Convergence of Competition Laws and Policies in the European Community

Germany, Austria, and the Netherlands

Michaela Drahos
Table of contents

Abbrevations................................................................. xv

Part I  Introduction ......................................................... 1

Chapter 1  Introduction .................................................... 3
  1 The convergence puzzle .................................................. 3
  2 The research questions and the objective of the research ............... 4
    2.1 The research questions ............................................... 4
    2.2 The objective of the research ....................................... 5
  3 Assessing the level of convergence of competition policy ............... 7
    3.1 Delineation of the term ‘competition policy’ ....................... 7
    3.2 Studying convergence and differences ................................ 8
    3.3 Convergence of what? – The variables of comparison ............... 9
  4 Explaining policy choices ............................................. 15
    4.1 Ideas, interests, and institutions .................................. 16
    4.2 The European Community and policy convergence .................... 26
  5 Formation of preferences in competition policy .......................... 32
    5.1 Actors and their interests .......................................... 32
    5.2 Ideas in relation to competition policy ............................ 37
  6 Methods ........................................................................ 46
  7 The structure of the book ............................................... 47

Part II   Has there been convergence? Competition law and policy in the 1950s and 2000 .................. 49

Chapter 2  EC competition law and policy ................................ 51
  1 Introduction ............................................................. 51
  2 The introduction of EC competition rules ................................ 51
  3 Objectives .................................................................. 53
  4 Application .................................................................. 56
  5 Scope ........................................................................ 58
  6 Horizontal agreements ................................................... 64
    6.1 The cartel prohibition ................................................ 64
    6.2 Individual exemptions and comfort letters ......................... 67
    6.3 Block exemptions .................................................... 68
    6.4 Planned changes ..................................................... 70
  7 Vertical agreements ...................................................... 70
    7.1 General prohibition .................................................. 70
    7.2 Resale price maintenance ............................................. 71
    7.3 Restraints in distribution agreements ................................ 71
    7.4 Restraints in intellectual property rights agreements ............ 74
<table>
<thead>
<tr>
<th>Chapter 3 National competition law and policy in the 1950s</th>
<th>85</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Introduction</td>
<td>85</td>
</tr>
<tr>
<td>2 The relation to EC law as defined by national law</td>
<td>85</td>
</tr>
<tr>
<td>3 Objectives</td>
<td>86</td>
</tr>
<tr>
<td>3.1 Germany</td>
<td>86</td>
</tr>
<tr>
<td>3.2 Austria</td>
<td>86</td>
</tr>
<tr>
<td>3.3 The Netherlands</td>
<td>87</td>
</tr>
<tr>
<td>4 Application</td>
<td>87</td>
</tr>
<tr>
<td>4.1 Germany</td>
<td>87</td>
</tr>
<tr>
<td>4.2 Austria</td>
<td>89</td>
</tr>
<tr>
<td>4.3 The Netherlands</td>
<td>90</td>
</tr>
<tr>
<td>5. Scope</td>
<td>91</td>
</tr>
<tr>
<td>5.1 Germany</td>
<td>91</td>
</tr>
<tr>
<td>5.2 Austria</td>
<td>92</td>
</tr>
<tr>
<td>5.3 The Netherlands</td>
<td>93</td>
</tr>
<tr>
<td>6. Horizontal agreements</td>
<td>94</td>
</tr>
<tr>
<td>6.1 Germany</td>
<td>94</td>
</tr>
<tr>
<td>6.2 Austria</td>
<td>97</td>
</tr>
<tr>
<td>6.3 The Netherlands</td>
<td>99</td>
</tr>
<tr>
<td>7. Vertical agreements</td>
<td>101</td>
</tr>
<tr>
<td>7.1 Germany</td>
<td>101</td>
</tr>
<tr>
<td>7.2 Austria</td>
<td>103</td>
</tr>
<tr>
<td>7.3 The Netherlands</td>
<td>103</td>
</tr>
<tr>
<td>8. Unilateral behaviour by firms with market power</td>
<td>104</td>
</tr>
<tr>
<td>8.1 Germany</td>
<td>104</td>
</tr>
<tr>
<td>8.2 Austria</td>
<td>105</td>
</tr>
<tr>
<td>8.3 The Netherlands</td>
<td>105</td>
</tr>
<tr>
<td>9 Merger control</td>
<td>106</td>
</tr>
<tr>
<td>10 Conclusion</td>
<td>106</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 4 National competition law and policy in 2000</th>
<th>107</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Introduction</td>
<td>107</td>
</tr>
<tr>
<td>2 The relation to EC law as defined by national law</td>
<td>107</td>
</tr>
<tr>
<td>2.1 Germany</td>
<td>107</td>
</tr>
<tr>
<td>2.2 Austria</td>
<td>108</td>
</tr>
<tr>
<td>2.3 The Netherlands</td>
<td>109</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS

3 Objectives ............................................................. 110
  3.1 Germany ....................................................... 110
  3.2 Austria ........................................................ 111
  3.3 The Netherlands ............................................... 113
4 Application .......................................................... 114
  4.1 Germany ....................................................... 114
  4.2 Austria ........................................................ 116
  4.3 The Netherlands ............................................... 119
5 Scope ............................................................... 122
  5.1 Germany ....................................................... 122
  5.2 Austria ........................................................ 124
  5.3 The Netherlands ............................................... 126
6. Horizontal agreements ............................................. 129
  6.1 Germany ....................................................... 129
  6.2 Austria ........................................................ 134
  6.3 The Netherlands ............................................... 139
7 Vertical agreements ................................................. 141
  7.1 Germany ....................................................... 141
  7.2 Austria ........................................................ 144
  7.3 The Netherlands ............................................... 146
8 Unilateral behaviour by firms with market power ................. 148
  8.1 Germany ....................................................... 148
  8.2 Austria ........................................................ 153
  8.3 The Netherlands ............................................... 155
9 Merger control ...................................................... 156
  9.1 Germany ....................................................... 156
  9.2 Austria ........................................................ 159
  9.3 The Netherlands ............................................... 161
10 Conclusion ........................................................ 162

Chapter 5  Conclusion to part II. Convergence and persistance to
different degrees .................................................. 163
1 Introduction ........................................................ 163
2 Differences and similarities between the original versions of
  the competition laws from the 1950s ............................. 164
  2.1 The relation to EC law as defined by national law .......... 164
  2.2 Objectives ..................................................... 164
  2.3 Application .................................................... 165
  2.4 Scope .......................................................... 166
  2.5 Horizontal agreements ....................................... 167
  2.6 Vertical agreements .......................................... 168
  2.7 Unilateral behaviour by dominant firms .................... 169
  2.8 Merger control ................................................ 170
3 Differences and similarities between the competition laws in 2000 170
  3.1 The relation to EC law as defined by national law .......... 170
# Table of Contents

3.2 Objectives ........................................ 171  
3.3 Application ........................................ 172  
3.4 Scope ............................................. 175  
3.5 Horizontal agreements ............................. 177  
3.6 Vertical agreements ................................ 183  
3.7 Unilateral behaviour by powerful firms ........... 186  
3.8 Merger control ....................................... 190  
4 Convergence ........................................... 193  
4.1 Converging policies ................................ 193  
4.2 Converging countries ............................... 196  
5 ... and divergence ..................................... 197  
5.1 New policies ....................................... 197  
5.2 Diverging countries ................................ 197  
6 Other European countries ............................ 199  
7 Conclusion ............................................ 202  

Part III The reasons for convergence? A study of the development of national law and policy ................................. 207  

Chapter 6 Channels of influence of EC competition law and policy .................. 209  
1 Introduction ............................................ 209  
2 Absence of harmonisation measures .................... 210  
3 Weak negative restraints on competition legislation ..................... 211  
3.1 The direct effect and supremacy of European law ............................ 211  
3.2 Different spheres of influence ........................ 212  
3.3 The obstruction of the proper working of EC competition rules ............. 213  
4 Restricting the room for manoeuvre in the application of national competition law .............................................. 215  
4.1 Invading the ‘national sphere’ of rules on cartels and dominant positions .............................................. 215  
4.2 The European Commission’s room for manoeuvre ......................... 221  
4.3 Differences between countries ................................ 221  
4.4 Concentrations with a ‘Community dimension’ .............................. 224  
5 Participation, decentralisation, and co-operation ......................... 225  
5.1 Decentralised application of EC competition law in the Member States .............................................. 226  
5.2 Participation of Member States in the development of EC law ............. 227  
6 Channels of influence .................................. 228  
6.1 Trade interests and the costs of deviating national policies ................ 228  
6.2 Framework for policy learning ................................ 231  
6.3 Restraints on national legislation ................................ 233  
6.4 Constraints and incentives in the application of national law .............. 235  
7 Conclusion ............................................. 237
# TABLE OF CONTENTS

**Chapter 7  The development of competition law and policy in Germany** .................................................. 239

1 Introduction ............................................................................. 239

2 Paradigm shift in the law of 1957 ............................................. 239

2.1 Historical circumstances and new ideas ............................... 240

2.2 The first ordoliberal draft, 1946-1949 ................................. 241

2.3 The German government takes over, 1949 ........................... 242

2.4 Ministerial doubts and a final push by the Allied forces, 1949-1952 ............................... 243

2.5 The government bill and the general position of parties and interest associations ........................................ 243

2.6 Industry pushes its way into the negotiations, 1954 ............... 246

2.7 Watering-down in Parliament, 1955-1957 ............................. 246

3 Long-term effects of the initial policy choice .......................... 248

3.1 The organisations applying the GWB and their role in future developments ........................................ 248

3.2 The emergence of an ‘academic industry’ ............................ 251

4 Failed initiatives for reform, 1965 ............................................ 253

5 Market power, countervailing power, and resale price maintenance, 1973 and 1976 ........................................ 254

5.1 Political developments facilitating more radical changes ........ 254

5.2 The adoption of ‘workable competition’ as a model, 1968-1969 ............................... 255

5.3 Setting the agenda, 1969-1971 ............................................. 256

5.4 The first unanimous passing in Parliament, 1971-1973 ........... 260

5.5 The newly created Monopolkommission ............................. 261

5.6 Mergers in the media sector, 1976 ....................................... 262

6 Retailing and sector exemptions enter the arena, 1980 ............. 262

6.1 Setting the agenda, 1976-1978 ............................................. 263


7 Another decade of retailing and sector exemptions, 1989 ........... 268

7.1 A protective wall or safeguarding performance competition? ............................... 268

7.2 EC influence and sector exemptions ..................................... 271

7.3 Giving in to amendment pressure, 1987-1988 ....................... 272

7.4 The government bill, 1989 ............................................... 273

7.5 Relatively smooth enactment by Parliament, 1989 ................. 274

8 Adaptation to EC law? 1998 ................................................ 275

8.1 Germany and European competition policy .......................... 275

8.2 Setting adaptation on the agenda, 1993-1995 ....................... 277

8.3 Protests against the ‘Absenkung des Schutzniveaus’, 1995-1996 ............................... 278

8.4 The interpretation of ‘adaptation’ by the Ministry, 1995-1996 ............................... 278

8.5 The BDI’s disappointment ................................................ 280

8.6 Renewed lobbying for stricter rules in the retailing sector ....... 280

8.7 The first ministerial draft, July 1997 .................................... 281

8.8 Further concessions in the government bill, November 1997 ....... 284

8.9 Negotiations in Parliament, 1997-1998 ............................... 284

9 Conclusion ............................................................................ 286
Chapter 8 The development of competition law and policy in Austria

1 Introduction

2 The first Austrian cartel law of 1951
   2.1 Opposing interests and mediation through the Social Partners
   2.2 Inflation as an impulse for competition policy, 1947-1949
   2.3 The absence of forces advocating a stricter law
   2.4 Preparing a government bill on abuse control for cartels; 1949-1950
   2.5 Transformation in Parliament into pure registration, June 1950
   2.6 A new wave of inflation and the return to ex ante abuse control, 1950-51
   2.7 Failed rejection by the Allied Council, 1951

3 Stalemate between the promoters and the opponents of competition policy, 1956-1957
   3.1 Exemption for agriculture, 1956
   3.2 A further prolongation, 1957

4 The increasing influence of the Social Partners, 1958
   4.1 The central role of the Social Partners in policy-making
   4.2 Increasing importance of the Social Partners in the application of the KartG, 1958
   4.3 The organisations applying the KartG and their impact on the development of competition policy

5 Consumer interests and dominant firms, 1962

6 Non-binding price recommendations, 1968

7 The EC-Free Trade Agreement and resulting changes in cartel law, 1972
   7.1 Competition rules in the Free Trade Agreement
   7.2 Adaptation of the KartG

8 Incremental modernisation: 1988 KartG
   8.1 Changes in external conditions
   8.2 Conflicts concerning co-operatives, 1986-1986
   8.3 Plans for modernising the KartG, 1986-1988
   8.4 Mild resistance by Parliament

9 Merger control and complaints by individual firms, 1993
   9.1 Application for EC membership and the KartG
   9.2 Setting the agenda, 1990-1992
   9.3 Preparation of a new amendment, 1992-1993
   9.4 Changes with reference to merger control
   9.5 Minor changes to the organisational structure of the Cartel Courts

10 Failed initiatives for adaptation, 1999
   10.1 Scandals and take-overs by foreign firms, 1996-1998
   10.2 Initiative to change, 1998
   10.3 Reaction to the initiative
   10.4 A decision in favour of incremental change and against 'revolution', 1999
# Table of Contents

## Chapter 9  The development of competition law and policy in the Netherlands

1. **Introduction** ............................................................... 341
2. **The introduction of the WEM** ........................................... 341
   2.1 The predecessors of the WEM ......................................... 341
   2.2 Trust in self-regulation and state planning ....................... 342
   2.3 Inflation and ‘re-cartelisation’ as an impulse for a new cartel law, 1950-1951 .................................................. 343
   2.4 Consensus on a moderate policy concerning cartels, 1950-1951 ... 344
   2.5 Nullity, public advice, and generic prohibitions, 1951-1953 ...... 346
   2.6 Further conflicts concerning procedural rules, 1953-1956 ....... 347
3. **Long-term consequences of the initial policy choice** ................ 348
4. **Early generic prohibitions, 1962-1971** .................................. 351
5. **Trends in the application of the WEM, The 1960s and 1970s** ........... 353
6. **The first confrontations with European law during the 1970s** .......... 356
7. **Failed initiatives for reform during the 1970s** ......................... 358
8. **The deregulation commissions and the retention of the WEM, 1981-1983** 361
9. **Increasing attention to Brussels since the end of the 1980s** ........... 364
   9.1 Setting adaptation on the agenda ..................................... 364
   9.2 Articles 81 and 82 and the application of the competition rules ... 365
   9.3 The building cartel as a catalyst for change ...................... 366
10. **Changes within the framework of the WEM** ................................ 369
10.1 **Stricter application of the WEM, The 1980s** ....................... 369
10.2 **New generic prohibitions, 1993-1994** ................................ 370
11. **Designing a new system, 1992-1997** .................................... 373
   11.1 Industry’s second-best choice ...................................... 373
   11.2 The preliminary draft, 1994 ......................................... 374
   11.3 The reports by the SER and the Cem ................................ 375
   11.4 The government bill, 1996 ............................................ 376
   11.5 The retailing sector and procedural rules. Parliamentary debate, 1996-1997 .................................................. 378
12. **Recent developments** ................................................... 381
13. **Conclusion** ............................................................... 381

## Chapter 10  Conclusion to Part II. European ‘push’ and national ‘pull’  

1. **Introduction – the riddle of the convergence of European competition policies** .................. 385
2. **Adaptation and resistance** .............................................. 386
   2.1 The timing of European influence ..................................... 387
   2.2 Steps towards adaptation .............................................. 388
   2.3 Resistance against adaptation initiatives ............................ 389
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.3</td>
<td>Notices by the Bundeskartellamt</td>
<td>447</td>
</tr>
<tr>
<td>3</td>
<td>Austria</td>
<td>447</td>
</tr>
<tr>
<td>3.1</td>
<td>Legislation</td>
<td>447</td>
</tr>
<tr>
<td>3.2</td>
<td>Preparatory documents</td>
<td>447</td>
</tr>
<tr>
<td>3.3</td>
<td>Block exemptions</td>
<td>449</td>
</tr>
<tr>
<td>3.4</td>
<td>Free Trade Agreements with the European Community</td>
<td>449</td>
</tr>
<tr>
<td>3.5</td>
<td>Implementation of the EEA competition rules</td>
<td>449</td>
</tr>
<tr>
<td>4</td>
<td>The Netherlands</td>
<td>449</td>
</tr>
<tr>
<td>4.1</td>
<td>Pre-WEM legislation</td>
<td>449</td>
</tr>
<tr>
<td>4.2</td>
<td>Wet economische mededinging (WEM)</td>
<td>449</td>
</tr>
<tr>
<td>4.3</td>
<td>Mededingingswet (Mw)</td>
<td>451</td>
</tr>
<tr>
<td>References</td>
<td></td>
<td>453</td>
</tr>
<tr>
<td>Table of case law</td>
<td></td>
<td>475</td>
</tr>
<tr>
<td>Interviews</td>
<td></td>
<td>483</td>
</tr>
<tr>
<td>Subject index</td>
<td></td>
<td>485</td>
</tr>
</tbody>
</table>