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DISTRIBUTION OF POWER AND ORDERED COMPETITION IN THE EUROPEAN COAL AND STEEL COMMUNITY

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Distribution of Power and Ordered Competition in the European Coal and Steel Community

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Abstract

In the early 1950s, the drive to find a practical solution to European antagonisms led to the construction of the first Common Market at the European scale, between Belgium, France, Germany, Italy, Luxembourg and the Netherlands. At the heart of the Coal and Steel Community, was the idea that shared economic interests would prevent the occurrence of new wars. The institutions created for this purpose led to a new distribution of powers between member states, firms and a supranational power that was tasked to prevent discrimination and organize exchanges between the six countries. By examining the jurisprudence and administrative regulations produced from the early 1950s to the early 1960s, I distinguish between three types of rules grounded in different approaches to competition. This analysis gives a new meaning to the idea of “ordered competition,” and the sources of inspiration behind the construction of Europe.

Keywords: European Coal and Steel Community, High Authority, Court of Justice, liberalism, administrative state, antitrust

JEL Codes: B25, K21, K23, L11, N44, P48

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There is a number of puzzles in the construction of the European Communities, and the subsequent European Union, that pervade the public perception of this institution: from one point of view it is castigated as the indefatigable promoter of free markets, from another as a bloated bureaucracy, and yet another as an attack on the nation-state. Historically, arguments on whether the European institutions amounted to a federal “superstate,” a welfare state or a free market have accompanied the debates on its actions to liberalize trade, on the attempt to build a “social Europe,” and on the monetary and fiscal integration of member states. These puzzles are also reflected in the books trying to make sense of it (e.g. Gillingham [2003], Bussière et al. [2006]). Historical studies, studies in intellectual history, legal studies, economic studies, political science approaches, all contribute to a diversity of viewpoints that sometimes seem hard to conciliate.

As a matter of methodology, I believe that the best approach to solve such puzzles is to go back to the context of their origins. This approach leads to the European Coal and Steel Community, a set of institutions that was created in the early 1950s to organize the European markets for coal, steel, and some immediately related products such as iron scrap and iron ore. The Coal and Steel Community pioneered the institutional form that is still that of the European Union today, with four main institutions: the High Authority (today’s Commission), the Council, the Assembly and the Court of Justice. In addition to the forms, much of the content of the new European polity found its first expressions and difficulties through the interaction of member states, firms, and individuals dealing with the High Authority and the Court of Justice.

This institutional form was the product of the negotiations between the future member states, which had started shortly after the Schuman declaration on May 9th, 1950. Robert Schuman, the french minister for foreign affairs, had taken his inspiration from a proposition submitted to him by the *Commissaire au Plan*, Jean Monnet, who had suggested the creation of an authority under

which the production of coal and steel of France, Germany, and other interested states, could be put in common. To this authority were added the other institutions during the negotiations which were led by the French delegation under the leadership of Monnet and his team, Pierre Uri, Paul Reuter, Étienne Hirsch.² Reuter, the jurist of the team, was the one who conceived of the institutions and their mechanisms, while Uri, the economist, pushed toward the idea of a market. When Monnet became the first President of the High Authority, he took Uri with him to Luxembourg, while Paul Reuter represented the French government in its suits against the High Authority. Maurice Lagrange, another French jurist involved in drafting the provisions of the Treaty concerning the Court, became the first advocate general at the Court. The product of the negotiations was an organized market, heavily regulated but relying nonetheless on the idea of undistorted competition.

The idea of organizing market competition, central to the Treaty, is a historically rooted concept, a reaction to the thirty years of crises that Europe had just lived through, but also part of a long-term transformation of governance in Western democracies. Depending on the reader or the writer, organizing competition can adopt completely opposite meanings: some view it as the use of the state to impose free markets on populations, while others see in it the overregulation of economic life by a bureaucratic machinery. These views were present at the beginning, and the outcome of the negotiations was a Treaty that tried to conciliate different national interests and different opinions on the organization of economic life, by creating a set of rules and institutions that still had a long way to go to determine more precisely what it meant to organize a market.

² I find the most complete account of the weeks leading to the Schuman declaration in Cohen (2012: Chapter 2), see also Roth (2008). On Monnet, see his memoirs (1978), and among the many books written about him those of interest for our story here are Hackett (1995) and Gerbet (1983). See also Kipping (2014) who describes the negotiations in great detail, and Leucht (2008) who analyzed the transnational networks of experts that helped spread the American model.

It is with an exploration of the rules created by the Coal and Steel Community that the present paper is concerned. Rules have a unique situation between ideas and outcomes, and the study of their motivations and means is a fruitful way to understand complex institutional and economic phenomena. A rich empirical record has been left in the decisions of the High Authority, which had to explicitly motivate its decisions and publish them, and in the Court cases that were brought against the Authority. Some of the cases attacked directly the motivations, offering alternative interpretations of the Treaty and the original intention of the negotiators. These debates help us distinguish in the mass of regulations, opinions and jurisprudence that were produced in the space of a few years between the different conceptions of the relationship between public authorities and the economy. The most informed contemporaries which took part in the legal and economic debates surrounding the regulation of the Common Market knew well of those distinctions, how much they could be contradictory, and what they left open for interpretation. An examination of the conflicts between the rules of the Coal and Steel Community thus helps us make sense of their paradoxes and the content of an institution built as a superstate but destined to run a market.

Examining the details of these rules, and how they interacted with each other shows that the historical reality was not and could not be the product of one ideology, the design of one overlooking philosopher. It was the consequence of the negotiations between different conceptions confronting each other during the Treaty negotiations and in the action of the Community. The rules adopted did not proceed from authoritarian liberalism, or any other enlightened despotism. I distinguish three sets of rules based on their objectives, means and justifications: first those rules preoccupied with the promotion of economic freedom through the limitation of government's power to cater to special interests and distort competition, motivated

by economic laws and a certain conception of natural liberty. Second, those rules preoccupied with fair competition and consumer welfare through the limitation of the economic power of cartels and corporations by the construction of rules of competition, justified by the idea that competition left to itself would promote the concentration of activities. Finally, those rules preoccupied with efficiency through the administrative organization of production and the control of prices, justified by an appeal to the general interest.

These distinctions are porous, but help us make sense of the action of the High Authority and the sources of this action. All these rules were concerned with competition, which is understandable for an institution meant to regulate a market. But different aspects of competition were emphasized: its conditions of existence with the destruction of public and private distortions; the creation of rules of competition to ensure fair practices; or dampening the consequences of competition, through the organization of economic relations of production and distribution, and through early social policies. It is only after this examination that we can draw the threads together with more abstract conceptions of the relationship between the state and the economy, to understand how these ideas inspired different rules and justified the constraints that they imposed on member states, firms and individuals.

I. Limiting Government's Power to Distort Competition

The Paris Treaty lists a number of objectives, among which we find the highest possible levels of productivity and employment, the improvement of production and the encouragement of economic expansion, the lowest possible prices, the “rational” exploitation of natural resources... As noted by Reuter (1953: 177), the main means to obtain these ends is the establishment of “normal conditions of competition,” explicitly mentioned in several articles (Arts. 5, 65, 66). Competition as a driver of economic forces is also implied in an important

formula contained in Art. 2 of the Treaty: “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.” The importance of this formula will become apparent later in the debates surrounding its interpretation. Art. 4 of the Treaty lists the obstacles to competitive conditions that are forbidden: tariffs on the exports and imports of goods, quantitative restrictions, obstacles to the free choice of buyers and suppliers, and other “subsidies” and “special charges” given or imposed by the member states. The power to ensure that states do not infringe these rules is given to the High Authority in Art. 67, in the Chapter entitled “Conditions of competition.”

The idea that the undistorted play of competition will lead to a situation where production is concentrated in the firms with the highest productivity is the core of the common market, and the main mechanism envisaged to obtain the lowest possible prices for the end consumer. However, most of the Treaty straddles this mechanism with caveats, exceptions, and powers given to the High Authority to control the market and intervene on production and prices during the transition, in times of crisis, and to alleviate the effects of competition and restructurations on employment. For instance, the formula of Art. 2 is immediately followed by the clause “while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States.” Before we turn to the rules governing these interventions, we will examine how the rules creating a common market and forbidding state subsidies were enforced by the High Authority and interpreted by the Court of Justice.

The establishment of what constituted subsidies and which of them were legal in view of the many caveats in the Treaty occupied much of the early work of the High Authority. It was

assisted in this task by the Court's jurisprudence, which played a key role in enforcing the limitations of political discretion contained in the Treaty. In its first general report to the Common Assembly, the High Authority boasted that "a substantial number of the discriminatory measures introduced by the governments of the six countries (subsidies, financial aid, special charges) have been done away with" (High Authority, 1953: 15). While the elimination of national protections was a clear goal of the High Authority (High Authority, 1953: 43), on the grounds that it led to higher prices for the customer, this statement should be nuanced by the special arrangements left for some subsidies and the creation of new protections at the level of the Community, such as the perequation mechanism benefitting the coal industries of Italy and Belgium. The second general report thus recognized that little progress had been made since the abolition of tariffs between the member countries (High Authority, 1954: 108).

In addition to the perequation system, a number of other subsidies were authorized during the transition period, although their level was progressively reduced; for instance, the High Authority authorized the French government to maintain a subsidy to the coal delivered to plants outside of a mining zone, but progressively reduced it: in March 1953, it was reduced to 70% of its previous level (Decision 26-53), then 66% of the new level in March 1954 (Decision 16-54), with a cap at 2'500 million francs, and to 1'800 million francs in May 1955 (Decision 19-55). This amount was maintained at the same level in 1956-1957, and reduced to 350 million francs for the last year of the transition period, that is, until February 9th, 1958. The goal was to ease the transition, and on one side the reduction was motivated by the idea that it would not result "in harmful price increases for consumers or excessive difficulties for businesses to adapt," while on the other side, the progressive character of the reduction was justified by the prevention of "serious social repercussions" (Decision 19-55).

Reducing this subsidy did not pose any major difficulties. However, some cases arose as to what really constituted a subsidy or a special charge forbidden by Arts. 4 and 67 of the Treaty. Giving a content to these concepts was important to establish and maintain “normal conditions of competition” (Art. 5), and several early cases examined by the Court helped to define these terms. In a case brought by a professional steel association in Luxembourg against the High Authority for failure to act against the organization of coal trade by the Luxembourg government, the Court was led to define a special charge as one “affecting unequally the production costs of comparably placed producers, [that] introduces into the distribution of production distortions which do not result from changes in productivity.” The same reasoning allowed the Court to explain the meaning of “most rational distribution of production” contained in Art. 2, by arguing that “the most rational distribution of production in accordance with Art. 2 is that which is based in particular upon the composition of production costs resulting from output, that is, from the physical and technical conditions particular to the various producers.”³ This judgment contributed to define the relationship between key concepts of the Treaty concerning the normal conditions of competition, the rational distribution of production and the notion of a production cost, and how government subsidies could prevent the “normal conditions” from occurring.

An illustration of this relationship between subsidies, production costs and competition can be found in the case of the so-called Bergmannsprämie, a tax-free bonus given to German miners working underground by the Federal government. Faced with the criticism of the High Authority, the German authorities had proposed in 1957 to compensate the miners’ bonus by having coal mining undertakings contribute payments to the miners’ pension fund in place of the

³ Joined cases 7-54 and 9-54, *Industries Sidérurgiques Luxembourgeoises v. High Authority*, p.196.

government's current contribution.⁴ The High Authority accepted the argument that this solution prevented a distortion of competition, but a group of Dutch firms felt differently and filed an application with the Court of Justice in September 1957. In this case, the Court ruled that there was no decision of the High Authority that could be attacked, and the case was dismissed; after this judgment and a renewed exchange of letters with the High Authority, the association of Dutch steelers brought another suit where the problem of a subsidy was posed in even clearer terms. The firms argued that a prohibited subsidy could not be compensated by another subsidy, and that the goal of the Bergmannsprämie was to avoid an increase in the price of coal by supporting the increase of production costs; on the other hand, the High Authority, supported by the German government, downplayed the interdictions of Art. 4 by arguing that “without any need to change the outward form of a subsidy, it sufficed to eliminate its harmful effect on the functioning of the Common Market” and contesting the idea that the bonus was a subsidy rather than a “mark of special consideration on miners,” crafted to make the career in the mines more attractive (30/59, Steenkolenmijnen v. High Authority, p.6-7).

Much of the debate being on what constituted a subsidy, the Court had to take a clear position on this matter. In their decision, the judges established that a subsidy was “a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces”; viewed in the light of Art. 2, it was an “obstacle to the most rational distribution of production at the highest level of productivity” because it disconnected selling prices and production costs (30/59, Steenkolenmijnen v. High Authority, p.19). Finally, the court established that the miners' bonus was “undoubtedly an element in production costs,” and because it was paid by the Federal government, “[t]his artificial reduction

⁴ See the facts of case 17/57, Steenkolenmijnen v. High Authority, p. 3.

in accountable production costs places the coal industry which benefits from it in a privileged competitive position compared with that of coal industries which have to pay for the whole of their production costs on their own” (30/59, Steenkolenmijnen v. High Authority, p.29)

Consequently, the Court ruled in favor of the Dutch steelers, and referred the matter back to the High Authority.

This case, ruled in February 1961 but started in early 1956, was part of a general orientation of the Court’s jurisprudence towards striking down state subsidies and taking a more active role in ensuring that the Treaty’s law was enforced. A common explanation for the increased role of the Court of Justice in European integration is the entry into force of the Rome Treaty; but equally important was the end of the transition period of the Coal and Steel Community in early 1958, at the same time that the European Economic Community was beginning its operations. The termination of transitional measures meant that the protocol on the transition was not applicable, a protocol which the High Authority had heavily relied on during the previous years, to authorize special exemptions and subsidies. A flurry of cases concerned with government discrimination appeared on the docket of the court throughout 1958, many of them concerned with discriminations arising from different transport rates.

During the negotiations, the question of transport had resulted in Art. 70 of the Treaty, which recognized that transport rates and policies remained within the purview of the member states, but that discrimination through preferential rates was not permitted. Many problems still had to be solved by the High Authority, which set up to this effect a commission of experts working on the different rates that had been established. Very early on, the member states adopted general pricing policies to eliminate the distinction between transport internal to their borders and transport to other member states, which generally led to a slight increase in national prices and a

decrease of international prices (High Authority [1953: 56-62]; Reuter [1953: 192ff]). This did not solve a number of exemptions and subsidies that were given to certain regions and certain undertakings, which the High Authority, spurred by the Dutch government, tried to undertake a first time in 1954 (Decision 17-54). At the end of the transition period, the High Authority sent a series of letters to the French and German governments, asking them to remove some of their subsidies to the transport of coal through their nationalized railway systems (the Société Nationale des Chemins de Fer and the Bundesbahn). Some subsidies were not deemed contrary to the Treaty, because they were “justified by the existence of other competing modes of transport,” but the Authority struck down most of the preferential prices given in France and Germany.⁵ These decisions were attacked by the German government, by a French firm, and by several German firms supported by their respective Länder; all those cases were dismissed by the Court in three judgments given on May 10, 1960. Because they all raised the same substantial points and were dismissed on similar grounds, we will consider only the most prominent case between a number of German firms and the High Authority (joined cases 3 to 18, 25 and 26/58, *Barbara Erzbergbau v. High Authority*).⁶

The problem considered was whether the *Bundesbahn*, the nationalized German railway authority, could subsidize the carriage by rail of mineral fuels to the iron and steel industries situated in the same Länder. This had to be examined in light of Art. 70 of the Treaty which prohibited discrimination in the price of transport between the participant countries; that is, a country could not charge a higher rate for a train doing a similar route from Germany to Belgium than for a train whose route was not international. The last paragraph of Art. 70 stipulated clearly

⁵ See the letter of the High Authority to the German government dated February 12, 1958 in the Official Journal of March 3rd, 1958.

⁶ It should be noted that in joining eighteen cases together, the Court faced eleven German lawyers defending the interest of eighteen firms and six Länder. One of the lawyers defending German interests was Ernst-Joachim Mestmäcker, a leader of the ordoliberal movement.

that the pricing policy of transports was still within the purview of each member State, which could potentially have different rates when the competition was between different modes of transportation rather than within different countries.

In their argument against the High Authority's decision to remove the special rates which they were benefiting from, the German firms replied that the establishment of a common market for coal and steel did not preclude national governments to ensure the prosperity of their national economies. The Court sided on this point with the argument of the High Authority that under the Treaty, member states were not free to lead a siting policy of their coal and steel industries through "the practice of subsidies in the form of the grant of special rates and conditions to undertakings producing coal and steel" (joined cases 3 to 18, 25 and 26/58, *Barbara Erzbergbau v. High Authority*, p. 193).

When the Germans tried to argue that this was not a discriminatory practice, the Court again gave reason to the High Authority, by judging the subsidy as discriminatory and "unnatural" in the sense that it was not a natural condition of production. This was also the position taken by the Advocate General, who argued that the undertakings should adjust themselves to equal transport conditions, rather than the opposite, which was argued by the applicants. Indeed, the applicants had argued that "[t]he most rational distribution of production exists when reasonable economic considerations justify the initial introduction and the maintenance of production in given conditions" (joined cases 3 to 18, 25 and 26/58, *Barbara Erzbergbau v. High Authority*, p.182-183). The High Authority argued against this that "the most rational distribution of production must be guaranteed by taking into consideration the conditions, such as they are, of the Common Market," an "economic principle" which "completely excludes the falsification of the geographical location and natural conditions affecting undertakings by manipulating

transport rates and conditions” (Barbara Erzbergbau v. High Authority, p.183). With reference to the idea of a spontaneous movement to the site of highest productivity contained in Art. 2, the Advocate General Lagrange argued with the High Authority that “the abolition of discrimination may involve structural alterations and the relocation of production, and all precautions must of course be taken to cushion the effects of such moves which would otherwise be too disruptive” (Opinion of the Advocate General, Barbara Erzbergbau v. High Authority, p.211).

The Court emphasized that preventing governments from subsidizing their national industries was not contrary to the goal of the Treaty set out in Arts. 2 and 3 to ensure the development of employment, the national standard of living, and production, even if it led to “a temporary reduction in employment.” Quite the contrary, it was in order to protect the capture of policy by special interests that the Treaty had established the principle of non discrimination, which the High Authority was enforcing by striking down subsidies. This was argued by the Court which recognized that “such measures are necessary in order to enable the Common Market to achieve its stated objectives, since the disappearance of undertakings which could not continue to exist by their own unaided efforts, but only with the help of constant and massive subsidies, would strengthen its resistance to crises” (joined cases 3 to 18, 25 and 26/58, Barbara Erzbergbau v. High Authority, p.194).

This decision tied together the principles defined earlier about what constituted “natural conditions” for the costs of production and what constituted subsidies and special charges, with a limitation of the possibility by a member state to intervene and stop the adjustment of production towards the sites of highest productivity. Lagrange noted that the German government normalized its transportation rates policy at the time of the decision, the solution advocated by the High Authority (1961: 415-416).

The rules limiting the action of governments, mostly contained in Arts. 2 and 4 of the Treaty, which mentioned the goal of a spontaneous adjustment and the interdiction of subsidies, were enforced by the High Authority and the Court throughout the 1950s. By limiting the power to subsidize industries to compete with other member states, they were meant to realize the objectives of lower prices and increased productivity. They were not however the only rules of the Treaty. Another important set of constraints imposed on the Community were the antitrust rules limiting the economic power of the firms of the Common Market.

II. Limiting Business Power through the Rules of Competition

Enshrined in the Treaty were a number of “rules of competition” (“règles de concurrence”, Art. 66) that defined the “normal conditions of competition” (“jeu normal de la concurrence,” Art. 65, also in Art. 5) and empowered the High Authority to collect information from Community firms and sanction those who did not play by these rules. Paul Reuter described in 1953 the content of these rules of “ordered competition” (Reuter, 1953: 202), their origins and desired outcome; he also recognized their fuzziness and deficient logic, which he found characteristic of even the most evolved national laws on this subject (Reuter, 1953: 202). He was hopeful however that the general concepts contained in the Treaty could be fleshed out by the action of the High Authority and the rulings of the Court. As we will see, these rules were the object of many disagreements between firms, governments, the High Authority and the Court (and even in the Court, between the Advocate General and the Judges).

The very first case judged by the Court concerned the obligation of firms to publish price lists and abide by them in their transactions, to ensure market transparency and the absence of discrimination. After it became apparent that some steel firms were straying away from those prices, the High Authority decided to grant them some leeway to do so legally (Decision 2-54).

The decision was immediately attacked by several governments, and the Court ruled in their favor, following the Treaty's rule of "compulsory and prior publication" against possible discriminations (France v. High Authority, 1/54, pp.14-15). The Advocate General sided with the High Authority, with reference to the role of the High Authority as arbiter of the rules ensuring "normal competitive conditions" and "the theory of perfectly free competition" and Stanley Jevons: "If prices are not free to find their own level, publication totally fails in its purpose which is precisely to help them to do so" (France v. High Authority, 1/54, pp.26-29). Thus, from the beginning of the Common Market, the "rules of competition" proved elusive in practice, and subject to opposite positions on the need to adapt prices quickly and the nondiscrimination principle. The situation for antitrust rules was even worse; at its center was the question of the organization of sales by the coal mines of the Ruhr.

A number of studies have documented the influence of American antitrust ideas on the Coal and Steel Community (and national laws, especially in Germany) during the postwar (see e.g. Leucht, 2008;2009; Leucht and Marquis, 2013; Kipping, 2014). With respect to pricing policy, several contemporary actors (Reuter [1953: 154], Rueff [1965: 19]) referred to the "basing point" idea that had been elaborated in the United States during the previous half century. This influence had also played a part on the antitrust articles (Arts. 65 and 66), which were of central importance during the negotiations of the Schuman plan, as the German government opposed a complete deconcentration of the Ruhr. The basic law of the new German state included antitrust provisions as well, but the German delegation (led by Walter Hallstein) during the Paris negotiations was reluctant to see those provisions being included in the Coal and Steel Community (Kipping, 2014). The role of American representatives in pushing for this

deconcentration and creating an antitrust law at the European level was central to the creation of the Community, as noted by newspapers of the time (see e.g. New York Times, 1951).

The initial motivation for the two articles on antitrust was clearly to restrain the powerful German cartels (Lagrange, 1980; Kipping, 2014). In the 1950s, the Ruhr coal and steel cartels were a vivid reminder of World War II, during which the Vereinigte Stahlwerke and other German companies had supported the nazis war effort. At the end of the war, the victorious powers began to dismantle steel concerns, an approach that stopped in 1948, and was replaced by the decartelization and deconcentration policy of the allies. In late 1952, the Allied High Commission in Germany changed the structure of coal sales in the Ruhr, and five days before the Treaty came into effect for the coal market, the producers organized themselves into “six independent joint selling agencies,” created under the control of the organization known as GEORG (Gemeinschaftsorganisation Ruhrkohle GmbH). How six agencies could both be “independent” and “joint” was the heart of the dispute between different firms and public authorities over the content of antitrust rules.⁷

The Paris Treaty took an approach to antitrust dictated by political and historical reasons. As Reuter put it, monopoly in itself was not illegal, but only certain actions that could lead to a position of market domination (Reuter, 1953: 208). This helped integrate in the new common market the national monopolies that had been created after the war, such as the coal industry in France. This also helped the economy of the Community to transition from a situation effectively dominated and organized by cartels, to a transitory situation seen as a first step on the road to a competitive market organized between the six member states.

⁷ See the facts of the judgment in *Stork v High Authority*, 1/58, ECSC Court of Justice. The action had been brought by a coal distributor against the rules of the new selling organization. For an overview of the structure of the coal market before and after the entry into effect of the Common Market, see Lister (1960: Chapter 8), and see Diebold (1959: 380ff) for a detailed account of the organization of sales in the Ruhr in relation to the activity of the High Authority and the Assembly.

In their final forms, Arts. 65 and 66 forbade agreements having as a consequence to “prevent, restrict or distort normal competition,” for instance by fixing prices or by controlling production. Not all agreements were forbidden, and Art. 65 listed a number of exceptions. Authorizations were to be examined on a case-by-case basis, with large powers given to the High Authority to obtain information from firms and sanction them. Art. 66 focused on the problem of mergers and prevented concentrations between undertakings when they were designed “to hinder effective competition” or “to evade the rules of competition” by creating advantageous market positions. Again, a list of exemptions were noted; but in both cases much was left to the appreciation of the High Authority. The fuzziness of the language and concepts used by the Treaty, the absence of a clear definition as to what constituted “normal competition” was noted again by Reuter (1953: 209). The subsequent task of the High Authority was to define and enforce these rules against Community firms; its main difficulty arose from the fact that the coal and steel firms of the Ruhr began to consolidate again during the 1950s, openly flouting the antitrust rules.

Starting its action on antitrust proved challenging for the High Authority; reference was made in its first General Report to the beginning of a case by case study of interfirm agreements, albeit with a lenient stance “to avoid using any drastic measures in an economic sector in which there has been no free competition for a long time” (High Authority, 1953: 96-98; see also Decision 37-53 establishing the beginning of the enforcement of antitrust rules). The second report did not have much more to say about the beginning of antitrust activities (High Authority, 1954: 20). In May 1954, the High Authority gave a series of decisions (24-54, 25-54, completed by 28-54, and 26-54) to define the concept of control of a firm, exempt small firms and detail the mandatory information that had to be furnished on proposed agreements; the following month, the High Authority issued its first authorization of interfirm agreements (Decisions 31 to 34-54).

One of the first refusal to authorize a common agreement came in July 1955, when the High Authority ordered the dissolution of an organization created between 97% of the German steel producers to buy iron scrap in common (Decision 28-55). Its decision motivated the refusal (which had already been notified to a similar organization two years ago) on grounds of Art. 65 of the Treaty, and the idea that “these agreements therefore tend to restrict competition on the common market, in particular by determining the price of iron scrap purchased within the Community, as well as by fixing the tonnages to be purchased and by allocating iron scrap purchased within the Community and in third countries” (Decision 28-55). In fact the High Authority had authorized its own organization in charge of distributing and importing iron scrap (Decision 33-53).⁸ But the main problem that occupied the rest of the 1950s was the fate of the coal cartels of the Ruhr. In February 1956, the High Authority authorized the transformation of GEORG, the common organization which was used as a centralized pricing organization for the coal mines of the Ruhr, into three independent selling organizations sharing some institutions and mechanisms, which became known as “Geitling,” “Präsident” and “Mausegatt” (Decisions 5 to 8-56). This was the first in a series of decisions to be attacked both by the German firms and by other firms in the Community.⁹

While these decisions were being made, and as judicial proceedings began, public opinion, especially in France, was growing fearful of the reconstitution of the powerful industrial cartels of the Ruhr. This concern was given expression in the constant needling of the High Authority by Michel Debré, one of the members of the Assembly of the Coal and Steel Community. Debré, a

⁸ The problem of iron scrap, which is used in the production of steel, became one of the issues plaguing the High Authority, brought to the Court as early as 1954, and leading to the development of many recommendations from the High Authority, for instance to directly use pig iron in the production of steel instead of iron scrap; these problems are not tackled here in greater detail.

⁹ See cases 2/56, Geitling v. High Authority, 18/57; 1/58, Stork v. High Authority; 18/57, Nold v. High Authority; 16-18/59, Geitling, Mausegatt, Präsident v. High Authority; 36-40/59, Geitling v. High Authority; 13/60, Geitling v. High Authority. These judgments cover the period from March 1957 to May 1962 but are neither exhaustive nor the end of the legal battle between those firms and the Community.

fiery speaker who went on to become Charles de Gaulle's first prime minister a few years later, began to question the action of the High Authority in April 1955, noting that "contrary to the commitments that have been made, at least before the French Parliament, significant reconcentrations have already taken place in Germany and others are planned" (Question n°25). In its answer, the High Authority noted that it had not yet examined all the cases brought before it, but also reminded his policy of leniency towards concentrations, viewed as a way to obtain "savings in investment and to rationalize production." At the time, the Authority was still examining the centralized organizations set-up in the Ruhr, in Southern Germany, in France and in Belgium. In September 1956, and in a follow-up question the next month, Debré came back to this issue by mentioning newspapers ads boasting of the reconstruction of the steel cartel with the creation of the Phoenix-Rheinrohr AG, demanding why the High Authority had authorized such a cartel; in its answer, the High Authority confined itself to downplay the merger. These questions were continued in 1957 (Questions n°44 and 50), and the French representative was joined by some of his colleagues asking the High Authority to clarify its actions on these matters. The High Authority reported that a number of mergers and agreements had been authorized, including seven mergers out of twelve that took place in the Ruhr (in April 1958, out of thirty authorized concentrations, eighteen had been in Germany, see Diebold [1959: 357]). In October 1957, both Debré (Question n°53) and a group of socialist representatives (Question n°51) asked the High Authority to provide precise numbers on its actions against agreements and concentrations, in relation to the increase in coal prices in the Ruhr decided at the same time by the three selling organizations. While the socialists argued that "the policy of the high authority is exclusively inspired by capitalist ideas," Debré continued his attacks against the reconstitution of the economic power and vertical integration of the Ruhr steelmakers throughout 1958.

The beginning of Debré's attacks was motivated in 1955 by the concentration reported in Germany, and intensified as those concentrations took a more definite shape. In response to the situation created by the concentration of German industries, the High Authority stepped up its antitrust activities by monitoring the three selling agencies created in early 1956. A series of decisions in 1957 and 1958 tried to address the problems raised by Debré and his colleagues at the Assembly. Concerning the price movements observed by Debré and others in the Fall of 1957, Decisions 24 to 26-57 taken in December 1957 were a stern reminder that the firms had to communicate their price lists before changing their prices; in Decisions 7 to 9-58, taken in June 1958, the High Authority showed some leniency to let the three organizations sign long-term contracts with wholesalers. As the expiration date of the initial agreement expired in March 1959, the coal mines of the Ruhr submitted a new agreement whereby they requested the authorization of a common selling organization replacing the three selling agencies. In February, the High Authority rejected their demand and renewed the previous agreements for a transition period, deeming that "the authorizations had not led to the expected results" (Decision 17-59; see also Feld, 1964: 77ff.; Lister : 259-267).

The decision was challenged by the selling agencies who lost in a judgment given in February 1960.¹⁰ But only a few months later, the agencies submitted a new agreement to the authorization of the High Authority, asking for the approval of a common selling mechanism, which was again rejected by the High Authority, barely a month after being submitted (Decision 16-60). The new challenge brought by the firms led to a thorough Court proceeding where all sides of the debate detailed their arguments. In a lengthy judgment, the Court introduced the idea of an "indispensable measure of competition" (*dose de concurrence indispensable*) that ought to be

¹⁰ Joined cases 16-18/59, Geitling v. High Authority.

maintained in the Community. This idea was used by the Court to reject the cartel's request and decide in favor of the High Authority's rejection of the common selling point. The reporting judge in this case was Jacques Rueff, who spent some time in his memoirs on the problem of the cartel in relation to the "modern forms of competition" and "oligopolistic" markets. Rueff sought to inspire his reasoning by "a realism that brings economic theory directly into legal doctrine" (Rueff, 1965: 25), and by drawing on the modern theories of imperfect competition (Rueff, 1977: 221) and game theory (Rueff, 1965: 25).¹¹

The legal battle did not stop there, and as conditions on the coal market continued to deteriorate after the 1958 coal crisis, the High Authority eventually agreed to the formation of two selling agencies instead of three in 1963; in 1969, the Commission of the European Economic Community authorized a final merger, at a time when the need for competition inside the coal industry was not advocated by anyone, as coal had lost its preeminent place in the provision of energy and was subjected to the competition of other sources of energy (Spierenburg and Poidevin, 1994: 615-617). In view of this ultimate result, which could have hardly been foreseen in 1952, one wonders whether all the efforts invested in trying to break up or reorganize the coal cartels were really necessary.

Actors and observers at the time seem to agree on the failure of the antitrust policy led by the Coal and Steel Community.¹² This should lead us to question what exactly were the goals of this policy. The official justification for antitrust rules was to avoid the concentration of economic power; another reason was to fight the power of German firms, against the background of fears

¹¹ In 1962 Rueff wrote to Edward Chamberlin with whom he had a somewhat regular correspondence that "I often think of you in the cartel trials that we have to judge" (Rueff to Chamberlin, March 8, 1962, Edward Chamberlin Papers, Duke University).

¹² For instance, Lagrange argued that the action of the High Authority in the matters of antitrust enforcement were "insufficiently vigorous and speedy", and that "since the Treaty entered into force, no satisfactory solution for this problem has been found; and this has enabled the interested groups to consolidate their position" (1961: 417).

that a reconstitution of the vertical integration that characterized the Ruhr could lead to a new war. There is a more abstract consideration that takes its roots in a longer term evolution, in the idea that the economic power of corporations should be checked by an independent agency. This was a reaction to the concentration of economic power after the restriction of government characteristic of the middle nineteenth century. This reaction took many forms, from the more radical marxist and socialist reactions to the development of administrative sciences in the United States, France and Germany. In this respect, the institutional set-up of the Coal and Steel Community was in continuity with a transformation of governance institutions in the West that took its roots at the end of the 19th century with the development of an administrative state.¹³

The limitations on economic agreements and cartels also meant that their more practical purpose, such as dealing with crises or ensuring a minimum of cooperation between firms of a given sector were forbidden by the same interdictions. While in the interwar, the production and distribution of coal and steel were run by international cartels and the more or less direct involvement of national governments, the demand to find another solution was strong in postwar Europe. It is clearly apparent from the Treaty of Paris that the powers denied to the cartels in Art. 65 are explicitly given to the High Authority in Arts. 54 to 59, 61 and 62. It is also apparent in the decisions of the High Authority to supervise the distribution of scrap in the market, and to forbid a similar organization by German steel producers. It is to the analysis of this administrative system that we now turn, through an examination of some of the rules created by the Coal and Steel Community to organize markets.

¹³ See Lindseth (2010) on this long-term interpretation of the postwar consensus. This construction of a new type of administration during the twentieth century was also described by Hayek (2011 [1960]), who witnessed its consequences in Europe and the United States.

III. Ordering Competition through Administrative Regulation

Parallel to its application of articles 65 and 66, the High Authority used its power to fix prices to control the coal industry. This policy was used explicitly as a tool against the concentration of the coal industry in the Ruhr, as is apparent from Decisions 18-54 or 12-55 (see also Lister, 1960: 288). In Decision 18-54 for instance, the High Authority argued that the selling organization in the Ruhr excluded an “effective competition” between its firms, and because of its volume (almost half of the total coal produced in the Community), it was necessary to maintain a maximum price. The controls were lifted when the three selling agencies were created in 1956, and the only production that remained under a system of price controls was in Belgium, due to the system of compensation adopted during the transition period, which ended in February 1958. Prices on the steel market were left mostly free, as were the firms to form agreements, to the chagrin of Michel Debré who could only witness the reconstruction of the integrated concerns in the steel industry (see also Diebold [1959: 363-364]); on the other hand, the scrap market was entirely managed by the High Authority and two offices set up for this task. The system was based on a compensation between firms that led to many cases where firms contested the amounts of money they had to give to the fund (in the millions of dollars). The issue in several cases was to reconcile the economic and legal conceptions of a firm (see Feld [1964] on this question).

While the motivations to limit the powers of governments and firms came from the principle of nondiscrimination and the benefits expected from a decrease in the costs of production, the powers given to the High Authority to intervene directly on the markets proceeded directly from consideration of the “common interest” (Art. 3) or “general interest of the Community” (Art. 9). The actions forbidden to firms in Arts. 65 and 66 became powers entrusted to the High Authority

in Arts. 54 to 59, 61 and 62 to control prices and production, examine and coordinate investment plans, subsidize firms and lead a social policy (which consisted in the construction of social housing and retraining unemployed miners). The justification of this power to organize production, especially in times of crisis, was not really contested at the time because those industries of investment were viewed as particularly subject to large fluctuations in activity.

In this respect, there is an important difference between antitrust rules on agreements and concentrations, or the “rules of competition,” and rules meant to organize a market to serve the public interest by “rationalizing” production. Antitrust, and more largely the “rules of competition” were justified to limit the economic power of firms, a consideration clearly driven by historical and political reasons in the case of the Ruhr. This contradicted the project of “rationalizing” production to promote efficiency, when competition was viewed as a wasteful process. This contradiction was apparent in the leniency of the High Authority towards agreements, and in the promotion of concentrations by some national governments, both policies adopted in order to “rationalize the production.”

The idea that markets had to be organized to “rationalize” and modernize production pervaded the work of the High Authority, through its approach to the coordination of investment, to the distribution of certain raw materials or through its social policy. It was also evident in its approach to cartels, where detailed regulations supplemented the antitrust policy that was enforced with varying enthusiasm. We have had the occasion to note that the Authority generally adopted a lenient position towards cartels because of its objective to avoid “perturbations” on the markets it regulated. Parallel to the decisions taken on antitrust and the Court rulings that came out of them, another battle was fought between the coal cartels and the High Authority regarding the regulation of their commercial practices. This detailed regulation was originally contained in

the second part of Decisions 5 to 7-56, which had authorized the new organization of the selling agencies Geitling, Mausegatt and Präsident. A distinction was introduced between wholesalers and retailers, and between firsthand and secondhand wholesalers, with only the so-called firsthand wholesalers allowed to contract directly with the selling agencies. To become a firsthand wholesaler, a distributor had to prove that it had sold at least 75'000 tons of common market coal in the common market, including 40'000 in its operating zone (there were seven of them), of which 12'500 tons had to come from the selling agency with which he wanted to contract.

The original regulations contained a transition period so that previous wholesalers could still obtain their coal directly from the new selling agencies; this led to a period of uncertainty for some distributors, and it became apparent during the next few months that these limits were too stringent. Accordingly, with Decisions 16 to 18-57, the High Authority changed those rules from 75'000 to 60'000 tons, from 40'000 to 30'000 tons and from 12'500 to 9'000 tons. This Decision also signified the end of the transition measures, and some wholesalers received notice that they could not negotiate directly with the selling agencies; one of them, the company Nold, filed a suit at the Court of Justice in September 1957 against the High Authority, to retain its status as a wholesaler. The court issued an order in December suspending the application of the rules to the applicant firm, until it gave its final judgment.

During 1958, we saw that the Ruhr firm prepared a new application for an common sale agreement between most of the mines; in Decision 17-59, taken on February 18, 1959, the High Authority rejected their demand, reconducted the previous agreements, and introduced another set of criteria for the firsthand wholesalers, doing away with the first criterion, and reducing the others to 20'000 tons and 6'000 tons. But on March 20, the Court gave its judgment in the Nold

case, which contested the commercial regulation preventing it from contracting directly with the selling agencies. The Court sided with the firm and asked the High Authority to review its regulations; its reasoning was that Art. 15 of the Treaty stipulated that the High Authority needed to state clearly its reasons for its decisions, and that the Court had the power to “take exception to any deficiencies in the reasons” which prevented it from reviewing the case (18/57, *Nold v. High Authority*, p.52). In particular, the Court found that in choosing its criteria, the High Authority did not specify how they could “contribute to a substantial improvement in the distribution of fuel” and whether they were not unnecessarily restrictive (18/57, *Nold v. High Authority*, p.52).

The annulment by the Court of the commercial regulation issued in 1957 prompted the High Authority to find a new defense for the two criteria of Decision 17-59, which were based on similar explanations. This led to the publication in June 1959 by the High Authority of Decision 36-59, where the articles on commercial regulation contained in Decision 17-59 were reproduced verbatim, but with three added pages of motivations. From these motivations, we can clearly see the contradiction between the pursuit on one hand of a commercial regulation drawn up to avoid “a repartition of buyers and market” by the selling agencies, and on the other hand the willingness to promote a “rational and efficient sale” through the delimitation of different categories of wholesalers, as the High Authority argued that “the non-selective admission of all traders to direct supply would be contrary to a rational distribution of functions, would cause an inadequate expansion of the distribution apparatus and would be likely to restrict effective sales.” In this balancing act between too much restrictions of wholesalers access to the selling agencies and too much access to these agencies, the High Authority recognized explicitly that its approach was to try different criteria based on the outcomes of the previous ones, and took solace in the

idea that its latest criterion would now be at a level ensuring “on one hand the improvement of distribution and avoiding, on the other hand, excessive restrictive effects and discriminations.”

In reply to Decision 36-59, the selling agencies modified their earlier suit in which they also asked for a change in this regulation, and filed a new one against the High Authority to maintain the criteria at the earlier, higher level, in a bid to limit the number of wholesalers they had to deal with. At the same time, the firm Nold which had won its first case against the High Authority, filed again to obtain the annulment of Decision 36-59, for opposite purposes than the selling agencies but to the same effect of maintaining the earlier status quo. The Court joined the two cases to avoid any misinterpretation, and gave its ruling in July 1960.

The judges found that the selling agencies were unfounded in thinking that the dismissal of the larger criterion was not motivated enough by the High Authority, which argued that it led to a distortion of competition because distributors were led to buy quantities from all three selling agencies to meet the minimum quantitative requirements. But the Court found the reasoning of the High Authority faulty again when it came to the other two criteria. These reasons did not show sufficiently that the new quantitative limits led to “a substantial improvement in distribution” (36-40/59, *Geitling v. High Authority*, p.441). In a series of questions asked to the Authority, the Court had received the reply that “the reason for the distinction between those two categories [first-hand and second-hand wholesalers] is to promote the rationalization of distribution by limiting the number of first-hand traders with which the joint selling agencies deal directly” (36-40/59, *Geitling v. High Authority*, p.442). This led the Court to argue that this distinction “does not correspond to objective technical or economic requirements” (36-40/59, *Geitling v High Authority*, p.442), especially since “the very purpose for which the selling agencies have been created is to take away from the mines the effort involved in organizing the

sale of their products on a commercial basis and their function, which is to furnish wholesalers with supplies, constitutes the essential reason for their authorized joint-selling agreement.” (36-40/59, *Geitling v High Authority*, 442-443). It also found that the criterion of 20’000 tons, as much as the 60’000 tons criterion had the effect “to favour in general, or at least in fact, purchases of coal from the Ruhr, because if a trader does not purchase the 20’000 metric tons from one agency, while wishing to continue to purchase the minimum of 6’000 metric tons so as to remain eligible for acceptance by that agency, he is forced, in most cases, to purchase the remainder of 14’000 metric tons from the other agencies” (36-40/59, *Geitling v High Authority*, p.443). This led the Court to annul the new decision of the High Authority and its commercial regulation, in another blow to the administrative body.

The opinion of Advocate General Lagrange in this case is particularly interesting in that it illuminates both the contradiction at the heart of the action of the High Authority, and the different degree in which actors believing in organizing markets wanted this organization to go. Lagrange noted that “the fear that the number of first-hand wholesalers might increase too much does not appear to be founded in fact” because only some wholesalers who met the criterion had chosen to be recognized as first-hand wholesalers since the change in criteria. While the High Authority had argued that this proved the reasonableness of the 20’000 metric tons limit, Lagrange had another interpretation: “why decree from on high a limit which, as we have seen, does not reflect a commercial necessity? The facts noted by the High Authority show on the contrary that *freedom is no doubt the best regulator of the matter*, for while the agencies are entitled to require that their traders receiving direct supplies must have the usual attributes of a wholesaler ... no wholesaler is *required* to apply for the position” (Opinion of the Advocate General, 36-40/59, *Geitling v High Authority*, p.457, original emphasis).

Lagrange was hardly a *laissez-faire* economist but one should note the consistency of his opinions with the recognition that at least some spontaneity was necessary for economic life to develop. He clearly opposed the detailed regulation that had for sole purpose to create an arbitrary distinction between two categories of distributors which spontaneously distributed themselves as retailers or wholesalers. The only criteria needed was to enforce the nondiscrimination principle to avoid that the selling agencies themselves use a quantitative criteria to restrain their pool of wholesalers under cover of rationalizing production, to control the markets for their own purposes. By creating this distinction, the High Authority was in fact coming back full circle to the original, arbitrary measures introduced in national legislations, which were fought at the same time by the Community, as we saw in the first section.

IV. The Meaning of Ordered Competition

In 1947, pressures on the French mining industry to increase production led to a major strike, and a split in the coalition government; the communist party, one of the most potent forces out of the last general election, left the cabinets and entered the parliamentary opposition. The following years saw a move of politics towards the center, before the 1951 election that consecrated the return to “bourgeois politics” (Vinen, 1995). By that time, no one in power thought seriously about collectivizing the economy. The wave of nationalization was over, and the Monnet Plan was an instrument of negotiations between workers, businesses and governments rather than a blueprint for the economy. But this left open the question of the institutional form to give to the relationship between states and markets, in the political context of postwar Europe.

Around 1950, the most pressing question was the settlement of the tensions with Germany, with the Anglo-Americans pushing for the integration of the country in the continental economy and the French tormented between revenge and weariness. The Schuman declaration, which

initiated the negotiations that led to the Treaty of Paris, was a shot in the dark, but one which drew on contemporary reflections about the organization of the economy, especially on the American experience. It was not only that U.S. experts crafted the economic policy of European countries, but more importantly that many French experts, who became involved in the negotiations of the Treaty of Paris and in the Coal and Steel Community, had traveled there and studied the institutions of the New Deal.

The connection of Monnet with the United States and his relationship with New Deal figures such as Felix Frankfurter have been noted in the literature (Hackett, 1995), as were his discussions in 1950 with David Lilienthal, the leader of the Tennessee Valley Authority from 1933 to 1946 (Lilienthal, 1964: 16-20). This New Deal agency was explicitly the inspiration for the name “High Authority” which Paul Reuter came up with during his brainstorming sessions with Monnet, as he knew well of the New Deal administrations which he had studied before and during the war (Reuter, 1941;1980; Leucht, 2008: 145; Lagrange, 2020: 548). Through Reuter and Lagrange, the influence of French administrative law was important but the idea of having independent personalities deciding in the interest of the Community, and the antitrust rules were inspired by recent developments in the United States.

These recent developments were both the construction of a body of antitrust law that was spread throughout the world after the war like a new gospel (Wells, 2002) as well as the agencies set up during the New Deal to regulate the economy through codes of “fair competition” and administrative interventions. The idea that competition had to be protected from trusts and from unfair practices was not necessarily contradictory with the idea that it had to be rationalized and organized in the discourse of those who wanted to replace a private governance of industrial production with a public governance ensuring the maintenance of some form of competition.

During the New Deal, this ensured the peaceful coexistence of the Federal Trade Commission, set up to ensure the respect of the rules of competition, and the National Industrial Recovery Administration, created to organize and regulate industrial production, whose short tenure between 1933 and 1935 led to the promulgation of over 11'000 orders (Epstein, 2020: 52). It is important to note that neither of the proponents of these solutions were against competition *per se*. They opposed what they saw as wasteful, unordered competition, but in the words of an intellectual leader of the progressive movement, “the leading advisers of President Roosevelt apparently have believed all along that the system of ‘natural’ competition would bring prosperity, if certain speculative practices and specific abuses were forbidden by statute or administrative order” (Beard, 1941: 4). Similarly, competition was the central means of the Treaty, but it was complemented with a distrust of free competition, a willingness to “rationalize” production, and a desire to limit the power wielded by large economic conglomerates.

This coexistence between competition, antitrust, and rationalization, was not the product of one ideology, but rather the outcome of a process of finding new institutional arrangements to the unintended consequences of previous solutions. This explains why the Treaty could be interpreted favorably by Jacques Rueff, the French judge of the Court who proposed the idea of a “certain measure of competition” to reject the cartels’ plans to coalesce. Rueff consistently presented himself as a liberal even in the depth of the depression (Rueff, 1934), and in 1958 he saw the Common Market as the triumph of liberal ideas, aided by the transition measures that dampened through time the effects of opening the borders (Rueff, 1958). At the same time, someone like Pierre Uri, much closer to the French planners of the postwar (Fourquet, 1980), and involved in the economic aspects of the Community since 1950, conceived of the Common

Market philosophy as a framework steered by the High Authority so that the decentralized decisions of firms could “effectively tend towards the common interest” (Uri, 1958: 186).

The outcome of different, sometimes conflicting objectives was an institution promoting a certain kind of “ordered” competition. The starting point was to limit the power to distort competition through subsidies, but the fear of the concentration of economic power led to the implementation of antitrust rules. But the distrust in free competition, viewed as anarchic by many who had experienced the economic crisis of the interwar, led to a willingness to organize the production and distribution between firms. In so doing, the evolution of the administrative state came back full circle to the original problem of a concentrated and arbitrary power that distorted competition; it was not an accident that the resulting distribution of powers looked a lot like contemporary developments in the United States, with similar consequences on the growth of regulation and administration.

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