. Article 60(3) requires the notification of any agreement or concerted practice among competing undertakings and of the decisions of associations of undertakings, irrespective of their purpose,<sup>100</sup> if not concluded in writing to be

<sup>92</sup> *ibid* 40: 'Caractéristiques de la nouvelle rédaction proposée pour l'article 41' 24 February 1950, *Fondation Monnet* AMG 17/8/74.

<sup>93</sup> *ibid* 78 for different drafts of Art 60, 'Verschiedene Fassungen' 17 February, 1 and 3 March 1951, *Fondation Monnet* AMG 17/8/98; *ibid* 87 Annex to arts 60, 61, 73 bis, 73rd and 73th, 14 March 1951, *Fondation Monnet* AMG 17/8/101 a), b) and c); *ibid* 97 Art 60, 14 March 1951, *Fondation Monnet* AMG 17/8/101a annexes.

<sup>94</sup> In the original the wording is '*accords strictement analogues*'.

<sup>95</sup> *ibid* 88: '*notable*'.

<sup>96</sup> *ibid* 55 on amending proposals: '*Änderungsvorschläge zu Art 60*' 13 February 1951, *Fondation Monnet* AMG 17/8/84.

<sup>97</sup> See art 60(2)(b): 'the concerned agreement is essential to attain the above result and does not restrict the undertakings' initiative more than is necessary to attain that result'.

<sup>98</sup> *ibid*.

<sup>99</sup> *ibid* 89: Art 60(2)(c): 'undertakings are not likely to control or limit production or a substantial part of the products in the common market, or be able to eliminate effective competition: '*ni de le soustraire à une concurrence effective d'autres entreprises dans le marché commun*'.

<sup>100</sup> In original: '*la nature de l'objet*', ie irrespective of its type/category.

submitted for the approval of the High Authority.<sup>101</sup> Otherwise, they are to be declared contrary to the ECSC Treaty. Thus, if the High Authority were to find that certain agreements are very similar, based on their ‘nature (type) or effects’ as under Article 60(1)(a)–(c), they may only be authorized if the same conditions are met.<sup>102</sup> This means that specialization agreements are not the only agreements that can justify an exception to the above absolute prohibition under Article 101.

Another modifying proposal refers to those agreements likely to cause the effects mentioned under Article 60(1).<sup>103</sup> A notable change of approach concerns the last cumulative condition of Article 61(2)(d), where the wording requires that such agreements should not have as a ‘net effect’ the reduction of competition within the Common Market.<sup>104</sup> Finally, Article 60(1) prohibits by rendering an absolute nullity ‘all agreements between undertakings, decisions by associations of producers and concerted practices’ aimed at preventing, restricting or distorting the normal game of competition.<sup>105</sup> It even stipulates that undertakings granted an exemption on the basis of Article 61(3) by means of false or inaccurate information are to be fined with a maximum of double their annual revenues on the products that were the object of the agreement or decision contrary to Article 61, irrespective of whether their object appears to be solely to restrict production, technical development or investments.<sup>106</sup>

#### *6. Some preliminary remarks on the drafting history of the above distinction*

Hopefully, the above overview of the development of ECSC provisions helps us to understand the text prior to the drafting of the Treaty of Rome and why the ECSC is indisputably its primary inspirational source.<sup>107</sup> For those who still doubt this, a historical document containing ECSC provisions provided the starting point for negotiations for the Treaty of Rome at the Messina conference.<sup>108</sup> Later, the French delegation presented an excerpt of their Pricing Regulation no 45/1483 of June 1945, as amended by the Decree of August

<sup>101</sup> *ibid* 67: art 61 20 February 1951, *Fondation Monnet* AMG 17/8/89.

<sup>102</sup> *ibid* 75.

<sup>103</sup> *ibid* 56–9: ‘Änderungsvorschläge der Delegationschefs zu Art 60’ 13 April 1951, *Fondation Monnet* AMG 17/8/85.

<sup>104</sup> See art 60(d): the agreement and specialization or joint purchase/sale does not prevent effective competition on the common market in respect of the products in question. This in French is expressed as follows: ‘*qu’il n’a pas pour effet net une réduction de la concurrence dans le marché commun*’; *ibid* 63: ‘*Art 60 révisé: modifications proposées*’ 15 February 1951, *Fondation Monnet* AMG 17/8/86.

<sup>105</sup> Schulze and Hoeren (n 15) 74 and 90: art 60 25 February 1951, *Fondation Monnet* AMG 17/8/93.

<sup>106</sup> *ibid* 90: ‘*au moyen d’informations fausses ou déformées*’.

<sup>107</sup> Djelic (n 14) 245 who also speaks of a ‘transfer’ of provisions from ECSC to the Treaty of Rome.

<sup>108</sup> Schulze and Hoeren (n 15) 107: ‘*Regelung des Wettbewerbs im Gemeinsamen Markt für Kohle und Stahl, Regierungsausschuss eingesetzt von der Messina-Konferenz*’ Brussels 29 August 1955.

1953. This regulation prohibits concerted actions, all ‘understandings’ (a synonym for ‘agreements’)<sup>109</sup> and express or silent arrangements, including collusion<sup>110</sup> or concentrations (the latter being prohibited irrespective of form and purpose) having the purpose or result (effect) of preventing free competition so as to reduce production costs or sale prices or to allow artificial price increases.<sup>111</sup>

A subsequent draft (1956) uses words even more economically, the wording being ‘all agreements between undertakings and all decisions by undertakings which have as an object or as an effect the prevention of competition, in particular by fixing prices or elements thereof; limiting production, distribution or investments; preventing technical or economic advance; dividing markets, products, clients or sources of supply’.<sup>112</sup> It states that such agreements or decisions may be authorized provided that the claimant is able to prove that they actually contribute to the improvement of production or distribution or the promotion of technical or economic advance. Here the claimant needs to prove that this will benefit consumers.

Yet another innovation was made by a group of legal experts who added two further requirements to this Article 101(3).<sup>113</sup> As previously mentioned, a French proposal required the IP author to prove an actual improvement of production, distribution or the promotion of technical or economic progress,<sup>114</sup> including the consumers’ fair share. In contrast, the German proposal changed the IP author to the neutral ‘claimant/applicant’, which diverts the intended scope of the application of IPRs.<sup>115</sup> The group of experts who drew up the final draft added the requirement that ‘such a contribution should not run counter to the objectives of the treaty’<sup>116</sup> as regards the improvement in question by

<sup>109</sup> In German the word used is ‘*Abmachung*’.

<sup>110</sup> *ibid*: Absprachen.

<sup>111</sup> *ibid* 159: ‘Regierungskonferenz für den Gemeinsamen Markt und Euratom, Auszug aus dem Dekret vom 9 August 1953, von der französischen Delegation vorgelegten Unterlage’ Brussels 6 September 1956, private archive of Groeben, MAE 244 d/56 ann/hn; 244 d/56 ann/cm.

<sup>112</sup> *ibid* 165: ‘Zweiter Entwurf zu Art 42, 42 a-c’ 7 September 1956, private archive of Groeben.

<sup>113</sup> *ibid* 199: ‘Entwurf einer Fassung für die Wettbewerbsregeln von einer Expertengruppe’ Brussels 8 November 1956.

<sup>114</sup> *ibid* 175.  
<sup>115</sup> Professor Korah acknowledged that German *ordo-liberals* were distrustful of IPRs and restrictive licensing agreements, allegedly influencing the Commission’s officials thinking in the 1970s. See V Korah, *Intellectual Property Rights and the EC Competition Rules* (Hart Publishing 2006) 1.

<sup>116</sup> Schulze and Hoeren (n 15) 210: ‘Entwurf einer Fassung für die Wettbewerbsregeln von einer Expertengruppe am 7. und 12.11.1956 für die Arbeitsgruppe für den Gemeinsamen Markt ausgearbeitet’ Brussels 12 November 1956, Bundesarchiv Koblenz B 102 22117 MAE 527 d/56 ann/hn; 527 d/56 ann/eg: ‘die mit den Zielen dieses Vertrages nicht unvereinbar sind, insbesondere deswegen, weil sie die Verbesserung ... bewirken ... jedoch mit der Massgabe, dass sie den beteiligten Unternehmen nur diejenigen Beschränkung auferlegen, die für die Verwirklichung der vorgenannten Ziele unerlässlich sind’. The Treaties’ goals orientation is maintained by the Dutch delegation, *ibid* 221: ‘Arbeitsgruppe für den Gemeinsamen Markt, Entwurf einer Fassung für die Wettbewerbsregeln’ Brussels 15 November 1956, Bundesarchiv B 102 22117 MAE 547 d/56 ann/msr, but it is replaced with technological and economic progress, *ibid* 239: ‘Billigung der Wettbewerbsregeln durch die Delegationsleiter’ 6 December 1956, private archive of Groeben

imposing on the undertakings concerned limitations which are not indispensable for the attainment of these objectives. However, the original understanding of ‘objectives’ does not seem to have been solely the promotion of technical progress and so on, but was to be generally derived from the treaty’s future goals. This allows a greater flexibility in balancing different types of efficiencies corresponding to other goals to be pursued in the name of competition, for example, social goals.<sup>117</sup>

Finally, a clause referring to affecting trade between Member States was introduced (1954) for agreements, decisions and concerted practices ‘which are likely to have’ a harmful effect<sup>118</sup> on the Common Market.<sup>119</sup> The same wording is used twice, which proves that harmful ‘effects’ were not an alien concept in the 1950s. At the last minute, ‘categories’ of agreements were introduced under ex- Article 85(3) EC.<sup>120</sup> As the above discussion makes clear, in the absence of any discussion within the ECSC, the drafting of the Treaty of Rome alone reveals all too little regarding the distinction between object and effect. Since Article 101 incorporates this somewhat confusing distinction without ever mentioning contracts under Article 101(1), it is easy to confuse the enforceability of agreements that require an intention to produce legal

MAE 262 d/57 eg; 262 d/57 vr; 262 f/57 vr; 262 d/57 ip. For an even closer interpretation to the one made nowadays see *ibid* 242: ‘Ausschuss der Delegationsleiter Fassung der Artikel betreffend Titel II–Kapitel 1: Die Wettbewerbsregeln’ Brussels 10 December 1956, Bundesarchiv Koblenz B 102 22117 MAE 788 d/56 msr.

<sup>117</sup> On balancing efficiencies considering a wider scope than the strict letter of the law see C Townley, *Article 81 EC and Public Policy* (Hart Publishing 2010). However, while this could be beneficial for consolidating an EU social feature, human health as public policy would fall under EU consumer law rather than competition, and not even EU unfair competition. Public health reminds me of the GATT Chapeau (art XX)’s protection of the environment and its exceptional measures to protect human, animal or plant life or health, eg to reduce tobacco consumption, risks caused by asbestos, protect dolphins, etc. For an excellent review of his book see O Odudu, ‘The Wider Concerns of Competition Law’ (2010) 30 OJLS 599.

<sup>118</sup> Memorandum (n 60) 102. See art 67 ECSC on harmful effects.

<sup>119</sup> *ibid* 101; for the different views of the German and Belgian delegations regarding the clause ‘trade between Member States’, which should be seriously affected: ‘*ernstlich behindern*’ see *ibid* 104: ‘*Grundsätze für das freie Spiel des Wettbewerbs*’, Bundesarchiv Koblenz B 102 12608 MAE 213 d/54 mj. See the French version of art 42 a, *ibid* 269: ‘*Gemeinsamer Markt Artikel 42 sprachlich überarbeitet, Projet de rédaction*’ Brussels 14 February 1957 MAE 262 f/57 gd, private archive of Groeben MAE 262 d/57 msr: Art 4(1)

Sont incompatible avec le marché commun, interdits et nuls de plein droit, tous accords entre entreprises, toutes décisions d’association d’entreprises, et toutes pratiques concertées qui sont susceptibles d’affecter le commerce entre les États membres et qui ont pour objet ou pour effet d’empêcher de restreindre ou de fausser le jeu de la concurrence à l’intérieur du marché commun.

See the split between art 101(1), (2) and (3) during the reading *ibid* 277: ‘*Redaktionsgruppe, Erste Lesung*’ Brussels 23 February 1957, private archive of Groeben MAE 648 d/57; *ibid* 283: ‘*Neue Fassung der Art 42-44 c*’ Brussels 28 February 1957, ‘*Conseil des Communautés européennes, Archives Historiques, Négotiations des traités instituant la CEE et la CEEA*’ CM3 no 265 MAE 262 d/57 msr.

<sup>120</sup> *ibid* 295: ‘*Die Gemeinsamen Regeln (Art 85-91)*’ 6 March 1957, private archive of Groeben MAE 776 d/57 arz/eg; 776 d/57 X/eg; 776 d/57 X/arz/eg; 776 d/57 x/hk; 776 d/57 X/arz/ls; 776 d/57 x/hn 776 d/57 x/ls.

effects with the restrictive effect required under Article 101(3). They are not necessarily the same thing. Without a doubt, the drafting process of adding, removing and translating provisions has made the final text of Article 85 EC somewhat inaccessible. This explains why the case law has been the subject of many controversies for competition commentators.

For example, *GlaxoSmithKline*<sup>121</sup> concerned a wholesalers' distribution agreement 'General Sales Conditions', which was sent for negative clearance (authorization) to the Commission. The agreement covered the cross-border (parallel) trade in medicines for which national price regulations already existed before it was drawn up. However, Spanish wholesalers had accepted the above sales conditions in writing, which meant that this agreement clearly fell under Article 101(1)(a), ie 'fixing any other trading conditions'.<sup>122</sup> GSK claimed that it merely intended to market medicines, but not to restrict competition. The General Court found that the Commission erred in law when it found that the agreement had both the object and the effect of restricting competition.<sup>123</sup> It was claimed that the Commission should have established the 'effects' of the agreement, ie that GSK restricted competition to the detriment of the final consumer under Article 101(3).<sup>124</sup> This argument was subsequently rejected by the Court of Justice.<sup>125</sup> The court said that since the agreement was in writing it was therefore legally enforceable. Even if the agreement referred only to sale conditions, and did not intend to fix the price, under Article 101(a) both are alternative criteria,<sup>126</sup> it satisfied the 'object' restriction. The agreement was therefore capable of producing legal effects. The analysis of effects for 'any' agreements, followed by a heavy burden of proof, makes the granting of an exemption of this type highly unlikely.

More recently, the Commission found in *MasterCard*<sup>127</sup> that a multilateral interchange fee (MIF) between the issuing and the acquiring bank on the settlement of card transactions had restrictive effects on competition in the acquiring market.<sup>128</sup> The fee restricted competition between acquiring banks to the detriment of merchants and their customers as it operated both on the acquisition of cross-border transactions and on the acquisition of domestic transactions.<sup>129</sup> The MIFs could not be regarded as 'ancillary' restrictions because they were not objectively necessary for the operation of an open

<sup>121</sup> Case T-168/01 *GlaxoSmithKline v Commission* ECR II-2981.

<sup>122</sup> *ibid* [13].

<sup>123</sup> *ibid* [91].

<sup>124</sup> *ibid* [147] and [216].

<sup>125</sup> Joined Cases C-501, 513, 515 & 519/06 P *GlaxoSmithKline v Commission* ECR I-9291 [63]; SB Völcker (2011) 48 CMLR 175.

<sup>126</sup> This was recently confirmed in Case T-111/08 *MasterCard, Inc, Master Card International and MasterCard Europe v Commission* 24 May 2012 [139]; on appeal Case C-382/12 P. Previously, the Commission found that the arrangement in *Visa International Interchange Fee* (2002) OJ L318/17 did not have as an object the restriction of competition, even if it restricted the freedom of banks to decide their own pricing policies. See AG Kokott's Opinion Case C-8/08 *T-Mobile Netherlands BV and Others* ECR I-04529 [42–45].

<sup>127</sup> *ibid* [120].

<sup>128</sup> *ibid* [27].

<sup>129</sup> para [29].

payment card scheme.<sup>130</sup> Debit cards generated important commercial benefits other than interchange fees<sup>131</sup> and these debit cards were not necessary for the economic viability of the banks in question.

The restriction was ‘directly related’ to the implementation of the main operation and subordinate to it.<sup>132</sup> The concept of ancillary restriction of competition has also been applied in a UK banking charges case,<sup>133</sup> when UK banks operated an overdraft facility ‘free-if-in credit’ for customers having their current accounts with the bank. In that case, the initial agreement was later varied by a separate credit service agreement, which was ancillary to the main operation and generated profits for the respective banks. Put simply, the overdraft facility subsidized the running of current accounts at zero costs.

*Mastercard* is another case where it is clear that there was a restriction by object which ‘by its very nature’ had the potential to fix prices indirectly, that is to say, at the intermediary level of the participating banks which would be passed on indirectly to final consumers.<sup>134</sup> The General Court limited its judicial review of ancillarity to procedural grounds. From an economic perspective, the ancillary nature of such a restriction entails complex economic assessments which were previously carried out by the Commission.<sup>135</sup>

In conclusion, once the purpose of the commercial agreement falls clearly under Article 101(1) (a)–(e), a legal presumption of restriction of competition by ‘object’ operates against the concerned undertakings. It is for the undertakings concerned to rebut the presumption. The present historical review of the ‘object/effect’ distinction during the drafting of the founding Treaties demonstrates that as it stands the law mirrors a strong public enforcement mechanism against illegitimate restrictions of competition by ‘object’. Agreements having an unlawful purpose such as price-fixing are automatically void. The presumption of the application of this prohibition is difficult to rebut. Undertakings need to justify their own commercial interests within the scope of Article 101(3) by demonstrating that they are improving overall economic efficiency. The original proposals reveal some scope for more flexibility and differentiated approaches to technical and economic progress in the context of specialized agreements and IPRs. As we have seen, the German and French proposals reveal certain differentiated linguistic approaches that highlight the understanding of commercial agreements in the civil continental context of cause/object and effect/nullity under French and German civil law.

<sup>130</sup> para [35].

<sup>132</sup> paras [77–78]; Case T-112/99 *M6 and Others v Commission* (2001) ECR II-2459 [104].

<sup>133</sup> *Office of Fair Trading v Abbey National plc* (2008) EWHC 875 (Comm); (2009) EWCA Civ 116; (2009) 2WLR 1286; (2009) UKSC 6; (2009) 3 WLR 1215; *Director General of Fair Trading v First National Bank plc* (2001) UKHL 52, (2001) 1 AC 481.

<sup>134</sup> See (n 126) [138].

<sup>131</sup> para [108].

<sup>135</sup> *ibid* [80].

### C. How Does Discrimination Relate to EU Unfair Competition?

For common-law competition lawyers, unfair competition<sup>136</sup> does not belong to traditional competition policy and therefore its historical review is welcome. Nevertheless, the principle of 'fair' competition is included in the preamble to the Treaty on the Functioning of the European Union. Unfortunately the extent to which 'some' of the national laws against unfair competition should later be enacted at supranational level is left open.<sup>137</sup> The seeds of unfair competition law in the ECSC treaty are closely related to the prohibition of discrimination. A note on the deconcentration of the Ruhr region (1951) mentions that its reorganization was essential to create a common market by effectively enforcing the treaty's rules on fair competition and non-discrimination.<sup>138</sup>

As has already been mentioned, at the start of the Messina conference, a historical document containing ECSC provisions became the inspiration for the negotiations of the Treaty of Rome.<sup>139</sup> Later, the French delegation presented an excerpt of their Pricing Regulation no 45/1483 of June 1945 as amended by the Decree of August 1953. The true meaning of this excerpt can only be fully understood in the context of price discrimination and unfair competition.

At the Messina Conference (1955), the Committee for the Common Market (Investments and Social Issues) mentioned in its working paper the various factors that influence competition, noting that competition rules are needed to ensure free competition within the Common Market, in particular to protect against any form of national discrimination. It also makes reference to 'fair competition' through the control of dumping and cartels.<sup>140</sup> The recognition of fairness in the international trade context of dumping proves that at least the provisions against international cartels and discrimination belong to unfair trade, ie unfair competition. Historically, Messina is a turning point in terms of perspective: first, it represented the start of the Treaty of Rome negotiations

<sup>136</sup> For an overview of the German unfair competition law, parallel imports and marketing methods see Säcker, 'The Relationship between Competition Law and Unfair Competition Law' in Hirsch (n 11) 15; more specifically, see H Köhler and J Bornkamm, *Gesetz gegen den unlauteren Wettbewerb* (29th edn, CH Beck 2011); for commentary on intentional hindrance and boycotts 494; on intentional predatory pricing 561; on discrimination, including price discrimination 565; for a more integrated approach of both competition and unfair competition see F Rittner and M Kulka, *Wettbewerbs- und Kartellrecht* (7th edn, CF Müller 2008) 109; PD Pichler, *Das Verhältnis von Kartell- und Lauterkeitsrecht: eine Standortbestimmung nach den Novellen von GWB und UWG* (Nomos 2009).

<sup>137</sup> Schulze and Hoeren (n 15) 106: 'Es bleibt aber noch festzustellen, in welchem Masse die durch gewisse nationale Gesetze gegen "unlauteren Wettbewerb" geregelten Materien auf supranationalem Gebiet geregelt werden sollen'.

<sup>138</sup> *ibid* 73: 'Note sur l'article 61 et la déconcentration de la Ruhr' 25 February 1951.

<sup>139</sup> *ibid* 107: 'Regelung des Wettbewerbs im Gemeinsamen Markt für Kohle und Stahl, Regierungsausschuss eingesetzt von der Messina-Konferenz' Brussels 29 August 1955.

<sup>140</sup> *ibid* 129: 'Arbeitsunterlage über die Faktoren, die geeignet sind, den Wettbewerb zu beeinflussen' Brussels 2 August 1955 MAE/CIG, 'Ausschuss für den Gemeinsamen Markt für Investitionen und Sozialfragen'.



and, secondly, recognized a subtle, positive function of fair competition.<sup>141</sup> Thus, it still refers to unfair competition in the context of approximation of national provisions.<sup>142</sup> The group of experts for the Common Market clearly decided to opt for a 'positive style' in drafting the prohibition of discrimination.<sup>143</sup> This explains why, in the final version of the treaty, unfair competition appears only in the preamble, disguised as fair competition.

In case it is unclear why discrimination has been central under Article 102, it is necessary to point out that in the 1954 document discrimination is dealt with in conjunction with the abusive exploitation of a dominant position, where the economic definition of discrimination is of 'a differential treatment of similar categories of suppliers or buyers which is not justified by cost differences'.<sup>144</sup> The absolute prohibition on discrimination concerns only grounds of nationality.

However, as previously mentioned,<sup>145</sup> the protection afforded to producers against unfair competition practices is one of the roles given to the High Authority under the ECSC. In the original proposal, Article 56 ECSC prohibits unfair or artificial competition pricing practices, in particular, solely temporary or local price-cutting having as a purpose the attainment of a monopoly position within the Common Market.<sup>146</sup> Furthermore, it also prohibits discriminatory practices leading to different treatment amongst buyers, based

<sup>141</sup> In the synopsis of competition rules see *ibid* 182: 'Synoptische Darstellung der Artikelentwürfe über die Wettbewerbsregeln für die Unternehmen' Brussels 9 October 1956, private archive of Groeben MAE 377 d/56.

<sup>142</sup> Schulze and Hoeren (n 15) 133. It was imperatively required that competition be fair and the provisions relating to unfair competition of the Member States be harmonized; *ibid* 135 the excerpts of the Report of the Commission for the European Political Community to the Foreign Ministers, Annex 1, 'Auszüge aus dem Bericht an die Ausseminister', private archive of Groeben MAE 139 d/55 ell/ip; 139 d/55 sell/lg; 139 d/55 hr; 'Conseil des Communautés européennes, Archives Historiques, Commission du Marché Commun des Investissements et des problèmes sociaux' CM3 no 36 MAE f/55 oc; 139 f/55 mw; *ibid* 143 on the need to harmonize the national provisions against unfair competition ('concurrency déloyale').

<sup>143</sup> *ibid* 206: 'Protokollentwurf über die Sitzungen der Arbeitsgruppe vom 5-7.11.1956' Brussels 9 November 1956, Bundesarchiv Koblenz B 102 22106 MAE 525 d/56 arz/msr; *ibid* 207: 'Groupe du Marché Commun, Projet de proces-verbal des réunions du Groupe tenues à Bruxelles les 5, 6 et 7 nov. 1956 (Examen en seconde lecture des projets d'articles relatifs aux règles de concurrence (Discriminations-ententes et monopoles)' Brussels 9 November 1956 Bundesarchiv Koblenz B 102 22106 MAE 525 f/56 mp.

<sup>144</sup> *ibid* 103:

Sehr eng mit der Betrachtung der Ausnutzung der Marktstellung zur Verfälschung des Wettbewerbs ist das Problem der Diskriminierung verbunden. Hierbei wird unter Diskriminierung im wirtschaftlichen Sinne die nicht durch Kostenunterschiede gerechtfertigte unterschiedliche Behandlung gleicher Lieferer- oder Abnehmerkategorien verstanden.

Since the US experience of enforcing the Robinson-Patman Act was not particularly encouraging, it was decided that discrimination should be prohibited only with regard to cartels and monopolies.

<sup>145</sup> On the future role of the High Authority see point 6.

<sup>146</sup> *ibid* 113; Annex II b, Art 60 section 1: 'die Praktiken unlauteren Wettbewerbs, vor allem die nur vorübergehenden oder örtlichen Preissenkungen, die auf Erlangung einer Monopolstellung innerhalb des gemeinsamen Marktes gerichtet sind.' The German text makes it clear that these are practices against fair competition.

on their nationality or the application by the same seller of different conditions to buyers in a similar position.<sup>147</sup> This proposal illuminates our understanding of Article 102(2)(a), which seems to have merged unfair pricing with other trading conditions, where the interpretation of unfair pricing is mostly<sup>148</sup> obscure.<sup>149</sup> In other words, it is difficult to grasp the intention behind including the terms ‘directly or indirectly’ in the draft innovation, which were introduced by the expert group for the Common Market (1956) in both Article 101(1)(a) and Article 102(2)(a).<sup>150</sup> The origins of unfair pricing help us understand that the direct imposition of unfair pricing by a dominant undertaking might be traced to the first limb of Article 56, when the imposition of unfair trading conditions would indirectly amount to discriminatory treatment of buyers or suppliers regarding terms and conditions other than pricing. A previous ECSC draft (1951) refers to ‘measures or practices that lead to a discrimination among producers or sellers or consumers, in particular with regard to pricing, supply conditions or transportation fees, as well as those practices that impede the seller’s free choice of his supplier’.<sup>151</sup> Here, temporary price-cutting at the expense of maintaining the production capacity is regarded as discrimination against customers.<sup>152</sup> In support of this idea is the positive definition of competition aimed at ‘ensuring access to production to all similar consumers’.<sup>153</sup> Hindering or impeding buyers’ free choice and the application of dissimilar conditions to similar transactions by one and the same seller are considered to be particular forms of discrimination.<sup>154</sup> Interestingly, it is suggested that producers are interested in being safeguarded against unfair competition practices.

<sup>147</sup> *ibid* 51: Proposal of art 56 9 December 1950, Fondation Monnet AMG 17/8/59: ‘les pratiques déloyales ou artificielles de concurrence et en particulier les baisses de prix purement temporaires ou purement locales ayant pour but d’acquérir une position de monopole’; *ibid* 114 for commentary on the possibility of making recommendations to the undertaking concerned if pricing exceeded the list price or to follow those of another supplier offering buyers the most advantageous terms and conditions.

<sup>148</sup> See art 4(b) ECSC which is almost identical; art 63(1) ECSC which prohibits systematic discrimination practised by purchasers, in particular in public procurement contracts.

<sup>149</sup> AD Chiriță, *The EU Control of Unfair Competition Practices: The Interpretation of Unfair Pricing* (Nomos 2011) 346.

<sup>150</sup> See art 42(1) and 42(a) respectively *ibid* 224: ‘Arbeitsgruppe für den Gemeinsamen Markt, Entwurf einer Fassung für die Wettbewerbsregeln von einer Expertengruppe am 20. Nov. ausgearbeitet unter Berücksichtigung des Meinungs austausches innerhalb der engeren Gruppe’ Brussels 19 November 1956, private archive of Groeben MAE 602 d/56 eg.

<sup>151</sup> Schulze and Hoeren (n 15) 111: Annex II b, ‘Auszug aus dem Vertrag über die Gründung der Europäischen Gemeinschaft für Kohle und Stahl’ 16 April 1951 art 4: ‘Massnahmen oder Praktiken, die eine Diskriminierung zwischen Erzeugern oder Käufern oder Verbrauchern herbeiführen, insbesondere hinsichtlich der Preis- und Lieferbedingungen und der Beförderungstarife, sowie Massnahmen oder Praktiken, die den Käufer an der freien Wahl seines Lieferanten hindern’.

<sup>152</sup> *ibid* 108: ‘Kunden’. *ibid* 107: ‘Regelung des Wettbewerbs im Gemeinsamen Markt für Kohle und Stahl’ 29 July 1955, private archive of Groeben MAE 139 d/55 mw; 139 d/55 hr; 139 d/55 sel/mw; 139 d/55 ell/p.

<sup>153</sup> *ibid*: ‘Verbraucher’.

<sup>154</sup> *ibid* 108.

The High Authority later defined price as the producer's profits after taxation.<sup>155</sup> Dumping is defined as pricing below the published list-price or the price-matching of another supplier, irrespective of whether the supplier belongs to the Community or to a third country.<sup>156</sup> Furthermore, the draft clearly states that meeting the prices of competing suppliers should be allowed, even through rewards or rebates, as long as this information is published in the price list.<sup>157</sup>

Under the ECSC, the principle of non-discrimination aims not to impose any disadvantages on undertakings that have not merged.<sup>158</sup> The High Authority was called upon to consider those disadvantages that could lead to an 'inequality in the competitive conditions of the discriminated undertakings'.<sup>159</sup> Put differently, discrimination is said to mean the differential treatment of sellers or buyers through the application of dissimilar conditions to similar businesses, or refusals to supply.<sup>160</sup> This proposed definition, however, does not meet all expectations<sup>161</sup> since charging the same price was considered questionable in the case of 'fungible goods', ie goods which are commercially interchangeable, where list prices or stock exchanges could be a better option.

The original draft of the Treaty of Rome maintains the substance of the ECSC treaty on the 'differential treatment of sellers or buyers through the application of dissimilar conditions to similar business deals or through refusals to supply or receive in relation to the abuse of dominant positions or agreements between undertakings' and which affect trade between the founding Member States.<sup>162</sup> The Common Market Committee (1955) referred to normal competitive conditions amongst producers, namely, 'individuals or undertakings marketing the products for sale with the aim of gaining profits'.<sup>163</sup> The aim of this was no doubt to exclude from the ambit of competition any intervention of public authorities that do not pursue a profit-seeking activity, for example, social subventions granted directly to consumers, research institutes or subsidies granted for reasons of national security.<sup>164</sup>

<sup>155</sup> *ibid* [6].

<sup>156</sup> *ibid* [8].

<sup>157</sup> *ibid* 109.

<sup>158</sup> *ibid* 77: 'Mémorandum' 1 March 1951, Fondation Monnet AMG 17/8/95: 'le principe de la non-discrimination tend seulement à ne pas imposer un désavantage aux entreprises qui ne sont pas concentrées avant l'entrée en vigueur du Traité'.

<sup>159</sup> *ibid* 82: art 61 (modified) 6 March 1951, *Bundesarchiv* Koblenz B 102 60721; *Mémorandum* (n 158).

<sup>160</sup> Memorandum (n 60) 104: 'unterschiedliche Behandlung von Verkäufern oder Käufern durch Anwendung ungleicher Bedingungen auf vergleichbare Geschäfte oder durch Lieferungsverweigerung'.

<sup>161</sup> *ibid* 105 for the suggestion of the French delegation.

<sup>162</sup> Schulze and Hoeren (n 15) 135.

<sup>163</sup> *ibid* 140: 'Commission du Marché Commun des investissements et des problèmes sociaux document de travail' Brussels 3 October 1955 MAE/CIG 301, Conseil des Communautés européennes CM3 no 38 MAE 404 f/55 jt; 404 f/55 mv; 404 f/55 oc.

<sup>164</sup> *ibid* [6-7].

The same Committee then advanced price discrimination as a prominent discriminatory or restrictive practice among private commercial relations.<sup>165</sup> As mentioned previously, one form of price discrimination is dumping, which consists of the ‘application of more advantageous conditions than the sale conditions of a given supplier and in lieu of delivery those which result from meeting the sale conditions of another supplier’;<sup>166</sup> another form is double pricing,<sup>167</sup> that is, the application of more onerous sale conditions than those of a given supplier. These ban such practices among Member States’ undertakings but the wording is mindful that once competition is functioning effectively among different national economies and following the elimination of exchange barriers, such practices will gradually disappear.<sup>168</sup> A clear purpose of dumping is offered in a footnote,<sup>169</sup> which states that the intention of predatory pricing is ‘to eliminate a competitor or to prevent the development of competition with the aim of ensuring certain monopoly positions on a given market’. However, price discrimination is maintained as a possible consequence of an abuse of a dominant position or concerted practice (*entente*) among undertakings. In this particular setting, it is clearly envisaged that price discrimination will exist among Member States and therefore be based on nationality. Other forms mentioned include refusals to supply or accept and, notably, disadvantageous delivery delays.<sup>170</sup> Price discrimination is closely related to restrictive trade measures which effectively amount to exchange barriers. The elimination of such barriers would run foul of the law if producers were to divide markets for their own profit gains.

The insightful discussion in this report culminates with the prohibition of:

- (a) practices that might ‘restrict the game of competition’ caused by the abuse of monopoly positions<sup>171</sup> or concerted practices among undertakings which might affect trade between Member States and
- (b) discriminatory practices of suppliers or consumers<sup>172</sup> through the application of different conditions, in particular pricing applied to similar transactions or by a refusal to supply or accept as a result of an

<sup>165</sup> *ibid* 141.

<sup>166</sup> *ibid*: ‘Application de conditions plus avantageuses à la fois que celles qui résultent de conditions de vente du fournisseur en cause et que celles qui résultent au lieu de livraison d’alignement sur les conditions de vente d’un autre fournisseur’; another French proposal defined dumping as applying differential pricing to buyers in a similar position *ibid* 249: ‘Vorschlag der französischen Delegation zu dem Dumping innerhalb des Gemeinsamen Marktes’ 17 January 1957, private archive of Groeben MAE 141 d/57 eg.

<sup>167</sup> In original: ‘double prix’.

<sup>168</sup> *ibid*.

<sup>169</sup> *ibid* 145: ‘Projet de rapport aux Ministres des Affaires Etrangères, Tome I, Titre II une politique du marché commun’ Brussels 8 April 1955, ‘Archives du Ministère des Affaires Etrangères’ Paris MAEF 305 no 28 MAE 80 f/56 yd; *ibid* 146 for a further suggestion being made on the drafting of discrimination to be possibly inspired by the US legislation and jurisprudence: ‘qui pourront utilement s’inspirer de la législation et de la jurisprudence américaines’.

<sup>170</sup> *ibid* 141–5.

<sup>171</sup> *ibid* 142: ‘l’abus de positions monopolistiques’.

<sup>172</sup> *ibid*: ‘fournisseurs ou des consommateurs’.

abuse of a dominant position or concerted practice, insofar as the discrimination is grounded on the basis of nationality.<sup>173</sup>

This very final conclusion, while comparatively concise, offers no accurate description of discrimination. Therefore, it does not help us understand the wider context of why price discrimination was included in the treaty.

The Report of the Foreign Ministers<sup>174</sup> which came next stresses discrimination over ‘pricing or other sale conditions in similar transactions or the refusal to deliver’. More clearly it articulated the discrimination of buyers/sellers within the context of the contract of sale in another draft proposal (1956), ie the ‘unjustified differential treatment of buyers or sellers at the conclusion of contracts’.<sup>175</sup> In oligopolistic structures, however, it seems that discrimination is often a primary step towards a general price alteration in order to maintain the elasticity of price.<sup>176</sup> Therefore, the draft states that only the intentional differential treatment of buyers or suppliers through cartels or monopolies should be prohibited.<sup>177</sup> This proves that the element of intention is essential for its future enforcement in relation to both monopolies and oligopolies.<sup>178</sup>

Somewhat surprising is a late proposal (1956) that price increases or price-cutting in comparable deals, which may consolidate a dominant position, should not be dealt with under discrimination, but as unfair competition against competitors.<sup>179</sup> That is to say price-cutting that is temporary but is not locally limited, which benefits all buyers and aims to attain a dominant position, should not be exempted solely because it does not amount to discrimination among trading partners.<sup>180</sup> Finally, cartels and monopolies, which have as a purpose or effect the impediment of competition for a particular product by one undertaking or a group of undertakings, should also deal with any practices that eliminate competitors from the market.<sup>181</sup> Since discriminatory practices do not limit competition, but are subject to more stringent rules, there is the stipulation that they should be policed only in cases of unfair competition.<sup>182</sup>

<sup>173</sup> *ibid* 142.

<sup>174</sup> *ibid* 146.

<sup>175</sup> *ibid* 166: ‘Zweiter Entwurf zu Art 42, 42 a-c’ 7 September 1956, private archive of Groeben.

<sup>176</sup> *ibid* 167: ‘Darlegungen des Sprechers der deutschen Delegation zu den Entwürfen der Art 40 bis 43 im Ausschuss Gemeinsamer Markt (Sitzungsperiode vom 3.-5. Sep.)’ Bonn 8 September 1956, Bundesarchiv Koblenz B 102 22118; Annex sent by the Ministry of Economics B 141 11047. This document was sent for consent to Professor Müller-Armack.

<sup>177</sup> *ibid*.

<sup>178</sup> *ibid* 171 for the prejudice or disadvantage to an economic agent in relation to discrimination, ‘Arbeitsgruppe für den Gemeinsamen Markt, Entwurf eines Protokolls über die Sitzungen der Arbeitsgruppe am 3., 4. und 5. Sep. 1956’ Brussels 10 September 1956, private archive of Groeben MAE 252 d/56 arz/aw; 252 d/56 ann/hn Political Archive of the Foreign Office Bonn, Dep 2, Referat 200 vol 3 MAE 252 f/56 mv.

<sup>179</sup> *ibid* 187 ‘Regierungskonferenz für den Gemeinsamen Markt und Euratom, Aufzeichnung über die Wettbewerbsregeln im Vertrag über den gemeinsamen europäischen Markt’ Brussels 20 September 1956, Bundesarchive Koblenz B 141 11047.

<sup>180</sup> *ibid*.

<sup>181</sup> *ibid* 188.

<sup>182</sup> *ibid*.

Regarding the previously advanced concept of monopolization<sup>183</sup> some major institutional proposals in the late 1950s are insightful. First, they require that a consulting committee on concentrations and discriminations needs to be used for mediation and arbitration and, secondly, where no solution has been accepted, that a court with specialized chambers of mixed formation should be employed, ie a court which includes both lawyers (ie jurists) and experts in economics or experts with a technical background.<sup>184</sup> A somewhat similar requirement is included for the abuse prohibition where it is stipulated that a decisional 'instance' rather than a court should be set up<sup>185</sup> because competition rulings are politico-economic decisions rather than court judgments.<sup>186</sup> Nowadays, we may well be mindful of having such experts in courts, but we do not need more political influence for which we have already appointed a full College of Commissioners.

#### D. Is There Really a 'Gap' under Article 102 TFEU?

Another interesting question is whether there is a legislative gap under Article 102 which prohibits the abuse of a dominant position by one or more undertakings. The gap under Article 102 is confirmed by the existence of both oligopolies<sup>187</sup> and stricter rules below the dominance threshold in many Member States on which the EU Commission (DG Competition) recently commissioned a study.<sup>188</sup> However, lawyers seldom blindly follow economists' views and require some proof or backing of their statements. There are several ways to prove the existence of this gap. One way would be to see how an industrial organization deals with the issue of monopoly and how oligopoly completes the overall picture.<sup>189</sup> Compared to the single model of monopoly that exists, there are many models of oligopoly. Under all of these, a firm must consider rival firms' behaviour in order to determine its own best policy and, therefore, interrelationships between firms are paramount.<sup>190</sup> The only problem is that oligopoly models rely on different assumptions about how firms behave whereas, although most economists agree about their basic characteristics, they

<sup>183</sup> *ibid* 49.

<sup>185</sup> *ibid* 168; 'Entscheidungsinstanz v Gericht'.

<sup>187</sup> I Kokkoris, *A Gap in the Enforcement of Article 82* (BIICL 2009); previously for mergers see I Kokkoris, *The Gap in the ECMR and National Merger Legislations* (Routledge 2010); Kokkoris and R Olivares-Caminal (n 11) 27 on dominance including both oligopolistic and monopolistic market structures; on the inability to apply art 102 to non-dominant firms 51. Interestingly Djelic (n 14) 242 pointed out that an 'institutional context against cartels may be a fertile ground for oligopolies'.

<sup>188</sup> Study on the impact of national rules on unilateral conduct that diverge from art 102 TFEU, COMP/2009/A4/021, not released for publication.

<sup>189</sup> DW Carlton and JM Perloff, *Modern Industrial Organization* (4th edn, Boston 2005). The paradigm of perfect competition and monopoly is completed by oligopoly models of game theory which address the strategic interactions between firms see S Bishop and M Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn, Sweet & Maxwell 2010) 33.

<sup>184</sup> *ibid* 147.

<sup>186</sup> *ibid*.

<sup>190</sup> Carlton and Perloff (n 189) 157.

do not necessarily agree on the best way to control oligopolistic markets.<sup>191</sup> A somewhat weaker and reluctantly applied jurisprudential recognition of the problems caused by oligopolies comes from collective dominance. The existence of collective dominance requires a certain degree of parallel behaviour amongst oligopolists, ie the ability to know how other members of the dominant oligopoly are behaving; to know that such a tacit coordination is sustainable over time; and to know that the foreseeable reaction of competitors and consumers will not jeopardize the results expected.<sup>192</sup>

Another approach is to see how historical approaches show what Article 102 once was and, finally, to draw a clear conclusion on what Article 102 should be. One idea of which every competition lawyer has heard is that Article 102 is all about the abuse of a dominant position by one or more undertakings. However, the words ‘position’ or ‘abuse’ have no definition in the text of the treaty, which makes it really difficult, without any imagination, to examine whether the concept of dominance can also cover the difficult problem of oligopolies.

A memorandum on the elimination of anticompetitive practices (1954)<sup>193</sup> explains the background principles of the ECSC, namely, the idea that private parties may limit competition through the conclusion of contracts (similar to restraints in trade) and the development of market dominant ‘positions’. The original use of the plural for power or market positions<sup>194</sup> is explained by reference to ‘contracts and decisions which influence the market’ (Article 60) and the creation of a powerful market position as result of a merger. The ‘Principles for the free game of competition’ also used three times on the same page to refer to ‘abuse of monopoly *positions*’. Similarly, the initial drafting of the treaty of Rome referred to the abuse of dominant market positions.<sup>195</sup> This is later confirmed in a Note on the Meeting of the Common Market Working Group (1956) by an oral German proposal that ‘monopolies and oligopolies should be formally separated from cartels and dealt with according to the abuse principle’.<sup>196</sup> Different from cartels, it is stated that monopolies ought to prohibit the abuse of such a ‘position’, not its creation, through acquisitions or takeovers.<sup>197</sup> From this previous note, there becomes apparent a sudden change of attitude on the part of the German delegation’s leader, Professor Müller-Armack, who demanded more general principles in the future treaty instead of detailed competition rules, allegedly saying that ‘even comprehensive competition rules may not bring about more competition’.<sup>198</sup>

<sup>191</sup> *ibid* 192.

<sup>192</sup> See CFI Case T-193/02 *Laurent Piau v Commission* (2005) ECR II-209, 111.

<sup>193</sup> Memorandum (n 60) 101.

<sup>194</sup> *ibid* 101: ‘Machtposition or Marktpositionen’.

<sup>195</sup> *ibid* 135: ‘Missbrauch marktbeherrschender Stellungen’.

<sup>196</sup> *ibid* 163: ‘Vermerk über die Sitzung der Arbeitsgruppe ‘Gemeinsamer Markt’ Brussels 3–5 September 1956, Political Archive of the Foreign Office (Auswärtiges Amt) Bonn 401 vol 24: ‘Monopole und Oligopole sind in dem Vertrag auch formell von den Kartellen zu trennen und sollen nach dem Mißbrauchsprinzip behandelt werden. Dies soll auch für Staatsmonopole gültig sein.’

<sup>197</sup> *ibid* 187.

<sup>198</sup> *ibid* 162: ‘sogar ein Zuviel an solchen Regeln ein Zuwenig an Wettbewerb schaffe’.

We do not need to speculate any further on the invisible game of politics, which is obvious and fully confirmed by a clearly expressed German political worry over the emergence of ‘supra-national’ competition rules, especially where such rules contradicted the draft of the future Law against Restraints of Competition (GWB).<sup>199</sup> However the serious worry was that these Brussels drafts were less stringent; thus, they would eventually be able to replace national regulations. Later, regarding their procedural scope, Müller-Armack again expressed concerns over a possible ‘transplantation’ of a prohibition principle requiring authorization rather than a notification procedure, which would have found greater acceptance with German industry.<sup>200</sup> His complaining tone was further notable in respect of the previously exposed prohibition of discrimination, which he regarded as ‘completely useless’, as it had been designed by the group of experts, thereby introducing ‘rigid competition criteria’; for this reason, it had to be changed to prohibit practices that could have as an effect ‘placing commercial partners at a competitive disadvantage among themselves’.<sup>201</sup> This unfair competition rule later became part of Article 102(2)(c). Furthermore, Müller-Armack’s worry over the above prohibition principle and authorization of exceptions was fuelled by conflicting approaches to GWB, causing him to propose the well-known text: ‘prohibited as incompatible with the Common Market’,<sup>202</sup> but his major concern still remained that EU regulations would conflict with Germany’s more stringent national regulations.<sup>203</sup>

Could it be that Müller-Armack was right after all? As mentioned from the outset, the Directorate General for Competition is currently fully aware of the existence, at national level of rules that are less stringent regarding the dominance threshold. However, the drafting history proves that it was wrong to

<sup>199</sup> See the Minute of the consultations on the drafting of competition rules of the Common Market Bonn 5 November 1956 (December 2010) <<http://www.uni-muenster.de/Jura.itm/eudoc/kartell/docs/311062.pdf>>, Federal archive Koblenz B 141 11047, previously cited in Chiriță (n 149) 353; MinRat Dr Meyer-Cording reporting to his state secretaries his ‘brilliant’ solution, namely, to ‘give up superfluous provisions on cartels and monopolies’! see Schulze and Hoeren (n 15) 195: ‘*Vorschriften des Vertragsentwurfs über Wettbewerbsregeln*’ Bonn 5 November 1956, *Bundesarchiv* Koblenz B 141 11047. Further monitoring is proved by a telex sent to the Foreign Office in Bonn which confirmed that the treaty would follow the German abuse principle see *ibid* 232: ‘*Fernschreiben no 498 an das Auswärtige Amt Bonn betreffend Fragen der Wettbewerbsordnung*’ 20 November 1956, *Bundesarchiv* Koblenz B 141 11050.

<sup>200</sup> Schulze and Hoeren (n 15) 205: ‘Vermerk betreffend die Konferenz über den Gemeinsamen Markt vom 5.11-7.11.1956’ Bonn 8 November 1956, *Bundesarchiv* Koblenz B 141 11049.

<sup>201</sup> *ibid* 228: ‘Examen en second lecture des règles de concurrence’, Common Market Group Brussels 20 November 1956, ‘Conseil des Communautés européennes Bruxelles, Archives Historiques, Négociations des traités instituant la CEE et de la CEEA’ CM 3 no 145 MAE/ sec 70 mp.

<sup>202</sup> Later inserted in the draft see *ibid* 233: ‘Ausschuss der Delegationsleiter, Entwurf von Artikeln der von der Arbeitsgruppe für den Gemeinsamen Markt in ihrer Sitzung vom 28. Nov. 1956 ausgearbeitet betreffend Titel II–Kapitel 1’; *Die Wettbewerbsregeln*, *Bundesarchiv* Koblenz B 102 22117 MAE 657 d/56 eg; 657 d/56 ann/eg; 657 d/56 ann/hn; 657 d/56 ann/msr; 657 d/56 mp (Corr). Please also note that original drafts in German had to be translated into French, 236.

<sup>203</sup> *ibid* 229.



exclude oligopolies; it was only later that the European courts established jurisprudential upper limits of dominance in terms of market share.

In order to complete the catalogue of anti-competitive practices, there was a need to address the problem of international restraints of competition<sup>204</sup> by 'market dominant undertakings (monopolies, oligopolies)'.<sup>205</sup> Interestingly, Chapter V of the Havana Charter establishing the World Trade Organization (1948) and GATT (1947) was an inspiration for the drafting of the non-exhaustive list of restrictive practices, which included hindering market access, sharing customers, setting contingencies, having discriminatory effects to the undertakings' disadvantage, limiting production, and preventing the improvement or the practical use of technical procedures, patents or non-patentable inventions.<sup>206</sup> However, market dominance was not prohibited per se; that is, mergers on technological or managerial grounds could still be allowed.<sup>207</sup> Finally, the reference to economic agents with considerable market share, as is the case with monopolies or oligopolies, was reiterated.<sup>208</sup> It stated that comparatively, smaller cartels should be free.<sup>209</sup> Different regulations were needed for oligopolies created by private or public undertakings that were in a dominant market position. In support of the initial proposals for the Treaty of Rome, previous experiences with the ECSC Treaty were recalled; for example, where public or private undertakings were able to misuse their position, the High Authority made recommendations; the restriction of competition under Article 4 (ECSC) was annexed for discussion.<sup>210</sup>

The term 'dominant positions' changed only with von der Groeben's proposal, which advanced two forms of exploitative abuse: (i) unilateral conduct by an undertaking, where the undertaking was 'not being exposed to any competition or to substantial competition for a particular type of product or

<sup>204</sup> *ibid* 105.

<sup>205</sup> *ibid* 102: 'In Ergänzung zu diesen Vorschlägen der Behandlung vertraglicher Wettbewerbsbeschränkungen wird, wie dargelegt, das Problem der Wettbewerbsbeschränkungen durch marktbeherrschende Unternehmen (Monopole, Oligopole) der Erörterung bedürfen.'

<sup>206</sup> *ibid* 122; *ibid* 118 see excerpts of the above charter, 'Auszüge aus der Havana Charta über die Gründung einer internationalen Handelsorganisation (24.03.1948) und dem Allgemeinen Zoll- und Handelsabkommen (1947)', Annex IV, mostly anti-dumping, customs and international trade; Roebing in Hirsch (n 11) 121. Another inspirational source was the European Council's excerpt Draft of a European Convention to Control International Cartels, Annex V Europarat, *ibid* 122: 'Auszug aus dem Entwurf einer Europäischen Konvention zur Kontrolle der internationalen Kartelle', private archive of Groeben MAE 139 d/55 mv; 13/d/55 hr; 139 d/55 sel/mw; 139 d/55 ell/ip. The latter also referred to restrictive practices such as price-fixing, terms and conditions which must be observed when buying, selling or borrowing, decisions by undertakings over a trade zone, business subsidiary, division or subdivision, etc, discrimination of individual undertakings, division of production or the setting of production contingencies, agreements to prevent the development or application of patent or non-patent procedures or inventions, etc. On the history of the Havana charter see Gerber (n 11) 43.

<sup>208</sup> *ibid* 110.

<sup>207</sup> *ibid*: 'betriebswirtschaftlichen Gründen'.  
<sup>209</sup> *ibid* 103.

<sup>210</sup> *ibid* 111: Annex II b; Art 4 (1951) prohibited discrimination, state aids, and restrictive practices having as purpose the division and exploitation of markets.

service,<sup>211</sup> and (ii) the merger of two or more undertakings that would create a dominant position. Both were later deleted in the Dutch delegation's draft proposal.<sup>212</sup> However, the German delegation's vision of control of abuse of a dominant position had to cover the 'oligopoly position' as well.<sup>213</sup>

So where does the recognition of the oligopoly gap really lead us? We have seen that European history prevented us from having oligopolies under Article 102. Is this plainly a bad thing? Previously (1960), it seemed difficult to distinguish good from bad, ie to distinguish between oligopolistic behaviour, ancillary and non-ancillary or price-fixing agreements.<sup>214</sup> This emerged in the articulation of 'modern' competition standards (1960–2005), which ever since has seen formalistic legal analysis prevail over economic analysis. It was Commissioner Monti's 'more economic approach' (2005) that drew our attention back to oligopolies and similar challenges.

### *E. What is the True Meaning of Distortion?*

This is a relatively simple question, since the meaning of distortion has already been addressed in the literature.<sup>215</sup> The Lisbon Treaty contains the general imperative that national laws and administrative provisions which might distort competition among Member States due to their existing differences should be adapted.<sup>216</sup> Nevertheless, history reveals a need for something new: the meaning of distortion cannot be properly understood without a look at the meaning of distortion at the macroeconomic level.<sup>217</sup> In other words, over- or underrated exchange rates need to be artificially maintained, a consequence of which is that a whole national economy is placed at a disadvantage in international competition.<sup>218</sup> This explains why the adoption of such economic and monetary policies has to be conducted in accordance with the principle of an

<sup>211</sup> *ibid* 148: 'Vorschläge von Herrn von der Groeben zum Entwurf für die Abfassung von Artikeln betreffend den Gemeinsamen Markt MAE 131/56 – beschränkte Verteilung', private archive of Groeben MAE 144 d/56 hn. His proposal was very similar to the wording of the German Act against Restraints of Competition (GWB) Section 19(2) first para. Extremely interesting is his procedural proposal, namely, settlements before the European Commission *ibid* 149, 189. The expert group for the Common Market maintained his proposal slightly amended to 'one or more' undertakings that are not exposed to the above *ibid* 211; *ibid* 218: 'Vorschlag des Präsidenten für die Fassung der Vorschriften über Wettbewerbsbeschränkungen' Brussels 14 November 1956, art 42a, Bundesarchiv Koblenz B 102 22117 MAE 541 d/56 mp; 541 d/56 hs; 541 d/56 msr.

<sup>212</sup> *ibid* 221.

<sup>213</sup> *ibid* 171. Thus, the German delegation considered that monopolies and oligopolies should be dealt with separately from cartels: '*Oligopolstellung*'.

<sup>214</sup> J Weissman, 'Is Oligopoly Illegal? A Jurisprudential Approach' (1960) 74 *Quarterly Journal of Economics* 437, see eg 'The Revolt against Formalism: Oligopoly Recognized' 453. In the UK, Lord Diplock and Kessler suggested unfair terms to be the result of 'oligopolistic exploitation' see H Beale, 'Inequality of Bargaining Power' (1986) 6 *OJLS* 131.

<sup>215</sup> Chiriță (n 56).

<sup>216</sup> See Title VII Art 116 and 117 TFEU respectively require the elimination of distortions resulting from different national administrative provisions, regulations or laws.

<sup>217</sup> See Title VIII on Economic and Monetary Policies of our current treaty.

<sup>218</sup> Schulze and Hoeren (n 15) 109.

open market economy with free competition under Article 119 TFEU, that is, without manipulated exchange rates. This notion was strengthened even further by Article 119(2), which referred specifically to the need for an exchange-rate policy to maintain price stability and to support general economic policies in accordance with the above principle, in the same way as for Article 127(1), which relates to monetary policies and competition. Unfortunately, over many years, there has been no recognition of this need in competition policy statements; in addition there has not been the 'efficient allocation of resources' which Article 120 recommends. We do not need to search in the historical archive for macroeconomic efficiency; sufficient reason is included in economic and monetary policies, namely, they must be conducted so as to enhance efficiency.

Specific distortions of competition mentioned in the 1955 document referred to taxation and social contributions, since both of these are cost elements.<sup>219</sup> It was proposed that exchange rates based on market rules would sort out the differences in taxation; however, 'manipulated' exchange rates would not. Previously, in this particular context, the ECSC had foreseen price-setting and social insurance provisions.<sup>220</sup> Different wages based on different productivity were not to be caught by competitive distortions. However, it was recommended that particularly higher or lower wages in specific sectors of the economy on the basis of agreements between employees and employers and which are contrary to the production rate should be considered as particular cases.<sup>221</sup> Thereafter, during the same negotiations it was acknowledged that there was a need to harmonize national policies with regard to wages, credits, discounts and exchange rates.<sup>222</sup>

## II. CONCLUDING REMARKS: WHAT LESSONS CAN WE LEARN FROM HISTORY FOR FUTURE AMENDMENTS?

The brief overview of the history of European competition law presented above suggests there was considerable inspiration in the ECSC Treaty for the Treaty of Rome, causing many competition rules to be adapted from the ECSC when drafting the Treaty of Rome. However, it is clear that there have been legal consequences as a result of this influence.

The Treaty of Rome was enacted with incomprehensible gaps that enforcers became aware of only gradually; as we have seen, these related to both mergers and oligopolies and also to terms and conditions of contracts. Many controversies about how certain competition rules ought to be interpreted have never been properly resolved and over many years lack of European consensus

<sup>219</sup> *ibid.*

<sup>220</sup> *ibid* 113; art 60 ECSC.

<sup>221</sup> *ibid* 109.

<sup>222</sup> *ibid* 134. See *ibid* 155 with France's desire to pursue distortions of competition through differential employment conditions, salaries, social security, taxation systems and other differential legal and administrative provisions.

(perhaps based on differences in the use of key words) has fuelled heated debates about how to enforce EU competition rules. The crux of the argument has been some participants' reluctance to be overly literal when enforcing European law. Is it true that we are too keen to respect the letter rather than the spirit of the law, as Montesquieu has suggested? It is for the European courts to reflect on this very carefully. If the answer is in the affirmative, is this then attributable to the Commission or to the European courts? Who is to be blamed for what happened when EU competition rules were drawn up, and indeed ever since?

It appears that the negotiation process between the founding Member States—which involved a certain degree of political influence, mutual understanding, and acceptance of cultural differences and preferences—resulted in a kind of legal reconciliation, but not necessarily a successful outcome for the competition rules embedded in the Treaty of Rome. Many interesting and insightful original drafts were polished to the extent that their true meaning was lost. Empty of content, we were left to imagine the intent of the wording when it came to enforcement. This clearly suggests that creativity during a drafting process to make the text sound original might not be helpful. Both shifts in political emphasis and the reformulation of words have created problems for many competition lawyers.

A deeper understanding of the true nature of the drafting process has yet to reveal another reason why specific words had to be reduced. Initially, there were only two relevant product markets, coal and steel, which were to merge production to promote their common interests. The Treaty of Rome proposed a wider integration of national markets after the famous '*all for one and one for all*' pronouncement; the six founding fathers must have perceived the ambition of a European political federation as too large a consortium for the benefit of their national interests. The unseen and seen game of politics interfered with law-making and certain polishing and cutting has been necessary. Competition rules were drawn up in a way which was not sufficiently detailed, perhaps in a futile attempt to make the realization of the Community less likely to consolidate itself, since the dynamics of competition would help the Community to accomplish its mission, ie the integration of European markets. Nevertheless, it is clear nowadays that competition has not only attained its mission, it has also gained its own legal status with a solid normative foundation in economics and has cemented the cultural traditions of the currently 28 Member States into one integrated European Union, ie market.

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