Summary

The dissertation argues that EC/EU competition policy, in content, scope, as well as form, has undergone a profound transformation since its enactment in the Treaty of Rome in 1957, and that this transformation needs to be understood against the background of broader ideational and socioeconomic changes in the history of the European integration project. The transformation of what has been identified here as the European competition model, started in the mid-1980s. Neoliberal ideas increasingly gained a foothold in Europe, affecting EU economic policymaking, including competition policy. Throughout the 1990s, neoliberalism subsequently was established as the dominant ideology in the daily enforcement practice of the European Commission’s DG Competition. In the early 21st century, a fundamental overhaul of the EU competition regime institutionally anchored the neoliberal orientation. Backed up by sophisticated econometric modelling in the assessment of anticompetitive conduct, the reform consolidated a narrow ‘competition only’ focus, and the use of microeconomic reasoning.

The transformation of the EC competition regime has been driven by a public-private alliance of the Commission’s DG Competition and transnational business representatives, as well as their corporate lawyers, who form part of the so-called wider legal community specialised in competition law matters. The reason for this transformation lies in the transnationalisation of production and ownership structures. Processes of transnationalisation, most notably the detachment of national ownership structures and the (re-)location of production, fundamentally changed the interests and preferences of large corporations. In addition, enhanced market integration in Europe, and across the Atlantic, as well as the subsequent removal of global barriers to trade and capital, contributed to this process. The increased confrontation between transnationally operating corporations and different competition regulatory regimes evoked a shared interest among transnational corporations in more transparency and legal certainty regarding their economic transactions. This was to be realised preferably by national and regional competition authorities adopting uniform laws and enforcement practices, which ensured the highest degree of economic freedom and free market access to new (geographical) product markets. Law companies, specialised in corporate advocacy, responded to the increased demand for legal services regarding multijurisdictional competition cases, and operated as a transmitter between the transnationally operating business community and political actors, such as the European Commission.

Prior to the emerging political and economic hegemony of the US in the aftermath of the Second World War, laws governing competition remained a distinctive institution of US-style capitalism. Looking back at the history of EC competition policy reveals that vested US influence in post-war
Europe was decisive for the adoption of competition laws. Nonetheless, EC competition laws and practices eventually came to look different from those of the US, exhibiting a range of distinctive features that contrast the competition model of the US. In the wake of the US economic reconstruction plans, US authorities sought to export their antitrust model to Germany (and to Japan). Transatlantic linkages were also crucial in the subsequent incorporation of competition laws in the process of European integration, starting with the establishment of the European Coal and Steel Community (ECSC) in 1951. With the centralisation of competition laws to the supranational level, the state-supported market order of cartels and monopolies in key industries was meant to be dismantled, and market access for corporate newcomers guaranteed, including the market access for US corporations seeking to expand their market shares across the Atlantic. When competition laws became one of the core constitutional principles of the founding Treaty of Rome in 1957, establishing the European Economic Community (EEC), European Treaty-drafters had internalised the language of market competition, and considered competition laws important for the economic integration project. The reason why the EC competition model looked different to its US counterpart can be ascribed to the enduring opposition of powerful industry representatives in Europe, and to some extent the particular ordoliberal ideas of the so-called Freiburg School. Ordoliberalism promoted an ordered and balanced market structure, in which equally matched competitors, mostly small and medium-sized enterprises (SMEs), would engage in competition with each other. According to this paradigm, it was the task of strong state authorities to foster competition by actively curbing the emergence of excessive economic concentration, and dissolving anticompetitive corporate agreements. The concentration of economic power in the form of oligopolies and monopolies, as well as cartels, was believed to undermine the advantages offered by a free market economy, and in the end democracy, as concentrated economic power would also eventually seek political power. The EC competition law enforcement institutions and practices were to some extent inspired by ordoliberal ideas. Remnants of the ordoliberal ideology can be found throughout the 1960s, 1970s, and occasionally also in the early 1980s. The European Commission, however, never adopted a strict interpretation of ordoliberal ideas. This was to some extent due to the institutional positioning of the Council in the Community structure. In the 1960s, in particular, there was little scope for the rather inexperienced Commission officials to play a prominent and proactive role in competition law enforcement, despite the powerful powers entrusted upon the Commission by Regulation 17.

In the era of embedded liberalism, stretching from the 1950s to the late 1970s, and partly to the early 1980s, EC competition laws were enforced in a flexible market interventionist manner, displaying protectionist and neomercantilist traits. Rather than adopting a strict competition focus, the Commission adjusted its decision making to what in the preamble of the Rome Treaty was identified as ‘balanced trade and fair competition’. A range of developments had a major impact on content, form, and scope of EC competition policy in this time. Ongoing trade liberalisation within GATT
made it increasingly difficult for EC Member States to erect conventional protectionist barriers to insulate national industries from foreign competitive pressures. This led to the adoption of ‘new protectionist’ measures at Member State level, which were directed at national industries and national champions, considered strategic both in the private and public sector. Protectionist non-tariff policies formed part of a countervailing strategy to boost economic growth and the ability of European corporations to face competition with the often larger, and technologically more advanced US companies. Various forms of state aid were granted, such as guaranteed preferential public procurement contracts, tax rebates for some industries, (research) subsidies, and investment in technical education, but also national standard setting, and the stimulation of mergers and acquisitions among national companies. In the 1960s and 1970s, EC competition laws were enforced in a consistent manner with the dominant embedded liberalism bargain at national level. In line with Member State and corporate interests, the Commission did not vigorously challenge national state aid, leaving the provisions prohibiting state aid largely unenforced. The protection of the competitive process was frequently subordinated to broader, macroeconomic industrial policy goals, also allowing public interest and employment considerations to be taken into account. EC competition law enforcement thereby formed a political response to the challenges posed by the much larger and more homogeneous US market. The Commission was overtly responsive to the interests of European industries seeking to catch up with the much stronger US economy, and adopted a supportive stance towards European companies. The gradual incorporation of national markets into one common market in Europe was intended to create the basic prerequisites that would allow sufficiently large (nationally based) corporations to reap the benefits of economies of scale production, and to expand in size. Without loosing sight of the European integration project, the Commission sought to synthesise the removal of internal barriers to trade and competition with the adoption of a rather lenient attitude towards mergers and acquisitions (M&As). It actively stimulated (cross-border) intercompany alliances, designed to pool R&D investments, and various forms of production, distribution, or marketing joint ventures. Thereby, it sought to thwart the practice in which governments picked their national winners, and actively stimulated strong Eurochampions instead, able to face the presumed ‘American challenge’. The absence of merger control laws in the Treaty of Rome was constitutive in this regard. At the same time, in most cases, SMEs were exempted from the necessity to comply with EC competition laws, which provided them in practice with a carte blanche to engage in various types of corporate alliances.

In the years of economic crisis starting in the 1970s, EC competition law enforcement was subordinated to a broad-based crisis management, which aimed at rescuing various European industries in decline. The Commission gave preferential treatment to certain industrial sectors by (temporarily) exempting so-called structural ‘crisis cartels’ from the necessity to compete, which engendered not only the preservation of companies, but also of jobs. Once it became clear in the late
1970s and early 1980s that attempts to solve the enduring economic crisis were not successful, neoliberalism, as a counter project to embedded liberalism, increasingly gained the discursive upper hand among political and corporate elites in many European countries. The Commission, in particular, advanced a broader agenda of enhanced neoliberal market integration. Initially, neoliberalism took shape as a deconstructive project, in which macroeconomic, industrial, and social policy goals were increasingly considered illegitimate. In the presence of political counterforces, the neomercantilist strategy of fortifying the competitiveness of European companies vis-à-vis outsiders did not abruptly end. The strength of the neoliberal orientation at Commission level only started to reveal its impact from the late 1980s onwards, rendering the early 1980s a period of transition. With the exception of the adoption of the EC Merger Regulation, neither the Single European Act (SEA), nor its successor treaty, the 1991 Maastricht Treaty establishing the European Union (EU), introduced any substantive changes of EC competition laws. As part of the constructive phase in the ascendancy of neoliberal project, the dominance of neoliberal ideas revealed a major revitalisation of competition law enforcement in the 1990s. EC competition laws were enforced more stringently in the area of state aid prohibitions, cartel, and other restrictive business conduct, as well as the privatisation of state-owned enterprises.

The renewed emphasis on competition as a central market organising mechanism was not simply bound up with what is commonly referred to as the rationale of economic globalisation, but rather induced by social and political forces at the EC level. European business elites, heading large transnationally operating corporations, started a vigorous political campaign at the Commission in the 1980s and 1990s. Most notably, the European Round Table of Industrialists (ERT) requested the endorsement of concrete neoliberal policy positions at EC level. In addition to overall claims for more deregulation, it advocated the completion of the common market project. It considered the common market to be not half as open as that of the US, and hence a severe handicap for the development of economic growth. In search of new lucrative prospects of corporate expansion, the ERT promoted the liberalisation and privatisation of state-owned key utility and infrastructure sectors. In response, the Commission’s DG Competition endorsed so-called privatisation directives under Article 90(3), a previously unused legal provision allowing the Commission to issue directives in the field of public enterprises and state monopolies, without the approval of the Council of Ministers. Similarly, in a joint effort with UNICE and its national member business associations, the ERT successfully pushed for the introduction of a pan-European merger regulation, which was adopted in 1989. Entrusting the Commission with exclusionary powers to vet large mergers and acquisitions meeting a defined turnover threshold meant that companies could bypass the often stricter Member State merger regulations. Rather than prohibiting economic concentrations, the centralised merger control regime was designed to facilitate (cross-border) mergers. Against the background of the enhanced pace of economic integration, enacted by the 1992-programme, and the neoliberal deregulation and
liberalisation more generally, the number of cross-border mergers sharply increased, leading to a profound restructuring of the common market. The Merger Regulation resulted in significant concentrations of transnational capital: since its enactment, the Commission approved more than 95% of all notified mergers. It should therefore not come as a surprise that transnational corporations were among the strongest supporters of the EU merger control regime.

Since the 1990s, EC competition policy has increasingly been complemented by an external dimension, which manifested in the increased application of EC competition laws on an extraterritorial basis. In addition to the EU’s active participation in global trade liberalisation, the Commission concluded a wide range of bilateral cooperation agreements in the field of competition with other industrialised states, as well as states in transition to a market economy. The conclusion of bilateral cooperation agreements with the US authorities constituted the most far-reaching of all. One of the reasons for the bilateral transatlantic trajectory lies in a shared concern of the transatlantic business community to curb the potential negative effects of the extraterritorial application of competition laws. Based on streamlined schedules and enforcement procedures, and regular contacts in the investigation and decision making phase, the competition authorities sought to facilitate transatlantic economic transactions for corporate actors. The inclusion of positive and negative comity principles is similarly telling in this regard. The resulting intensive working relationship by the EU and US competition authorities was crucial for the steps of convergence towards the US model, enacted by the overhaul of EU competition laws and enforcement practices in 2004.

The amalgamation of neoliberalism into the European integration project was constitutive to the spread of neoliberal ideas elsewhere in the world, in particular as the EU took an active role in setting the conditions for open and competitive markets, not only within Europe, but since the 1990s also on a global scale. The Commission’s DG Competition evolved as one of the ‘chief socialisers’, who sought to craft a common understanding on competition policy as a tool for the successful management of economic policies around the world. It has played a major role in launching global initiatives, aimed at establishing a multilateral agreement on competition control within the WTO. Even though such an agreement did not materialise, due to the stark opposition of the US and a range of developing countries, these activities indicate that the Commission seeks to play a vital role in the promotion of global convergence of competition laws. Instead of a binding WTO agreement on competition, the non-binding and more informal International Competition Network (ICN) has been established. It was declared the chief mechanism for achieving global convergence of competition laws and practices. Currently, both the US competition authorities and the Commission take a leading role in defining regulatory standards and so-called best practices for competition authorities around the world. Moreover, the Commission engaged unilaterally in a range of ‘advocacy’ activities. It has started a dialogue on competition issues with developing countries and is providing material and immaterial
‘aid’ for building up competition authorities, as well opportunities for the exchange of personnel – activities that are generally referred to as ‘technical assistance’ and ‘capacity-building’.

Corporate pressures and repeated critique on the lack of transparency and legal certainty of the Commission’s still rather flexible decision making, eventually led to a fundamental overhaul of the EU competition regime in 2004. The permeation of neoliberal ideas in the enforcement of competition laws entered a phase of consolidation, breaking definitely with the broadly defined macroeconomic industrial and social policy objectives that dominated competition policy in the era of embedded liberalism. Against the background of the broader neoliberal restructuring of the common market project since the mid-1980s, the transformed EU competition regime exposes competition law enforcement to market mechanisms and introduces a more microeconomic reasoning in the assessment of anticompetitive conduct. Through the abolition of the administrative public control model, and the concomitant decentralisation of Article 81 and 82, the administrative barriers posed by the necessity to notify intended cooperative agreements with other companies to the Commission were removed. This enhanced the freedom of companies to engage in various types of corporate alliances. The reform rested upon the view that ‘less regulation is better regulation’ and market-based solutions are superior to the interventionist arm of a public authority. This strengthens the power of transnationally operating corporations not only in the realm of the common market, but also on a global scale. The primacy of enforcement has shifted to the proactivity of private parties who are expected to bring observed antitrust breaches to the national courts. Private enforcement, together with the institutionalisation of enhanced microeconomics in the assessment of anticompetitive business conduct, narrows the scope of competition law to short-term efficiency criteria and price indicators. With the retrenchment of the Commission as a central controlling instance regarding corporate agreements, broader and long-term orientated socioeconomic objectives, such as industrial and employment considerations, are ruled out in EC competition law enforcement. The decentralisation of the enforcement of Article 81 and 82 to the Member State jurisdiction implies that also Member State competition policy is deprived of a flexible, macroeconomic orientation. The requirement to enforce EC competition laws consistent with the Commission’s approach, and the extensive interventionist powers entrusted upon the Commission, has significantly reduced the enforcement powers of national competition authorities. In addition to the decentralisation of enforcement powers, the involvement of private market actors as complementary controlling instances of the competitive process was intended as an encouragement to tougher competition, which is believed to feed back on overall economic welfare and the goals defined in the Lisbon Agenda set in 2000. In the absence of significant political opposition, private antitrust enforcement is likely to be further strengthened by subsequent reform steps as the 2005 Green Paper indicates.
The ‘Modernisation’ of the EU competition regime constitutes a considerable step of regulatory convergence towards the Anglo-Saxon style of competition law enforcement, by taking important elements of the US competition model as a reference point. In response to joint lobbying activities of the transatlantic business community, among which the Transatlantic Business Dialogue (TABD) and the ERT, convergence towards the US regime has taken place with the facilitation of private enforcement in Europe (in the US private enforcement is dominant practice). Moreover, in the field of merger control vital steps of regulatory convergence were taken in order to create a friendly regulatory environment for transnationally operating corporations in the transatlantic realm. The establishment of the Working Group on Transatlantic Antitrust Cooperation in the field of merger control, involving Commission officials and officials of the US Federal competition authorities, was crucial for matching the EU merger control regime with that of the US. The ‘competition only’ focus of US Federal competition authorities, and the primacy of efficiency arguments, sustained by the use of clear-cut microeconomic analyses in the assessment of concentration activities, traditionally led to a more lenient stance towards corporate size in the US. Increases in corporate efficiency that resulted from a merger or an acquisition were balanced against negative effects of economic concentration on competition. This implied that as long as prices remained competitive and ‘economies of scale’ was realised, US competition authorities adopted a permissive attitude towards mergers and acquisitions. In the EU, in contrast, market shares served as an indicator for the creation or strengthening of a dominant position, and hence, competition distorting behaviour. Although the Commission adopted a rather permissive stance towards economic concentrations already under the market shares based Dominance Test over time, with the newly adopted SIEC Test drawing on the SLC Test of the US, the prevalence of so-called expected future efficiency gains received a legal fundament. This allows dominant companies to secure their competitive strength in an ever more globalised economy more easily through corporate expansion. Similar to the US, not the concentration of market power as such, but cartels and other restrictive business practices with clear negative effects on consumer welfare, again measured in terms of efficiency conceptions, form the focal point of competition control under the new regime.