Zeitschrift des Max-Planck-Instituts für Rechtsgeschichte und Rechtstheorie
Journal of the Max Planck Institute for Legal History and Legal Theory

Rechts Rg geschichte

Rechtsgeschichte
Legal History

www.lhlt.mpg.de

http://www.rg-rechtsgeschichte.de/rg34
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 34 (2026)
http://dx.doi.org/10.12946/rg34/284-286

Rg 34 2026 284 – 286

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Cutting a Gordian Knot: How Europe Solved Merger Control

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Cutting a Gordian Knot: How Europe Solved Merger Control*

The European Commission's current revision of its merger control guidelines raises questions that have never been fully resolved. How should competition rules address the market dominance of major technology companies and state-owned enterprises from abroad? Can merger policy serve industrial policy goals without abandoning legal coherence? And what happens to the competition law framework when tariffs and geopolitics are factored in? These debates feel both urgent and new. They are neither. In fact, they defined thirty years of frustrated intergovernmental negotiations before the European Community (EC) finally adopted Regulation 4064/89 in December 1989. This regulation is often remembered as a breakthrough, and rightly so. However, it did not resolve the underlying tension between competition law and industrial policy. Instead of untying the knot, it cut through it, Alexander-style: by reaching for a sword. Lukas Herget's monograph is the first sustained archival account of how the knot was tied in the first place and the cost of this particular method of cutting.

Herget's book, a revised version of his doctoral thesis published by Mohr Siebeck, runs to 275 pages. It is structured chronologically. The introductory chapter briefly outlines the theoretical framework of national path dependencies, placing the study in the context of the history of European integration and competition law (1–12). Subsequent chapters cover the foundational period from 1958 to 1966 (13–92), when the Treaty of Rome conspicuously left the question of merger control unresolved despite rising firm concentration (Articles 85 and 86 EEC addressed restrictive agreements and dominant positions but said nothing explicitly about mergers); the first wave of Commission activism and European Court of Justice (ECJ) jurisprudence in the early 1970s (93–162), which crystallised in the *Continental Can* ruling from 1973 (where the Court accepted in principle that Article 86 could apply to a merger strengthening a dominant position); the apparently dormant decade of the late 1970s (163–192); the renewed momentum after the *Philip Morris* ruling of 1987 and the political impetus of the Single European Act (193–214); finally closing with the negotiations of 1988–89 and the adoption of the EC Merger Regulation in December 1989 (215–234).

The book's central argument is threefold. First, the emergence of European merger control was a political struggle, in which national governments sought to preserve regulatory autonomy while aiming to shape Community rules to serve domestic economic interests. Second, the Commission and the ECJ were not passive: both institutions deliberately cultivated legal ambiguity through expansive readings of Articles 85 and 86, generating sustained pressure on member states to accept a uniform regulation. According to Herget, both actors attempted to support their own institutional interests »through legal interpretation techniques and semantics in order to introduce them [their institutional interests; A. K.] into the debates as original legal arguments« (10). Third, and most originally, Germany's role in these negotiations was far more complex than the standard account allows.

There are many things to like about this book. Firstly, Herget avoids unnecessary detail; each chapter begins with a clear overview of the subsequent argument, and the narrative maintains forward momentum throughout. Furthermore, the archival work is meticulous. The holdings of the Federal Ministry for Economic Affairs (BMWi) are drawn on extensively and cross-checked against

* Lukas Herget, Wettbewerb oder Industriepolitik? Die Europäische Fusionskontrolle als Spielball nationaler Wirtschaftspolitiken (1958–1989), Tübingen: Mohr Siebeck 2025, 275 S., ISBN 978-3-16-164390-3

Commission records. Finally, the Commission-ECJ observations are analytically precise. Herget shows how the Court's argumentation in *Continental Can* and in subsequent rulings – culminating in *Philip Morris*, which established that Article 85 could apply to the acquisition of a minority shareholding with competitive influence – were deliberately used as instruments of institutional pressure (117–125; 208–215). The Commission realised that achieving a binding uniform framework politically was unachievable without external compulsion, and the Court's expansive treaty interpretations provided this pressure by creating the threat of ex post judicial review for completed transactions. Member states that had blocked a regulation in the Council were faced with an alternative that they (and their domestic companies) disliked even more: unpredictable jurisdiction exercised on a case-by-case basis. This interpretation of the Court as an indirect legislative actor and »motor of integration« is thorough and well documented.

In the reviewer's opinion, the findings on the changing German position are the book's most significant contribution. Traditional narratives about EU merger control view the late 1970s as a period of stagnation, characterised by the »long wait«, during which Community-level discussions essentially ceased. However, Herget reveals through the BMWi files that intergovernmental stalemate coexisted with active internal deliberation within national administrations. Furthermore, he demonstrates that during this period, Germany was unusually resistant to Commission proposals for advancing merger control precisely because these proposals accommodated industrial policy considerations too readily (181–191). This nuances the established view of Germany as a steadfast supporter of the Community merger regime: Bonn's support was always conditional on the proposed rules mirroring the competition-based logic of its domestic Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB) and the existing framework of the Federal Cartel Office *(Bundeskartellamt)*.

Methodologically, Herget's actor-centred approach is a helpful corrective to historiography that focuses on treaty texts. However, while readers learn what the Commission or national delegations argued, they rarely find out more about the individuals who presented these arguments, what shaped their thinking, and whether their personal convictions differed from the official briefs. The approach is therefore closer to institutional history with named actors than to new forms of legal biography. While the delegation files that Herget uses are well-suited to recovering official positions, they are arguably less suited to recovering the internal arguments and personalities that shaped those positions before they became official.

A more general point that emerges from reading this work is the binary framing of French »planification« against German »ordoliberalism« (20, 235), a well-established schema in European competition law literature, which nonetheless risks overstating the ideological coherence of national positions. French industrial policy was not monolithic, and the German economics ministry was not free from internal tensions. These structural observations lead to an implicit finding of this study that might be further explored in future research: Interestingly, ordoliberalism is a prominent interpretive lens in the early chapters, when Herget skilfully synthesises the extensive literature on the treaty negotiations, but it disappears from the book's analytical core, i. e. the negotiations of the 1970s and 1980s. This is not an omission: Herget convincingly shows that, during this period, German jurists and economists were primarily preoccupied with jurisdictional and procedural questions rather than the ideological commitments implied by the ordoliberal framing. Above all, they wanted the supranational merger review process to align with the national process. The doctrinal label mattered less than the nuanced legal questions that were often the subject of heated debate in contemporary scholarship, a topic that Herget also explores. This has implications for the assumption in many EU integration studies that ideational persistence shapes negotiating positions over time. Herget's evidence suggests that the causal pathway ran as much through bureaucratic and institutional interests as through economic ideas or ideologies. While this is a methodological by-product of this carefully archival-based study, future research could make that argument even more explicit.

Reading Herget in early 2026, at a time when the revised EU merger guidelines are taking shape, it is hard to miss the continuity of the underlying debate. The 1989 Regulation did not completely resolve the question of whether competition rules should be insulated from industrial policy; instead,

it partly deferred the issue through a political compromise. In other words, the Gordian knot was not untied. It was cut at a specific point, with consequences that would only become apparent later, for instance in the Commission's discretion over the substantive merger test and in the recurring dispute over whether »European champions« should be given preferential treatment. Herget's account of how the initial compromise was reached provides a useful perspective, countering the idea that today's debate represents a departure from a stable equilibrium. Ultimately, the question posed by the book's title (Competition or industrial policy?) is not one of dichotomy to be resolved, but of tension to be managed and renegotiated.

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