Review of Kiran Klaus Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (Oxford University Press 2013)

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This wonderful collection gathers essays on the historical development of EU competition law, from its early years until the ‘more economic approach’, demonstrating how various actors from within and outside the EU institutions, in particular the then DG IV (now Directorate-General for Competition), interpreted and applied competition rules. The aims of the book are quite ambitious in scope, and its methodology is interdisciplinary, covering also history and politics.

The first contribution, Sigfrido M Ramírez Pérez and Sebastian van de Scheur, ‘The Evolution of the Law on Articles 85 and 86 EEC: Ordoliberalism and its Keynesian Challenge’, discusses the projected antagonism among goals, such as the traditional protection of individual rights and the preservation of economic freedom on the one hand, and economic efficiency on the other. An interesting thesis is that within DG IV, there was not only an ordoliberal discourse, but also a Keynesian influence, which the authors claim favoured ‘planning … and neo-corporatism’. In their view, this meant a clear departure from ordoliberal ideas with an emphasis on industrial and social policy, as well as a more tolerant stance towards cartels and state aid. The authors challenge the idea that the Germans were the only ones with a consolidated experience in antitrust matters, since the German Act against Restraints entered into force at the same time. While this is true, the authors neglect a previous experience gained while enforcing the German Act against Unfair Competition, which entered into force on 1 July 1896 and which protects competitors, consumers, and any other market participants. The authors also advance the idea that it was not personal rivalries which divided DG IV but national and political colour. Unfortunately, the idea previously advanced by the authors, namely, that EU competition principles were ‘Keynesian’ ‘insofar as they aimed to be tolerant in cartel policy and flexible towards state intervention … and neo-corporatist in their attempt to accommodate the views and interests of not just business … but also of trade unions and consumers’, is not fully substantiated or supported by any relevant literature. This idea is further reiterated when the flexibility in relation to crisis cartels and state aid is again attributed to the same Keynesian conception. However, this view, that is, of passing on to Keynesian economics the responsibility for the eventual failure of the projected European competition policy when it comes to its tolerant attitude towards crisis cartels and state aid in the 1970s, implicitly following the United Kingdom’s joining the EU in 1973, is debatable, if not highly contestable and, indeed, implausible. It is unclear why the authors have even considered adopting this isolated position in the book. The readers are, therefore, reminded in particular of the famous clash between two great personalities, namely, Frederick August von Hayek, as representative of the Austrian school of economics and an ordoliberal writer, and the macroeconomist, John Maynard Keynes.

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2 ibid.

3 ibid 27.

4 ibid 29.

5 ibid 28.

6 ibid 34, 37.

Apart from a historical account of political leadership within DG IV, the authors interestingly also reveal that Advocate-General Roemer in the famous Continental Car attempted to persuade the Court of Justice to follow a historical interpretation of Article 86 EEC based on the subjective intention of its drafters, which did not sit well with the continental tradition of placing that provision in its current context based on the well-known teleological interpretation of ‘undistorted competition’. The authors do not elaborate more on why, in 1973, the court did not follow at least an objective interpretation of the drafters’ intent, which was largely caused by the EEC archives not being published and made publicly available at that time. The reluctance of the Court to rely on proposals put forward and later fine-tuned during the negotiations, without them being available to the public, was definitely a wise choice. It remains to be seen whether the EU Courts will not change this stance and refine obscure meanings on the basis of public access to historical documents. Otherwise, the purpose of engaging in a historical check – without persuading the Courts of the contrary - remains irrelevant if solely a dynamic interpretation of current objectives were to be favoured over historical interpretation.

Nevertheless, the authors conclude that the ‘EEC competition policy did not follow a German Ordoliberal programme’. Surely the political interests of the day, such as social and industrial policy, had meant that state aid had to be given prominence over purely competitive pursuits? The same is happening currently with Article 3 TEU’s ‘highly competitive social market economy’ striving to achieve ‘full employment and social progress’.

The second contribution, Lorenzo Federico Pace and Katja Seidel, ‘The Drafting and Role of Regulation 17: A Hard-Fought Compromise’, acknowledges the French origins of Article 85 EEC, which is recently evidenced elsewhere in the literature. The authors criticise the fact that, while advancing the ordoliberal origins of EU competition law or the lack thereof, certain authors have either not consulted the Union’s historical archive or have analysed only the negotiations leading to the Treaty of Rome but not what followed thereafter, in particular the fate of the above, now replaced, Regulation. In pursuit of this claim, the authors suggest that the external experts involved in the drafting of Regulation 17/62 were ‘exclusively German’, coming from the two prominent ordoliberal circles of Walter Hallstein and Hans von der Groeben. That said, since the old regulation sparked a major disagreement over the centralised notification system and the great difficulties inherent in putting it into practice, it is unclear why the authors precisely wish to emphasise its Germanic legacy, particularly since its legalistic imprint and administrative burdensome practice has irritated many scholars and practitioners alike.

The third contribution, Adrian Kuenzler and Laurent Warlouzet, ‘National Traditions of Competition Law: A Belated Europeanization through Convergence?’, describes the historical origins of competition laws in several Member States in order to explain the existing legal background in Europe. Interestingly, the authors suggest that the negative attitude towards cartels needed a ‘macroeconomic’ balancing test whereby public interest criteria, such as that in the United Kingdom, for example, where the ‘protection of the public, utility considerations, defences against other restraints on competition, effects on labour market policies’ also came into play. Another helpful emphasis but one that jars with an earlier idea advanced in this book, is the recognition that while Keynesian ideas had dominated Western Europe in the 1960s, ‘their hegemony eroded after the economic crisis of 1973’.

Overall, this contribution focuses greatly on the microeconomics side of...
the competition provisions, while acknowledging that they could not remain in splendid isolation from
the macroeconomics side, which had to consider various macroeconomic indicators, such as inflation
or economic growth. It is unclear how competition policy was practically used as ‘a tool in the fight
against inflation’ in the 1970s. The authors conclude that despite a number of ‘idiosyncratic
elements in national competition law’ and while the German model ‘was perhaps the most influential
in the development of early EEC competition policy’, no process of ‘Germanization’ had actually taken
place. This should provide comfort of some sort to those authors who still deny that the German
model has been particularly dominant in this area of European law.

The fourth contribution, Brigitte Leucht and Mel Marquis, ‘American Influences on EEC Competition
Law: Two Paths, How Much Dependence?’, is extremely interesting in tracing the potential American
influence on a select group of key personalities involved in EU competition law and policy. One
cannot challenge the hypothesis of a Germanic influence on EU competition law without begging
another question, namely, who had actually influenced the Germans? The reader is invited to
discover the old controversy over whether a possible reading of Article 86 EEC could be interpreted in
the spirit of monopolisation, to which the ECJ said ‘no’. The authors conclude that despite the fruitful
transatlantic interactions involving DG IV, this did not involve the EU Courts.

The fifth contribution, Thorsten Käseberg and Arthe van Laer, ‘Competition Law and Industrial Policy:
Conflict, Adaptation, and Complementarity’, traces the conflict between competition and industrial
policy, and in particular, the unfortunate competitive disparity of larger US corporations vis-à-vis
smaller EU enterprises. As industrial policy was absent in the Treaty of Rome, its consideration came
only in 1962. Notably, von der Groeben and his successor, Borschette, ‘resisted the creation of
European champions insofar as it posed the risk of creating dominant market players’. It is in this
context that the Commission attempted to use state aid rules to ‘neutralize the cross-border spillover
effects of national industrial policies’. Under Commissioner Sutherland, in the mid-1980s, industrial
policy marked a shift towards ‘privatization, liberalization, and deregulation’. Thus, a persistent fear
has been the use of the EU Merger Regulation to advance social and industrial policies, probably
based on the unfortunate experience in the 1970s of allowing crisis cartels in the shipbuilding and
textiles industries.

With the sixth contribution, Ernst-Joachim Mestmäcker, ‘Towards a Concept of a Workable European
Competition Law: Revisiting the Formative Period’, the reader is able to reach the right conclusion as
to the exact purpose of this book, that is, the challenge ‘to overcome national traditions and interests
in favour of an ever closer union’, which remains nowadays a valid objective. The author makes
several insightful revelations based on his own experience, including his influential interpretation of
Article 86 EEC as a means to protect ‘the interference with other firm’s freedom to compete’, namely,
the exclusionary focus, as opposed to Joliet’s focus on ‘monopolistic exploitation’.

Unfortunately, this antagonistic divide between exclusionary and exploitative abuse still persists and is
even simplisticly captured in the belief that exclusionary focus is tantamount to protecting
competitors while the latter has to be disregarded as it concerns effects on consumers.

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18 ibid 122.
19 ibid 123.
20 ibid 124.
Dependence?’ in Patel and Schweitzer (n1) 154.
22 Thorsten Käseberg and Arthe van Laer, ‘Competition Law and Industrial Policy: Conflict, Adaptation, and
Complementarity’ in Patel and Schweitzer (n1) 173.
23 ibid 175.
24 ibid 179.
25 ibid 185.
27 Käseberg and van Laer (n22) 189.
28 Ernst-Joachim Mestmäcker, ‘Towards a Concept of a Workable European Competition Law: Revisiting the
Formative Period’ in Patel and Schweitzer (n1) 193.
29 ibid 202.
Finally, the last contribution, Heike Schweitzer and Kiran Klaus Patel, ‘EU Competition Law in Historical Context: Continuity and Change’, brings us back to the intriguing issue underlying this book, that is, the fierce attacks against the influence of ordoliberalism in Europe as an embodiment of fairness concerns, ie, that it focuses on competitors’ protection, ignores economics, and is formalistic by nature.30

How, then, to reconcile this negative public perception? Despite its original ordoliberal purpose of translating economic theory into law, the influence of the ordoliberal current persuaded scholars of various nationalities to believe otherwise and to resist the cultural legal traditions being transplanted or imposed from Brussels to elsewhere in the EU. While wonderfully revisiting the milestone challenges of the EU competition law, the authors reveal the cause of the major disagreement. However, it is not entirely clear whether knowing the cause has successfully reconciled the traditional continental and Anglo-Saxon divide and whether knowing the leading influencers, in particular their nationalities, should be of any relevance in a ‘United States of Europe’, if ever this were to happen. Nonetheless, the book is to be praised as a highly recommended read to any scholar or practitioner of European law.

30 ibid 223.