

SUBSTANTIVE MODERNIZATION IN EU COMPETITION LAW: AN EMPIRICAL COMPARISON

Eun Hye Kim* 

University of Leeds

ABSTRACT

While existing accounts in competition law have discussed change in relation to the institutional design of enforcement agencies worldwide, the conditions under which substantive competition law evolves have remained underexplored. Concentrating on two distinct reform processes, namely, the gradual opening of traditionally state-owned markets to competition law and the shift towards the ‘more-economic approach’ (MEA), the article employs modern psychometric scaling techniques to develop two novel measurement instruments that accurately capture change. It offers the first empirically sustained account of the inherently dynamic nature of competition law and the role judicial actors can play in jurisprudential transformation. Statistical findings show that both substantive reforms constituted self-contained processes operating according to opposing logics and driven by diverse factors. Overall, the goal of furthering market integration only took centre stage for sector-specific liberalization, while it played a marginal role for the MEA. The methodological advances made in this article open the prospect of teasing out the hidden dynamics of jurisprudential change as well as the impact contextual factors can have on judicial behaviour.

I. INTRODUCTION

European Union competition law is on the move. Throughout its history, it has been hit from time to time by tidal waves of change.¹ Three successive developments particularly stand out. In the last two decades before the turn of the millennium, the Union ventured into liberalizing traditionally state-regulated sectors, injecting competition into them as a means to unify the European market. In many instances, the de-monopolization process triggered the partial, if not complete, privatization of former state monopolies. This transformation not only entailed the

* Centre for Business Law and Practice and the School of Law, University of Leeds; E-mail: e.kim@leeds.ac.uk. I am grateful to the two anonymous reviewers and to Pinar Akman, Toby Davies, Filippo Lancieri, Peter Whelan, and the panel on goals at the 20th ASCOLA Conference for their helpful comments, as well as Giorgio Monti, Mel Marquis, Urška Šadl, Dave Armstrong, Royce Carroll, Talal Alzabidi, and Adam Enders for insightful discussions. For funding, I would like to thank the Antitrust Section of the American Bar Association (International-Scholar-in-Residence Program). Pursuant to the ASCOLA Transparency and Disclosure Declaration, I declare not to have any conflicts of interest to disclose.

¹ See also Eun Hye Kim, ‘Judicial review & Anticompetitive agreements: An overview of EU and national case law’, *Concurrences e-Competitions*, Art. N° 105,103, 1–2 (3 March 2022).

radical restructuring of national markets² but also reconfigured labour relations and thus had far-reaching consequences for the identity of the working class. Before this first tidal wave had ebbed away, the next one swept over the competition landscape, hitting its procedural system with full intensity. With the completion of the Single Market, the Union embarked upon replacing its centralized enforcement system with one that encouraged enhanced collaboration with national competition agencies and courts. Originating in the mid-1990s and lasting into the early 2000s, this procedural modernization process overlapped with a significant effort to align substantive competition law and enforcement with mainstream economic theory, also known as the ‘more-economic approach’ (MEA).

Many of the changes the MEA sought to introduce are still in progress, but with the emergence of big data, multisided platform markets, and digital ecosystems, EU competition law is once again documenting a swift transformation. The global COVID-19 health crisis has further accelerated the ongoing transition towards the digital economy, pushing more traditional market players to the sidelines, with many facing potential bankruptcy due to their inefficiencies and perceived failure to innovate.³ Reckoning that competition law must adapt to keep up with technological innovation, the European Commission launched several initiatives, with the amendments to its Horizontal Guidelines⁴ and Horizontal Block Exemption Regulations⁵ and the adoption of the Digital Markets Act⁶ being its most recent responses to this challenge.

Most of these developments have unfolded gradually, subtly transforming the European competition landscape over the last few decades. Nonetheless, the Treaty provisions on competition have remained in place without formal changes in the legal and institutional framework.⁷ The apparent ability of competition law to accommodate exigent circumstances is hard-wired into the discipline, which operates with capaciously written provisions. This characteristic is a testament to its bendy, ‘sponge-like’ nature⁸ and has led scholars to draw greater attention to the structural features of competition law as well as institutional factors that could have an impact on how the law develops.⁹ Rather than treating competition law as a ‘pure’ discipline, this literature adheres to the view that competition law is a *social construct* and, therefore, susceptible to various forces and cross-pressures arising from context.¹⁰

Although existing scholarship is well aware of the open-ended nature of many competition law provisions that could expose their interpretation to various contextual influences, a systematic appraisal of the concrete effects of these factors on legal evolution is missing. Based

² Richard Whish and David Bailey, *Competition Law* (11th ed., OUP 2024) 1103–4.

³ Barak Orbach, ‘Antitrust in the Shadow of Market Disruptions’ (2020) 34 *Antitrust* 32.

⁴ Commission, ‘Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements’ (2023/C 259/01).

⁵ Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2023] OJ L142 and Commission Regulation (EU) 2023/1067 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements [2023] OJ L143.

⁶ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

⁷ Laurent Warlouzet, ‘The Rise of European Competition Policy, 1950–1991: A Cross-Disciplinary Survey of a Contested Policy Sphere’ (2010) EUI-RSCAS Working Paper 2010/80, 6 <https://cadmus.eui.eu/bitstream/handle/1814/14694/RSCAS_2010_80.pdf?sequence=1&isAllowed=y> accessed 7 August 2025; Francis Jacobs, ‘The State of International Economic Law: Re-Thinking Sovereignty in Europe’ (2008) 11 *JIEL* 5, 28; Pablo Ibáñez Colomo and Andriani Kalintiri, ‘The Evolution of EU Antitrust Policy: 1966–2017’ (2020) 83 *MLR* 321, 322.

⁸ Ariel Ezrachi, ‘Sponge’ (2017) 5 *JAE* 49.

⁹ See e.g., Pablo Ibáñez Colomo, *The Shaping of EU Competition Law* (CUP 2018); Stavros Makris, ‘Openness and Integrity in Antitrust’ (2021) 17 *JCLE* 1; Stavros Makris, ‘EU Competition Law as Responsive Law’ (2021) 25 *CYELS* 228; Oles Andriychuk, ‘Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law’ (2021) 85 *MLR* 598.

¹⁰ Ezrachi (n 8) 51. See also HLA Hart, *The Concept of Law* (2nd ed., Clarendon Press 1994) 124–126; Frederick Schauer, ‘The Social Construction of the Concept of Law: A Reply to Julie Dickson’ (2005) 25 *OJLS* 493; Neil MacCormick, ‘Law as Institutional Fact’ in Neil MacCormick and Ota Weinberger (eds), *An Institutional Theory of Law: New Approaches to Legal Positivism* (D. Reidel Pub. Co; Kluwer Academic Publishers 1986).

on an analysis of 234 hand-coded observations consisting of opinions of Advocates General (AGs) rendered in competition law cases and the corresponding judgments of the European Court of Justice (ECJ), the article offers the first empirically sustained account of the inherently dynamic nature¹¹ of competition law and the role judicial actors can play in its transformation. Given that its focus is on *substantive modernization*, the article will concentrate on and compare two distinct processes of substantive change, namely, the gradual opening of traditionally state-owned markets to competition law and the shift towards the MEA. While the Court's integral contribution to the liberalization process has been analysed previously,¹² scholarly renderings normally do not put it in direct connection with modernization in the sense of the MEA.¹³ This study seeks to fill this gap by conducting a statistical investigation into the distinct contextual factors that have motivated these reforms.

The contribution this article makes is twofold. In the bigger scheme of things, the comparison hopes to contribute to the broader academic discourse on the goals of competition law, which continues to be a protracted one.¹⁴ The two substantive modernization processes were selected because they epitomize two distinct goals: market integration and consumer welfare. Introducing competition to traditionally state-owned markets meant surrendering nation-bound social and public policy concerns to the objective of furthering market integration.¹⁵ The MEA, on the other hand, places heightened, if not exclusive, emphasis on the promotion of the consumer welfare standard as defined by neoclassical price theory.¹⁶ Corroborating past theoretical work,¹⁷ the present study furnishes proof that these two objectives indeed constituted the central missions pursued under each modernization process respectively. The findings reveal the power of judicial actors to strategically advance these selective goals. Uncovering the reciprocity of the relationship between actors and context, the study discusses the deep yet largely unrecognized implications for the evolution of competition law. At a moment when the European Commission is about to adopt guidelines on exclusionary abuses of dominance,¹⁸ the novel insights this article produces allow the Commission, the Court of Justice of the European Union and its AGs to take stock of what has been achieved. Knowing how distinct micro-changes worked together to usher in paradigm shifts will allow the European enforcer to take practical measures for the future.

¹¹ Ezrachi (n 8) 50.

¹² Lisa Conant, *Justice Contained* (Cornell University Press 2001); Sirja-Leena Penttinen, 'The Role of the Court of Justice of the European Union in the Energy Market Liberalisation' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014).

¹³ Rather, commentators have focused on the relationship between procedural reform and the MEA. See, David Gerber, 'Two Forms of Modernisation in European Competition Law' (2007) 31 *FordhamIntlJL* 1235.

¹⁴ Instead of many, see e.g., Giorgio Monti, *EC Competition Law* (OUP 2007) 51–52; Okeoghene Odudu, 'The wider concerns of competition law' (2010) 30 *OJLS* 599; Christopher Townley, *Article 81 EC and Public Policy* (Hart 2009); Ioannis Lianos, 'The poverty of competition law: the long story' (2018) CLES Research Paper Series No 2/2018, <https://www.ucl.ac.uk/cles/sites/cles/files/cles_2-2018.pdf> accessed 7 August 2025; Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart 2012) 182–184; Dina Waked, 'Antitrust as Public Interest Law: Redistribution, Equity and Social Justice' (2020) 65 *The Antitrust Bulletin* 87; Konstantinos Stylianou and Marios Iacovides, 'The goals of EU competition law: a comprehensive empirical investigation' (2022) 42 *Legal Studies* 620.

¹⁵ This was the Commission's response to some Member States' attempt to delay the adoption of liberalizing directives in the energy sector, see the Commission's Press Release IP/01/872 of 20 June 2001 'Commission confirms need to tackle cross-border investment restrictions and energy market distortions'.

¹⁶ Anne Witt, *The More Economic Approach to EU Antitrust Law* (Hart 2016) 265.

¹⁷ David Gerber, *Law and Competition in Twentieth Century Europe Protecting Prometheus* (OUP 2001); Imelda Maher, 'Re-imagining the Story of European Competition Law' (2000) 20 *OJLS* 155, 156.

¹⁸ In 2023, the Commission amended its Guidance Paper, see European Commission, Press Release, Commission announces guidelines on exclusionary abuses and amends guidance on enforcement priorities, 27 March 2023, <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_23_1911/IP_23_1911_EN.pdf> accessed 7 August 2025. Some view these amendments as a 'move away from the "more economic approach," just as the EU Courts were warning to it', see Damien Geradin and Stijn Huijts, 'Abuse of dominance: has the effects-based analysis gone too far?' (2024) 40 *Oxf. Rev. Econ. Policy* 776, 778.

In connection with the foregoing, the study also hopes to contribute on the methodological front. The following empirical analysis ventures deeper into the use of quantitative methods borrowed from psychometrics, thereby unlocking unrealised possibilities for thinking about jurisprudential change processes and the underlying motivations driving these developments. The article employs Mokken Scaling Analysis (MSA), a nonparametric item response theory (IRT) method, to develop high-quality measurement instruments from manually coded data. By extracting the information contained in variables specifically devised to describe both reforms, two summary measures are constructed to gauge the latent concept, which is a *judicial actor's propensity to promote incremental change* in the case law. These two novel and parsimonious measurement instruments facilitate a more meaningful comparison between the two substantive reforms, pinning down potential causes for divergences.

The article is structured as follows. Section II provides a conceptual and methodological rationale for conducting the present study. To better appraise the contextual conditions surrounding each modernization process, Section III relies upon a variety of sources to deduce a set of testable theoretical implications. Section IV employs MSA to develop two instruments that accurately measure judicial attitudes towards change in substantive competition law. The obtained instruments will serve as dependent variables in a subsequent ordinary least squares (OLS) regression (Section V). The sixth section discusses the implications of the empirical findings. The final section concludes.

II. DIRECTIONS AND TRAJECTORIES

David Gerber, in his influential article *The Transformation of European Community Competition Law?*, suggested that the achievement of a workable single market would represent an important turning point in the history of EU competition law, asserting that '[i]n a unified market, the goal of unification loses its meaning'.¹⁹ This meant that once economic integration had largely been attained, the significance of the market integration imperative would diminish. Similarly, Witt noted that the objective of protecting the internal market 'lost some of its immediate urgency after 1 January 1993'.²⁰ Competition law had to reconfigure itself to take on new challenges arising from changing political and economic realities.

A competing narrative tends to assume a pivotal and, most importantly, *stable* role for the goal of market integration. Noting that market integration continues to feature regularly in the Court's case law as well as the decisional practice of the Commission, this contrary view submits that the link between competition law and market integration is as strong as ever.²¹ Notably, this account is difficult to square with Gerber's prognosis.

Upon closer scrutiny, it becomes evident that the apparent contradiction arises from a failure to distinguish between *directions* and *trajectories*. While both terms pertain to the concept of *motion*, directions describe the orientation of an object's movement in relation to a reference point without considering space and time. In contrast to that, trajectories refer to the entire path an object follows as it moves through space and time.²² Conceptually, directions and trajectories thus represent two different units of analysis. While the former adopts a snapshot view to show a particular scene pack, the latter can be likened to the entire movie that ties all scenes together to tell a coherent story.

¹⁹ David Gerber, 'The Transformation of European Community Competition Law?' (1995) 35 *Harvard International Law Journal* 97, 98–99.

²⁰ Witt (n 16) 10.

²¹ See Albertina Albors-Llorens, 'The Ties that Will Always Bind: EU Competition Law and the Single Market' in Jeremias Adams-Prassl et al. (eds), *The Internal Market Ideal* (OUP 2024) 200.

²² Definition of 'direction' (n.), sense 9.a, *Oxford English Dictionary* <<https://doi.org/10.1093/OED/2224389658>> accessed 28 July 2025; Definition of 'trajectory', *Cambridge Academic Content Dictionary* <<https://dictionary.cambridge.org/dictionary/english/trajectory>> accessed 28 July 2025.

A similar distinction is drawn in historiography. Moving away from the conventional emphasis on the *courte durée*, which portrayed history as a series of ruptures and discontinuities shaped by discrete events and actions, Fernand Braudel adopted a *longue durée* approach that emphasized cyclical patterns and deep continuities running through interconnected societal, economic, and geographic structures.²³ Expanding upon Braudel's seminal reconceptualization of historical time, Penelope Corfield contended that developmental trajectories consist of numerous micro-shifts that unfold synchronously or asynchronously. In her view, each short-term moment is situated within a broader long-term framework, while simultaneously, every transient moment is shaped by and embedded within enduring historical processes.²⁴

This way of thinking also lends itself to reflecting on *incremental jurisprudential change*, which is the focus of the present study. Drawing on these insights, it directs attention to developmental trajectories in the case law rather than immediate directions as articulated in single judgments. The construct is here defined to describe an instant or a process by which existing case law is exchanged or altered, marking a threshold separating the status quo from the status quo ante. This implies that change must always be considered *in relation to something else*. And in the case of jurisprudential change, this 'something else' relates to instances or processes that consolidate existing case law.

Historians adopting the *longue durée* approach typically delineate the past into distinct eras, and every era is marked by a certain 'zeitgeist' that drives the social forces into a particular direction reflective of the people, groups, and epistemic communities of that period.²⁵ Applied to competition law, this is where goals become relevant. Every antitrust era has its distinct characteristics and, most importantly, a defining goal that encapsulates its 'zeitgeist'. The judgments and legal interpretations judicial actors render in a given period thus reflect the dominant ideas and attitudes of that era, and new eras come about by rejecting and criticizing the views characteristic of the ones that came before.²⁶ It is thus argued here that even if there might be a multiplicity of potential objectives and aims, judicial actors will prioritize certain goals characterizing the respective antitrust era to make old pathways give way to new beginnings.

The conceptual distinction between directions and trajectories in the case law also has important methodological consequences. Existing empirical scholarship seems to equate references to specific goals of competition law with evidence of their continued relevance, primarily using coding as the sole means of establishing patterns. This has led some scholars to claim that EU competition law pursues a multiplicity of goals without a clear hierarchy. Yet, caution should be exercised when using coding as the sole means of establishing patterns and relationships. Coding does not *constitute* but only *presumes* measurement. It describes the practice of assigning numeric values to text excerpts to organize observations into a more palatable structure. Stern critics even warn that, decoupled from doctrinal analysis, coding on its own could be 'reduced to just counting stuff'.²⁷ Coding is an important starting point, but measurement allows quantification and drawing inferences about legal concepts that are latent and often multifaceted. More importantly, coding treats judgments as disjointed datapoints, failing to recognize the 'binding agency' that ties these micro-shifts together.²⁸ Several micro-developments can take different

²³ Fernand Braudel, *La Méditerranée et le monde Méditerranéen à l'époque de Philippe II* (Editorial Armand Colin 1949); Fernand Braudel, 'Histoire et Sciences sociales: La longue durée' (1958) 13(4) *Annales* 725–753; Fernand Braudel, 'History and the Social Sciences: The Longue Durée' (2009) 32(2) *Review* 171–203.

²⁴ Penelope Corfield, *Time and the Shape of History* (2007 Yale University Press) xv.

²⁵ Theo Jung, 'Zeitgeist im Langen 18. Jahrhundert: Dimensionen eines umstrittenen Begriffs' in Achim Landwehr (ed) *Frühe Neue Zeiten* (transcript Press 2012) 319.

²⁶ Barak Orbach, 'The Present New Antitrust Era' (2019) 60 *William & Mary Law Review* 1439–1493.

²⁷ See Gareth Davies, 'Taming the Law: The Risks of Making Doctrinal Analysis the Servant of Empirical Research' in Marija Bartl, Pola Cebulak and Jessica Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar 2022).

²⁸ Corfield (n 24) 6.

directions, creating jagged lines. Focusing on the immediate directions of jurisprudence will thus inevitably create the impression that case law is inconsistent, regulation messy, and that actors are capricious. Inadvertently, this leads scholars to adopt a presentist and static view, focusing on immediate directions in the case law rather than accounting for deeper continuities that provide the broader context in which judgments are delivered.

Rendering the latent construct of incremental jurisprudential change visible therefore requires novel measurement instruments. This study exemplifies how combining qualitative content analysis with more advanced statistical methods like IRT can assist scholars studying the evolution of competition law empirically in reducing complexity in their data to disentangle multidimensional reform processes. MSA, for instance, turns rank-ordered observations into a composite measure of the latent trait as scores on a rating scale. The obtained measurement scale summarizes the information contained in the individual variables in a single metric and thus, provides a more meaningful notion of the distances between datapoints than just averaging them by year.

III. RESEARCH HYPOTHESES

Starting with the similarities between the two change processes, it is evident that, in terms of the applicable legal framework, the basic conditions were the same for both reforms. In general, the Treaty provisions on competition are skeletal. When reading Articles 101, 102, and 106 TFEU, what stands out immediately is the broad and ambiguous wording of these provisions. The capacious framing invites diverging interpretations, and change-inclined actors theoretically have ample room for advancing their ideas. In search of possible divergences, it thus makes sense to turn our gaze away from the legal framework towards constraints stemming from the broader institutional context and power-relational dynamics between diverse actors. This study directs attention to a set of factors hypothesized to constitute the main differences between the two modernization processes:

- 1) While the process of sector-specific liberalization was primarily driven by the European project of integration, the link is less apparent for modernization in the sense of the MEA.
- 2) Judicial actors are expected to cite AG opinions more extensively when pushing for change in the sense of the MEA than in the process of opening up state-owned markets to competition.
- 3) Academic discourses surrounding the MEA exerted greater influence on judicial actors' attitudes towards change than it was the case for the process of sector-specific liberalization.
- 4) The influence of U.S. law was less pronounced for the liberalization of utilities markets, while it was more prominent for changes introduced under the MEA.
- 5) Change in the sense of the MEA was more likely if the conduct under scrutiny was committed by a large and highly diversified business rather than a smaller or medium-sized business. In contrast to that, the impact of business size and level of diversification was negligible for liberalization.

All hypotheses except for H2 were derived deductively from previous contributions to competition law. As theory-building is an iterative²⁹ process, insights gained from empirical data can also inform the substantive content of hypotheses. This applies to H2, which was

²⁹ Tom Ginsburg and Nicholas Stephanopoulos, 'The Concepts of Law' (2017) *The University of Chicago Law Review* 147–175, 175.

built inductively based on descriptive statistics. Before motivating each hypothesis and briefly elaborating on the relevant contextual factors and their operationalization (for more details, see Appendix A3), another caveat is in order. Readers should be made aware that the above hypotheses do not distinguish between ECJ judgments and AG opinions. As they are not legally binding, AG opinions may appear to be less relevant for understanding the path of jurisprudence. Their influence remains elusive if framed in terms of how often and to what extent the Court follows them.³⁰ The main difficulty lies in the precise determination of when the Court reached a certain conclusion at the behest of an AG opinion and when it arrived there on its own. Moreover, some contextual factors like the citation of U.S. Law are more prevalent in AG opinions, which could be another argument against studying them together with ECJ judgments.

In light of this, the approach taken here merits further explanation. The view adopted in this study is that jurisprudential change should be treated *holistically*. Rather than limiting our view to the question of whether ‘the Court follow[s] the recommendation of the AG and reach[es] the same outcome in the same case’, a greater emphasis should be placed on the dynamic nature of the judicial process.³¹ Only where multiple players interact can the case law develop dynamically.³² This new focus on the interplay between institutional actors stands out from previous analyses that veer towards the role of the European Commission as the main driver behind reform. Accounts in literature observe that the Commission started its project of modernizing EU competition law to reflect mainstream economic thinking in the late 1990s.³³ In some instances, however, the AG preceded the Commission in advancing a novel understanding of crucial competition law concepts.

The Opinion of AG Jacobs in *Syfait* underscores this point. In this case, the AG pushed for adopting an efficiencies defence in a dispute that touched upon a dominant undertaking’s refusal to deal.³⁴ The AG tried to counterbalance the change he advocated by limiting the outcome to the specific circumstances of the case, repeatedly stressing that the highly specific nature of the pharmaceutical sector would allow such an outcome.³⁵ The hesitant reasoning style of the AG should not diminish the tremendous significance of this proposal. The AG’s bold foray stands in stark contrast to the subsequent judgment rendered by the ECJ. While the AG pushed for change, the Court showed no appetite to engage with the substance of the case. It decided to abstain from making any legal comments by declaring that it had no jurisdiction as the *Epitropi Antagonismou*, the body which posed the questions in the preliminary reference proceeding, was not a court or tribunal in its view.³⁶ Nonetheless, the AG’s proposition found its way into the case law in roundabout ways. The idea was picked up by the Commission in its then-unpublished Guidance Paper, before the Court eventually recognized the possibility of an efficiencies defence for Article 102 in its ruling in *British Airways*, Case C-95/04 P.³⁷ Analysing AG opinions and

³⁰ See Urška Šadl and Suvi Sankari, ‘The Elusive Influence of the Advocate General on the Court of Justice: The Case of European Citizenship’ (2017) 36 *Yearbook of European Law* 421; Jens Frankenreiter, ‘Are Advocates General Political? An Empirical Analysis of the Voting Behavior of the Advocates General at the European Court of Justice’ (2018) 14 *Review of Law & Economics* 1; Carlos Arrebola, Ana Júlia Maurício, and Héctor Jiménez Portilla, ‘An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union’ (2016) 5 *Cambridge International Law Journal* 82.

³¹ Kamiel Mortelmans, ‘The Court Under the Influence of Its Advocates General: An Analysis of the Case Law on the Functioning of the Internal Market’ (2005) 24 *Yearbook of European Law* 127, 169.

³² Michal Bobek, ‘A Fourth in the Court: Why Are There Advocates General in the Court of Justice?’ (2012) 14 *CYELS* 529, 555.

³³ Witt (n 16).

³⁴ Case C-53/03 *Syfait* [2004] ECR I-04609, Opinion of AG Jacobs, paras. 69–70.

³⁵ *Ibid.*, paras. 100–101. In fact, AG Jacobs employed this technique in *Albany* as well as in *Oscar Bronner*. See Case C-67/96 *Albany* [1999] ECR I-05751, Opinion of AG Jacobs, para. 252 and Case C-7/97 *Oscar Bronner* [1998] ECR I-07791, paras. 30–31.

³⁶ Case C-53/03 *Syfait* [2005] ECR I-04609, paras. 37–38.

ECJ judgments together, the present study appreciates the role the AG has played in shaping EU antitrust. The choices they endorsed in their opinions had significant consequential effects for the future course of the law, as once uttered, ideas are hard to expunge, even if initially ignored or rejected by the Court.

A. The Attainment of a Workable Single Market—A Historic Turning Point

Divergences present themselves when considering the two modernization processes from a contextual perspective. Depending on the institutional setting and the legal issues involved, judicial actors must grapple with competing interests. If an actor is confronted with questions on the division of competencies between the Member States and the EU, she might respond differently than in cases touching upon inter-institutional matters that could give rise to tension within the EU. Sector-specific liberalization was a highly sensitive subject matter. The EU's foray into traditionally state-owned sectors for the sake of driving integration and the process of Europeanization inevitably entailed a competence creep at the expense of the Member States' exercise of their sovereign rights.³⁸ In contrast to regulating economic operators, regulating sovereign states proved a politically charged and, thus, thorny endeavour imbued with protectionist interests. As a result, it took a long time for competition enforcement to gain a foothold, and it did so slowly and hesitantly. Introducing competition to traditionally sheltered industries by relying on Article 106 TFEU redesigned the competition law landscape in fundamental ways, putting an end to a host of state monopolies. This shifted the focus from private businesses as the primary targets of economic control towards the State.³⁹ With respect to this first wave of change as well as the subsequent process of procedural modernization, the Commission and the Court pulled in the same direction, united in a mission to proliferate the strength and reach of the internal market.

While the creation of the internal market had been a key priority since the establishment of the European Economic Community (EEC) in 1957, it was only in the 1980s, when the EEC's economy started to fall behind the rest of the developed world, that renewed impetus would be given to relaunching it. The Commission's 1985 White Paper,⁴⁰ containing approximately 300 measures to remove both physical and intangible barriers to trade, generated the political momentum needed for change. Formalizing these proposals, the Single European Act (SEA) entered into force in 1987 and established a deadline for the completion of the Single Market until 31 December 1992.

With the attainment of a workable single market, the Commission swiftly redirected its focus towards modernizing the institutional structure and the procedures on the adoption and application of the EU competition law regime. In support of the Commission, the Court backed the proposed procedural changes and legitimized the directions chosen by the Commission to assuage the Member State governments. As was the case for the process of liberalization,⁴¹ institutional actors on the EU level needed to form a united front to protect the supranational order. Even though decentralization and procedural reforms had no direct bearing on the

³⁷ Giorgio Monti, 'Article 102 TFEU: Sources of Interpretation' in Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds), *Abuse of Dominance in EU Competition Law* (Edward Elgar 2017) 49. I am grateful to the reviewer for pointing out that chronologically, the judgment in *British Airways* was delivered before the Guidance. In fact, the Guidance had been delayed because the Commission wanted to include the judgment in the Guidance. However, *British Airways* had already relied on and resorted to the foreseeable content of the Guidance Paper at the time of the proceedings before the Court.

³⁸ See, Lei Zhu, *Services of General Economic Interest in EU Competition Law: Striking the Balance between Non-Economic Values and Market Competition* (Asser Press Springer 2020).

³⁹ See Gerber (n 17) 137.

⁴⁰ EC Commission, White Paper on the Completion of the Internal Market COM(85)310 final (14 June 1985).

⁴¹ Conant writes that '[t]he European Commission did not attempt to force change solely through legal means as it theoretically could, but consistently worked to create political consensus and incrementally eliminated exclusive rights'. See Conant (n 12) 121.

substance of EU competition law, the reforms are significant for reconstructing the institutional context conditioning the MEA. Procedural modernization and the introduction of the MEA involved the same actors and audiences as they unravelled at around the same time, with the procedural changes preceding and conditioning the substantive transformations aimed at by the Commission.⁴² This is why one cannot be fully understood without considering the other.⁴³ Procedural modernization also broke new ground for the MEA, and in fact, modernization efforts spilled over from the procedural to the substantive sphere.⁴⁴

However, as it has turned out, the Commission's vantage point when it embarked on its mission to decentralize competition enforcement was quite a different one in terms of *legitimacy*. The simultaneity of the two modernization processes should not disguise the fact that while the Commission could rightly justify procedural reforms with the need to guarantee the uniform application of competition law to further market integration, it had no solid basis for pushing for substantive change. Put crudely, the absence of a clear political momentum left the Commission walking on thin ice. The enforcer reasoned that substantive change was an inevitable consequence, claiming that a common economic language and methodology were required to ensure the effectiveness of the novel decentralized system. This allowed the Commission to pre-empt criticism from those who might allege that it acted independently and without consulting the Member States.⁴⁵ Thus, substantive reform was not based on any further premise or justification but indirectly derived its legitimacy from the exigence to guarantee the correct and efficient implementation of procedural innovations.⁴⁶ In reality, however, the bonds between the MEA and the imperative goal of completing the internal market were rather loose.

Thus, the study predicts that while sector-specific liberalization was primarily driven by the goal of market integration, the link was less apparent for modernization in the sense of MEA (H1). To test this hypothesis, the study uses several variables. Given the sensitivity surrounding the liberalization of former state-owned markets, Member State preferences may serve as a powerful constraint on the behaviour of judicial actors and signal the contentious nature of the issue. Context sensitivity may require them to reflect upon the political and economic implications of a given decision or recommendation. A suitable proxy for the sensitivity of a subject matter is whether the Court and the AG acknowledge the written observations submitted by Member States. It is important to stress that this measure does not capture genuine compliance with the Court's position on a given issue.⁴⁷ Rather, it serves as an indicator of how sensitive the matter is to national interests. The submission of observations by a Member State can signal how it believes the case should be resolved and may be interpreted as an attempt to influence the outcome. The greater the number of such observations, the more sensitive the issue is likely to be.

The variable 'Positive Mentions of EU' serves as a proxy for the respective Member State's stance on EU integration and employs the widely used and validated indicators of the Manifesto Database.⁴⁸ The Manifesto Project analyses political parties' election manifestos to distil their

⁴² European Commission, Directorate-General for Competition, *Modernization of EC Antitrust Enforcement Rules: Council Regulation EC No 1/2003 and the Modernization Package* (2004).

⁴³ Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law* (7th ed., OUP 2019) 95.

⁴⁴ Gerber (n 13) 1256.

⁴⁵ *Ibid.*, 1258. This aspect focuses on the power relations between the Commission and the Member States and must be distinguished from the argument that the MEA generated output legitimacy by improving the working of the market.

⁴⁶ *Ibid.*, 1256.

⁴⁷ To retrace the academic debate, see Clifford J. Carubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 *American Political Science Review* 435–452; the criticism of Stone Sweet and Brunell was printed alongside a response by Carubba, Gabel, and Hankla in issue 106 of the *American Political Science Review* in 2012: Alec Stone Sweet and Thomas Brunell, 'The European Court of Justice, State Noncompliance, and the Politics of Override' 204–213; taken up again by Clifford J. Carubba, Matthew Gabel and Charles Hankla, 'Understanding the Role of the European Court of Justice in European Integration' 214–223.

policy preferences. These variables became relevant whenever the applicant was a Member State, or when the case involved a public undertaking or an entity engaged in a public-private partnership. 'Positive Mentions of EU' accounts for favourable mentions to the European Union and may include statements regarding the desirability of joining or expanding the EU, and the desirability to strengthen the competencies of the European Parliament. In expectation, this variable will be primarily associated with the first modernization process.

On the other hand, actors promoting change in the sense of the MEA will resonate with factors related to the economic ideology propagated by the governing party in a respective Member State, as accounted for by the 'Fairness and Equality' variable. This variable also uses the data made available by the Manifesto Project, which, for one, accounts for positive mentions of the concept of social justice and the need for fair treatment of all people in the election programme of the governing political party. This may include positive mentions affirming the special need for the protection of underprivileged social groups, the removal of class barriers, the need for fair distribution of resources as well as the end of discrimination more generally. Furthermore, the variable considers whether the election programme pronounces itself in favour of the expansion of the social welfare state by favourably mentioning the need to introduce, maintain, or expand any public social service or social security scheme. This pertains to, for example, government funding of health care, childcare, elderly care, and pensions, as well as social housing. Such agenda items embody the fundamental principle of solidarity, that is, the notion that members of society should share both the advantages and burdens equally and justly and imply that those who are better off should contribute to the well-being of society as a whole and subsidize weaker social groups. These considerations are contrary to the essence of the MEA, which promotes the adoption of the consumer welfare standard as the sole beacon of competition law, accompanied by the integration of principles of economic analysis. Considering the content of the 'Fairness and Equality' variable, it would be interesting to see how actors promoting the MEA would respond to it.

B. Citation of AGs

Differences between the two modernization processes also arise when considering the respective roles and self-understandings of the Commission, the Court, and the AG. During the formative years of the EU competition law system, the Court took on a leadership role by developing constitutional doctrines that settled the relationship between the EU and the Member States and thereby enabled it to secure its position.⁴⁹ Joined and knit together by the common aim to develop the Single Market project, the Commission and the Court would cooperate closely. From the Court's perspective, market integration had become a tool for consolidating its competencies. For the Commission, this constituted a fair institutional compromise, as the Court's relentless support of its enforcement efforts became a source of political backing, strengthening its role vis-à-vis national authorities.⁵⁰

Despite shifting political and economic contexts, the Court could sustain this institutional arrangement far beyond the foundational period. When the onset of the oil crisis in 1973 left global politics stunned, the Union decided to channel its resources into boosting the economy by tackling barriers imposed by state monopolies. This selective broadening of competition in the public domain formed part of the broader European project of creating a single market,

⁴⁸ Andrea Volkens et al., *The Manifesto Data Collection. Manifesto Project (MRG/CMP/MARPOR)*. Version 2023a. Berlin: Wissenschaftszentrum Berlin für Sozialforschung (WZB)/Göttingen: Institut für Demokratieforschung (IfDem) <<https://doi.org/10.25522/manifesto.mps.2023a>> accessed 1 May 2025.

⁴⁹ JHH Weiler, 'The Transformation of Europe' (1991) 100 *YaleLJ* 2403; Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *IO* 41.

⁵⁰ Gerber (n 19) 109.

as national and state intervention were perceived to pose the greatest barriers to this effort.⁵¹ The psychological momentum⁵² that the market integration objective provided allowed the Court to ‘keep the dream alive’.⁵³ Thus, the process of opening up traditionally sheltered industries was very much a Court-induced process. For instance, the process of liberalization in the telecommunications sector was set into motion by ECJ judgments on Article 106 TFEU long before the Commission even considered tackling government intervention based on the same provision.⁵⁴ Later, the ECJ vindicated⁵⁵ the Commission’s moves in that direction by backing its decisions and upholding directives issued by the Commission under Article 106(3) TFEU.

Descriptive statistics based on the items describing some of the main developments under both reforms (Tables 1 and 2 below) reveal an interesting dynamic: With respect to the process of sector-specific liberalization, it was the Court that led the way, forging ahead to shape crucial competition concepts in a way that often curtailed the sovereignty of the Member States. For the scatterplots below (Figure 1), the vertical axis starts at 0 where those observations are located in which the judicial actor endorsed a traditional approach in favour of Member State sovereignty. As the values increase along the vertical axis, the approach taken by the actor reflects newer solutions that are more favourable to introducing competition in these sectors. Thus, the higher the values of each variable, the more change these outcomes reflect. Viewed side by side, the plots show an upward progression towards change as time passes and reveal that for none of the variables designed for the first process of substantive modernization did the AG take the lead. Instead, it was always the Court that set the ball rolling, doing the fresh thinking by inventing novel concepts or endorsing bolder outcomes. The AG, on the other hand, mostly remained in the background. Seemingly hesitant to endorse capricious lines of reasoning that could create an impression of disunity, the AG only started moving towards more innovative solutions after the Court had led the way.⁵⁶

A radically different picture emerges from the inquiry into the process of incorporating economic insights into competition law. While the Court of Justice maintained a central role in introducing sector-specific liberalization, its leadership in bringing about jurisprudential change has seemingly waned. In contrast to that, the exemplary scatterplots below (Figure 2) highlight the pioneering role of the AG in breaking new ground, with the blue dots always preceding the orange ones. Additional scatterplots can be found in Appendix A1. Based on these preliminary findings, the study assumes that actors pushing for change in the sense of the MEA are more inclined to cite AG opinions (AGCIT variable) than actors promoting liberalization (H2). Extensive references will be interpreted as an attempt to rally support for a particular position, igniting doctrinal debates.

As opposed to the processes of sector-specific liberalization and procedural modernization, where the fronts were delineated, the evolution of economic understanding in competition law involved multiple interests that arose from an intricate network of complex relationships between various actors with diverse views. Initially, the Court seemed to have a natural inclination to avoid deep encounters with economics, treating economics as the province of the Commission because of its presumed superior expertise. However, in response to the

⁵¹ Commission of the European Communities, ‘Twentieth Report on Competition Policy’ (1990) 50.

⁵² Gerber (n 19) 122.

⁵³ This expression is taken from Antoine Vauchez, ‘Keeping the dream alive: The European Court of Justice and the transnational fabric of integrationist jurisprudence’ (2012) 4 EPSR 51.

⁵⁴ Aurelio Pappalardo, ‘State Measure and Public Undertakings: Article 90 of the EEC Treaty Revisited’ (1991) 1 ECLR 29.

⁵⁵ Conant (n 12) 98.

⁵⁶ Eun Hye Kim, ‘The Advocate General as an Actor of Change—or Consolidation—in EU Competition Law’ (PhD thesis, European University Institute 2022).

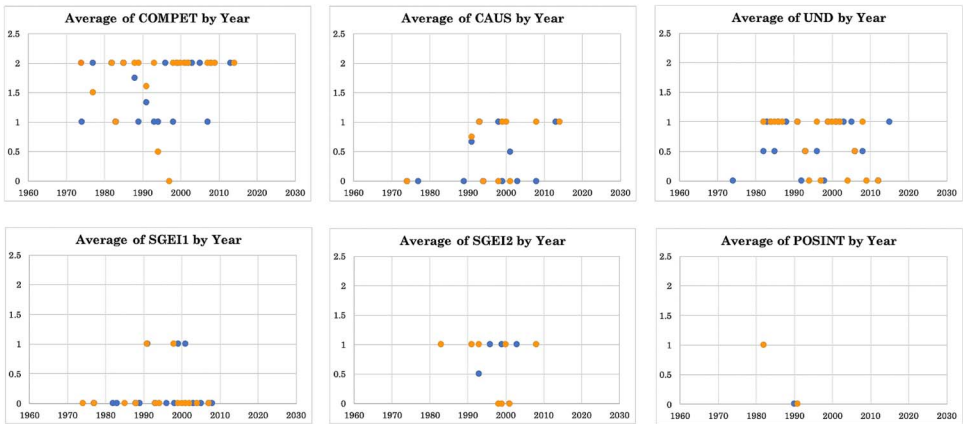


Figure 1. Scatterplots for each of the items describing the process of sector-specific liberalization through Article 106 TFEU (see Table 1 for more details). The plots take the average of all AG opinions (blue dots) issued in the same year. The same applies to ECJ judgments (orange dots). For all variables, missing values (–999) have been removed. Where only one AG opinion or ECJ judgment was rendered in a given year, the dots represent single opinions or judgments and no average values.

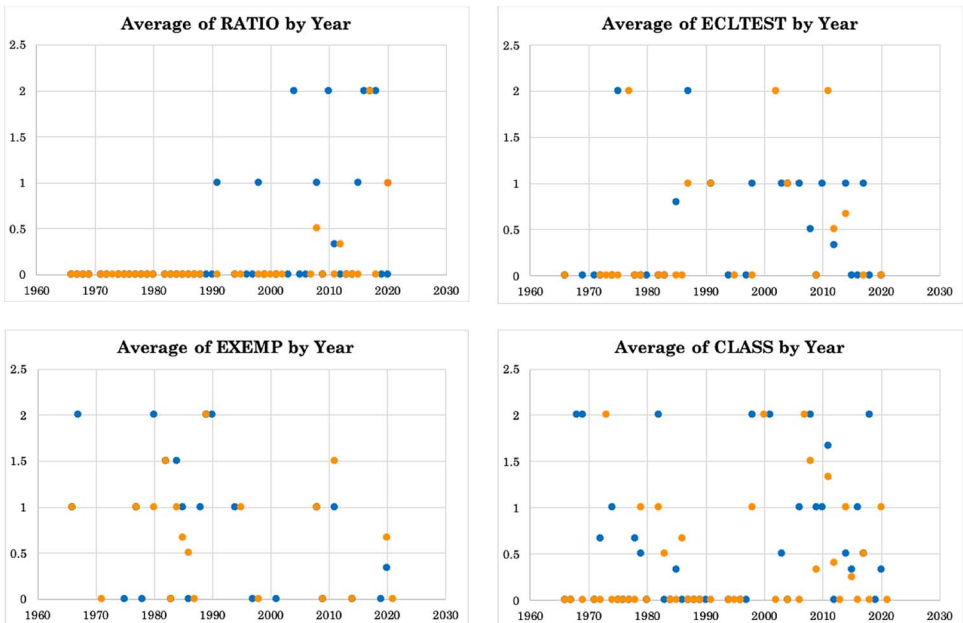


Figure 2. Scatterplots for four of the items describing the MEA. The plots take the average of all AG opinions (blue dots) issued in the same year. The same applies to ECJ judgments (orange dots). For all variables, missing values (–999) have been removed. Where only one AG opinion or ECJ judgment was rendered in a given year, the dots represent single opinions or judgments and no average values.

re-conceptualization of competition law as focused on economic efficiencies and consumer welfare as defined by neoclassical economics, even *legal* tests are increasingly becoming

'intensely economic in nature'.⁵⁷ With the evolving nature of the law that progressively incorporated economic principles, deep-rooted changes in the institutional balance were inevitable. Furthermore, the Commission's powers increased after the Council started equipping it with far-reaching legislative competencies, resulting in not only numerous instruments such as Commission directives and regulations but also guidelines, guidance papers, and notices. Whereas the Commission seemingly hurried the Court along to obtain the necessary support for sector-specific liberalization and procedural reforms against national competition authorities, courts, and governments, modernization through economization was met with resistance. This process affected the Court's own powers of review and the inter-institutional equilibrium of forces. The Court, made up of generalist judges, feared that increasing economization would marginalize its role. In addition, mounting criticism accusing the Court of being too activist⁵⁸ made clear that the Court would no longer be able to assume a leadership role.

Maintaining this fragile balance, individual judges and AGs could act either as allies of the Commission or as actors of resistance, joining forces to retain the Court's position. The broad formulation of many competition provisions has allowed the Commission to take a central role 'as the body that gave initial impetus to some of the defining features of the EU competition law system'.⁵⁹ Much of the literature on the evolution of competition law and regulation directs attention to the Commission's contribution, embodied by progressive guidelines and other soft law instruments, as the major driving force behind reforms.⁶⁰

Notwithstanding the fundamental role of the Commission in revising many key principles of EU competition law, its proposals are not automatic catalysts of change and must find their way into the law. The Commission may need an ally from the innermost circle who would push the Court towards changing its stance, bridging the gap between law and enforcement. Such accomplices may be found in like-minded AGs willing to contribute to ongoing reforms and become allies of other actors who are already pushing for reforms.⁶¹ And sometimes, it was the AG daring to take the first step in a new direction (see above example of the Opinion of AG Jacobs in *Syfait*). As a full member of the ECJ, the AG is organically and functionally linked to the Court⁶² and privy to its inner workings. At the same time, being an outsider to the actual decision-making process grants her the freedom to engage with the broader antitrust community. In a nutshell, it is the boundary-blurring position⁶³ of the AG that enables her to promote new jurisprudential lines and mobilize support for them. Writing an opinion can create a unique opportunity for the AG to bring about change from within, and her impetus can have the effect of tilting the balance in existing controversies in favour of one solution or the other. Many modernizations described with respect to the MEA can be linked to the progressive minds

⁵⁷ See Damien Geradin and Nicolas Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Legal Assessment' (2010) TILEC Discussion Paper 2011-008, 20 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698342> accessed 7 August 2025.

⁵⁸ Thijmen Koopmans, 'The Role of Law in the Next Stage of European Integration' (1986) 35 ICLQ 925.

⁵⁹ Ibáñez Colomo (n 9) 44.

⁶⁰ See e.g., Heike Schweitzer, 'The European Competition Law Enforcement System and the Evolution of Judicial Review' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Bloomsbury 2011); Ibáñez Colomo (n 9); Witt (n 16) 172. Some accounts even view modernization as an 'exclusively Commission-driven' process, see Bruce Wardhaugh, *Competition, Effects and Predictability: Rule of Law and the Economic Approach to Competition* (Hart 2020) 166.

⁶¹ Regarding the impact of the Supreme Court on society, Rosenberg ascribed a limited role to courts in producing societal change. More than being a major driver of societal change, Rosenberg put forward that '[p]erhaps only when political, social, and economic forces have already pushed society far along the road to reform will courts have any independent effect', see Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago 1991) 5-6. Similarly, Conant provides a compelling account of societal mobilization and institutional interactions that mediate judicial-policy-making in the EU, see Conant (n 12) 213.

⁶² Case C-17/98 *Emesa Sugar (Free Zone) NV v Aruba* [2000] ECR I-00665, Order of the Court, para. 16.

⁶³ Sida Liu, 'The Legal Profession as a Social Process: A Theory on Lawyers and Globalization' (2013) 38 *Law & Social Inquiry* 670, 676 ff.

of certain AGs. As the AG showed greater willingness to embrace change with respect to the MEA than the gradual abolishment of state-backed monopolies, it is concomitantly more likely to observe references to AG opinions in the context of this reform process (H2).

C. References to Academic Literature

In light of the previous point, one thing was certain: reform would be difficult to envisage with patchy support. However, the mere existence of contentiousness could be enough for an actor to push for change.⁶⁴ Contentiousness feeds uncertainty and thus presents a window of opportunity where constraints become relaxed. An obvious source of such uncertainty is academic controversy which feeds into doctrinal ambiguity. Sensitivity to ongoing debates among scholars of competition law can prove beneficial to tacticians who can take advantage of pre-existing efforts to instigate change. Moreover, judicial actors themselves can contribute to the rise of uncertainty. Where change efforts are not yet visible, they can use extra-judicial writings as an outlet for the diffusion of innovative ideas. By making their views known to a broader audience, judicial actors can mobilize support and tune in the legal community with their arguments, influencing the intellectual climate.

While it can be expected that there have been discursive interactions between judicial actors and the academic community in the context of both modernization processes, the discussions surrounding the MEA seem to have been much more pervasive. Previous contributions also stressed that change is more likely given the existence of an epistemic community of experts.⁶⁵ It is well documented that, for instance, liberalization in the telecommunications sector was accompanied by the formation of a transnational network under the direction of the European Commission, which played an active role in forging ties with a host of diverse actors to convince sceptical Member States.⁶⁶

However, in comparison to the discourse on the MEA, discussions on liberalizing state-owned markets happened on a much smaller scale. It was already in the 1980s that the very first calls for a reorientation of EU competition law along the lines of the Chicago School of Thought were heard,⁶⁷ and one of the most prominent voices was Valentine Korah. She was among the first to urge the EU to refocus its approach towards one that integrates economic analysis to a greater extent.⁶⁸ Initially, these efforts failed to impress Europe, and it was not until the mid-1990s that they were met with some acceptance. By the end of the 1990s, the MEA and its relationship with the modernization project that culminated in Regulation 1/2003⁶⁹ and the brave new world of 'self-assessment' dominated conversations on competition matters. At about the same time when calls for an MEA began to mount in Europe, an international network, also dubbed the 'transnational competition law group', began to take form.⁷⁰ The group was loose and informal, but it brought together a vast number of competition lawyers and high-profile officials from U.S. and EU agencies, as well as academics who participated in international

⁶⁴ Similarly, Karen Alter, 'Tipping the Balance: International Courts and the Construction of International and Domestic Politics' (2011) 13 CYELS 1.

⁶⁵ Peter Haas, 'Introduction: Epistemic Communities and international policy coordination' (1992) 46 IO 1; Anne-Marie Slaughter, *A New World Order* (PUP 2004) 42.

⁶⁶ Conant (n 12) 114. See also Godefroy Dang-Nguyen, Volker Schneider and Raymund Werle, 'Corporate Actor Networks in European Policy Making: Harmonizing Telecommunications Policy' (1993) MPIFG Discussion Paper 93/4 ISSN 0933-5668.

⁶⁷ See, Gerber (n 13) 1248.

⁶⁸ Korah was one of the most prominent voices and was joined by numerous other scholars. Some of her contributions include Valentine Korah, 'From Legal Form toward Economic Efficiency-Article 85(1) of the EEC Treaty in Contrast to U.S. Antitrust' (1990) 35 Antitrust Bulletin 1009 and Valentine Korah, 'The Paucity of Economic Analysis in the EEC Decisions on Competition Tetra Pak II' (1993) 46 CLP 148.

⁶⁹ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/1.

⁷⁰ Gerber (n 13) 1240.

conferences, which provided a forum for exchanging ideas. These exchanges were conducive to the shaping of an epistemic community that emphasized international cooperation and greater convergence.

Consequently, it will be possible to observe higher values of change in the sense of the MEA whenever there is a reference to academic literature. According to the third hypothesis, academic discourses surrounding the MEA had a greater influence on actors' attitudes towards change than was the case for sector-specific liberalization (H3). The 'Citation of Academic Literature' variable is binary and accounts for the presence or absence of such references. In addition, the 'Number of Academic Notes' variable counts the number of articles recorded under EURLEX's doctrine function as a proxy for contentiousness.

D. Citations of U.S. Law

Another important factor that could account for differences between both modernization processes is the citation of U.S. legal provisions and judgments. EU competition law is said to have 'evolved in the shadow of US antitrust'.⁷¹ Anyone familiar with the history of EU competition law will agree that the U.S. antitrust experience has long been a shining lodestar, even if an all too narrow focus on the United States would obscure the existence of genuinely European trajectories long before the occupation of Germany by the United States after the Second World War.⁷² One of the most extensive references to U.S. case law can be found in the Opinion of AG Mayras in *Imperial Chemical Industries*, which discusses five American antitrust law judgments.⁷³ This fixation on U.S. antitrust can be explained by a common feeling of economic backwardness shared by Europeans and the perceived need to catch up with the then-flourishing American economy.⁷⁴ As the European countries were trying to boost their economies, the U.S. experience with its well-functioning institutions was like a mirror constantly held up to them.⁷⁵

However, American-style liberalization only convinced Member States like the United Kingdom, while it drew heavy criticism from France and Germany, which clung to their national public service traditions.⁷⁶ As a principal representative of a liberal market economy where privatization and efficiency are the benchmarks, the United Kingdom strongly favours deregulation and is known for pursuing a neoliberal policy agenda.⁷⁷ This was visible in the United Kingdom's enthusiasm for liberalizing its own telecommunications sector *ahead* of the EU and its fervent backing of later Commission directives.⁷⁸ Tony Prosser compared the Anglo-Saxon Model to a 'Trojan horse, bringing to the Union support for the unfettered market principles of the United States'.⁷⁹ A trademark of the Anglo-Saxon social model is its emphasis on labour flexibility and liberalized markets, coupled with weak levels of social protection. This stands in stark contrast to the Continental social model, which is characterized by the generous provision of welfare as well as high levels of social and employment protection, but at the same time,

⁷¹ David Gerber, *Global Competition Law, Markets and Globalization* (OUP 2010) 161.

⁷² David Gerber, 'The Origins of European Competition Law in Fin-de-Siècle Austria' (1992) 36 AJLH 405.

⁷³ Opinion of AG Mayras in Joined Cases 48–69 *Imperial Chemical Industries* [1972] ECR I-0619, 669–670.

⁷⁴ Gerber (n 17) 164.

⁷⁵ The perceived superiority of the U.S. antitrust regime has been a recurring theme, and the Organization for Economic Co-operation and Development (OECD) actively encouraged developing countries across the globe to adapt competition laws inspired by U.S. antitrust as best practice. However, the tide has turned in favour of the European model; see Anu Bradford et al., 'The Global Dominance of European Competition Law Over American Antitrust Law' (2019) 16 JELS 731; Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020).

⁷⁶ Conant (n 12) 115.

⁷⁷ Giorgio Monti, 'The United Kingdom's Contribution to European Union Competition Law' (2017) 40 *FordhamIntlJL* 1443; Warloutet (n 7) 19.

⁷⁸ Conant (n 12) 109.

⁷⁹ Tony Prosser, 'EU Competition Law and Public Services' in Elias Mossialos, Govin Permanand, Rita Baeten and Tamara Hervey (eds), *Health Systems Governance in Europe* (CUP 2010) 315, 318.

suffered from high rates of unemployment while economic growth was slow.⁸⁰ Especially France feared that the liberalization of its vast public sector, which was based on the idea of solidarity and equal citizenship, would lead to weakened job security and unemployment for public-sector workers.⁸¹ While the U.S. experience provided an informative perspective, its influence was more muted and indirect in light of such strong resistance. Furthermore, the models put forward by the American law and economics literature were tailored to the American economy,⁸² and evidently, their applicability to the European context was limited by these scope conditions.

In contrast to that, the present study posits that, for the same reasons as mentioned concerning the influence of academic controversy, the influence of U.S. law was more pronounced and explicit in the case of the MEA.⁸³ Many of the substantive changes brought about by the MEA resemble the shifts that the Supreme Court of the United States introduced, inspired by the ideas and theories of the Chicago School.⁸⁴ Judicial actors who place greater emphasis on reconciling EU competition law with U.S. antitrust through economization are expected to have a general predilection to turn their gaze across the Atlantic for inspiration, citing U.S. antitrust cases, provisions, or scholarship more frequently. The following example illustrates this point. Convergence found itself in the bright glare of attention when the EU and U.S. antitrust agencies reached different conclusions in the *GE/Honeywell* case.⁸⁵ After both investigating the same merger that was proposed between General Electric Company and Honeywell International Inc. in the aerospace industry, the European enforcer blocked the merger while U.S. regulators cleared it.⁸⁶ Because of this divergence, the International Competition Network (ICN) was called into life in 2001 following an initiative taken by the United States to create a more specialized forum for international cooperation and exchange.⁸⁷ In one instance, the views expressed by the ICN percolated into an AG opinion. AG Mazák mentioned the ICN network alongside two other networks in *France Télécom SA*.⁸⁸ Therefore, the influence of U.S. law is expected to be less pronounced for the process of sector-specific liberalization and more prominent for modernization in the sense of the MEA (H4). The ‘Citation of U.S. Law’ variable is binary and records whether such references are present or not.

E. Business Profile

Another factor that could make a difference is the profile of the business whose conduct is under review. It is argued here that the unevenness between highly diversified and homogeneous product markets affects the ability to set impulses for change through litigation. Highly diversified businesses cover a greater range of products, enabling them to offset losses in one sector with gains in another. Greater resilience against market risks and defaults also means more independence and financial freedom to invest in research and development. Normally, higher levels of diversification coincide with bigness. Big tech companies and super-platforms possess exceptionally high diversification levels and are presumed to invent sophisticated practices

⁸⁰ Kaire Pöder and Kaie Kerem, ‘“Social Models” in a European Comparison: Convergence or Divergence?’ (2011) 49 *Eastern European Economics* 55.

⁸¹ Prosser (n 79) 318.

⁸² Maher (n 17) 156.

⁸³ See Frédéric Marty, ‘Is the consumer welfare obsolete? A European Union competition law perspective’ (2020) GREDEG Working Paper 2020–13, <<https://ideas.repec.org/p/gre/wpaper/2020-13.html>> accessed 7 August 2025.

⁸⁴ Anne Witt, ‘The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?’ (2019) 64 *Antitrust Bulletin* 172, 173.

⁸⁵ Donna Patterson and Carl Shapiro, ‘Transatlantic Divergence in GE/Honeywell: Causes and Lessons’ (2001) 16 *Antitrust* 18.

⁸⁶ U.S. Department of Justice, Press Release (2 May 2001), and *General Electric/Honeywell* (Case COMP/M.2220) Commission Decision [2004] OJ L48/1.

⁸⁷ See Witt (n 16) 14–18.

⁸⁸ Case C-202/07 P *France Télécom SA v Commission of the European Communities* [2008] ECRI-2371, Opinion of AG Mazák, para. 75.

that call conventional categories into question.⁸⁹ Their resource wealth encourages them to deliberately flock to the Court to change the law in their favour, whereas smaller businesses typically producing homogenous products have little prospect of doing so.⁹⁰

While large and highly diversified businesses are generally held to drive change, their influence is not indiscriminate. Concerning liberalization, it can be assumed that private economic operators received the news rather favourably as the abolition of exclusive rights conferred upon designated service providers by the state meant the removal of barriers to entry and would pave the way for them to compete. Even if former incumbents would often use the profits incurred while they held a dominant position to subsidize production in adjacent markets, thereby foreclosing potential competitors, the market-opening effect of the liberalization process was conducive to more competition in the long run. Thus, the process of liberalization was less controverted by private economic operators, regardless of their size and level of diversification. Concerning the prospect of procedural modernization, previous accounts document how large European businesses and their legal counsel expressed apprehension about the prospect of decentralized enforcement and the obligation to self-assess as they held onto the heightened degree of legal certainty the old Commission procedures granted.⁹¹

For the MEA, the business community would argue the converse. Complaining that the Commission's decisional practice and the case law were too formalistic, large businesses would push for the incorporation of neo-classical economic thinking. In particular, they claimed that the structure of the EU competition system hindered effective production and innovation and curtailed their procedural rights.⁹² At the same time, a narrow conception of consumer welfare that excludes broader societal concerns would absolve companies of social responsibility.

A glance across the Atlantic could give further insight into the interconnections between the MEA and large businesses. As the Chicago School assumes that powerful firms—especially those operating in digital markets—are endless sources of innovation,⁹³ courts have been urged to engage in a more searching appraisal of the factual circumstances. The 'procompetitive virtues' would only manifest themselves if courts embraced a 'more nuanced economic understanding'.⁹⁴ Inevitably, the Chicago School of Thought is geared towards promoting corporate interests⁹⁵ and similar dynamics could be at play in the reconfiguration of EU competition law along the lines of the MEA.

Accordingly, the last hypothesis (H5) posits that change in the sense of the MEA was more likely whenever the conduct under review was committed by a large and highly diversified business rather than a smaller- or medium-sized business. Conversely, the impact of business size and level of diversification is predicted to be weak or absent for liberalization. 'Business profile' is a binary variable with highly diversified, multiproduct firms falling under category 1 and all others falling under category 0.⁹⁶ It can be expected that the magnitude of change will increase markedly with higher levels of diversification, meaning that judicial actors will be much keener to embrace the MEA when the company whose conduct was under review is vertically integrated to a higher degree or exhibits higher levels of product diversification.

⁸⁹ Geoffrey Manne and Joshua Wright, 'Innovation and the Limits of Antitrust' (2010) 6 JCLE 153, 165.

⁹⁰ Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limitations of Legal Change' (1974) 9 Law and Society Review 95, 97–103.

⁹¹ Eleanor Fox, 'Antitrust and Institutions: Design and Change' (2010) 41 Loyola University Chicago Law Journal 473, 481.

⁹² Ibid.

⁹³ *New York v Meta Platforms, Inc*, 66 F.4th 288, 295, 305 (D.C. Circuit 2023).

⁹⁴ Manne and Wright (n 89).

⁹⁵ Even if innovation may emerge from smaller companies and deconcentrated markets, proponents of the Chicago School of Thought employ a 'rhetoric of innovation' to deter enforcement, see Andrew McLean, 'Innovation against change' (2024) 12 JAE 378.

⁹⁶ The coding adopts the classification suggested by William Kovacic, Robert Marshall and Michael Meurer, 'Serial Collusion by Multi-Product Firms' (2018) 6 JAE 296, 297–298.

IV. DATA AND METHODS

The study aims to unpack the determinants of jurisprudential change and how these contextual forces can explain differences between the two processes of substantive modernization. However, several challenges intrinsic to the object of inquiry keep throwing a spanner in the works. Sweeping transformations of the case law are rarely articulated in a single judgment. Rather, incremental shifts can add up to wholesale transformations, marking the end of bigger, slow-moving processes that may be invisible at first sight.⁹⁷ The inconspicuous nature of these micro-developments often conceals their true dynamics and scale, posing serious obstacles to any attempt at measurement.⁹⁸ This is further complicated by the fact that human traits, attitudes, and abilities are 'latent' constructs that can vary over time and are highly susceptible to external influence.

To address this issue, the first part of the empirical investigation develops two novel and parsimonious measures that accurately reflect judicial attitudes towards change in substantive competition law. A discipline concerned with the question of how psychological constructs can be optimally linked to observable indicators is psychometrics, a sub-field of psychology. While modern psychometric scaling methods have found application in education and the political sciences, for instance measuring students' learning strategies⁹⁹ or attitudes such as nationalism or anti-establishment orientations,¹⁰⁰ the techniques have never been applied to study substantive legal evolution. Recognizing the vast potential of psychometric scaling methods for the study of legal questions could open up new avenues of research.

Drawing inspiration from this literature, the study uses MSA, a nonparametric IRT method, to create high-quality measurement instruments based on the outcomes coded for the variables (also referred to as 'items' in IRT) devised for each reform. To be more specific, MSA entails distilling a set of indicators from a bespoke item pool (see Section B) and collapsing them into a single metric that reflects change in the sense of a particular reform. The obtained summary measures will serve as dependent variables in a subsequent OLS regression analysis. This facilitates a more meaningful comparison between the two substantive reforms while pinning down the causes for the divergences. All statistical analyses and tests were computed in *Microsoft Excel* and in R,¹⁰¹ primarily using various functions contained in the *mokken* package.¹⁰² The following section describes each analytical step in detail.

A. Sample Characteristics

The study draws on an original dataset comprising 234 hand-coded observations: 118 AG opinions, all received by the ECJ between 1 January 1966 and 1 April 2021, and the 116 corresponding ECJ judgments. The lower number of judgments compared with AG opinions is due to the Court's practice of occasionally allowing several AG opinions to be issued per case.

⁹⁷ James Mahoney and Kathleen Thelen, 'A Theory of Gradual Institutional Change' in Kathleen Thelen and James Mahoney (eds), *Explaining Institutional Change* (CUP 2009) 1–2.

⁹⁸ The one-time alteration of precedent, which may be the most obvious manifestation of jurisprudential change, has been treated elsewhere, see Kim (n 56).

⁹⁹ See Rikkert Van der Lans et al., 'Developing an Instrument for teacher Feedback: Using the Rasch Model to Explore Teachers' Development of Effective Teaching Strategies and Behaviors' (2018) 86 *The Journal of Experimental Education* 247.

¹⁰⁰ Joseph Uscinski et al., 'Why do people believe in COVID-19 conspiracy theories?' (2020) *The Harvard Kennedy School Misinformation Review*, Shorenstein Center on Media, Politics, and Public Policy <<https://misinforeview.hks.harvard.edu/article/why-do-people-believe-covid-19-conspiracy-theories/>> accessed 7 August 2025; Adam Enders et al., 'The Relationship between social media use and beliefs in conspiracy theories and misinformation' (2023) 45 *Political Behaviour* 781.

¹⁰¹ R Statistical Software (v4.4.2; R Core Team 2025).

¹⁰² L.A. Van der Ark, 'Mokken Scale Analysis in R' (2007) 20 *Journal of Statistical Software* 1 <<https://doi.org/10.18637/jss.v020.i11>>> L.A. Van der Ark, 'New Developments in Mokken Scale Analysis in R' (2012) 48 *Journal of Statistical Software*, 1 <<https://doi.org/10.18637/jss.v048.i05>>.

The final dataset contains comprehensive information on doctrinally salient issues relating to Articles 101, 102, and 106 TFEU. The cases included are considered leading cases, mostly for the reason that they further developed the case law and, thus, provide a most likely scenario for detecting jurisprudential change. Following a search on the Court's Curia database, the sample was refined qualitatively by comparing and aligning it with the cases discussed in Ezrachi's analytical guide to the most prominent cases of EU competition law,¹⁰³ Conant's account of the liberalization of utilities markets,¹⁰⁴ and Witt's monograph on the MEA.¹⁰⁵ As the study focuses on the evolution of substantive competition rules, matters that are exclusively institutional or procedural were excluded. The same applies to cases primarily relating to the judicial review of fines and other cases that, at closer inspection, turned out not to raise any doctrinally substantial questions.¹⁰⁶ Other cases were not included for language reasons¹⁰⁷ or because they were resolved by an order instead of a judgment.¹⁰⁸

B. List of Items

Both reform processes led to a wholesale transformation of the competition law landscape by simultaneously introducing novelties on several fronts. To capture these shifts, two sets of categorial items that embody the most salient¹⁰⁹ doctrinal changes under each reform were formulated. The items are designed in a way that their outcomes juxtapose traditional solutions with novel ones representing change, thereby reflecting opposing stances regarding a concept or approach.

The process of liberalizing traditionally state-regulated markets that took off in the late 1980s constitutes one of the most dramatic episodes in the history of EU competition law.¹¹⁰ In the name of unifying Europe through the creation of a common market, the Union cautiously intervened to open shielded industries such as telecommunications, energy, postal services, water, transport, and broadcasting to competition law. The main vehicle for the construction of a liberalized Common Market was Article 106, a provision that had largely gone unnoticed for the first 25 years of its existence. Read in conjunction with the Treaty provisions on Article 101 and 102, the provision has been used to open up state-owned industries to competition law. The table below (Table 1) provides an overview of the items that capture the most significant developments under this reform process.¹¹¹

The following example helps make better sense of the different outcomes of the above items. The COMPET item touches upon the issue of competence distribution. Its outcomes are modelled upon the different approaches to judicial control observed in the Court's jurisprudence

¹⁰³ The index provides the page numbers for the cases that Ezrachi discusses at length in bold type. If the page numbers were not in bold, the analytical guide only made short cross-references to those judgments. Except for the cases mentioned above, all cases with their page numbers in bold font were included in the sample.

¹⁰⁴ Conant (n 12).

¹⁰⁵ Witt (n 16).

¹⁰⁶ Case C-74/04 *Volkswagen v Commission* [2006] ECR I-06585 is one of the cases that was removed. It concerned the notion of 'agreement,' which is a prerequisite for a practice to fall within the scope of Article 101 TFEU. Given that this requirement was not fulfilled, most variables would have adopted the outcome NA (–999). The same applies to Case C-68/12 *Protimonopolný úrad Slovenskej republiky* [2013] 4 CMLR 16, which dealt with the very specific question of whether a collective boycott can amount to an infringement of Article 101 TFEU.

¹⁰⁷ The Opinion of AG Van Gerven delivered in Case C-277/87 *Sandoz prodotti farmaceutici SpA v Commission* [1990] ECR I-00045 was only available in Dutch.

¹⁰⁸ See e.g., Joined Cases 109 and 114–75 *National Carbonizing Company v Commission* [1976] ECR –00381, Opinion of AG Mayras.

¹⁰⁹ It should be noted that rather than attempting to accommodate every single doctrine of competition law, the proposed variables describe the most important changes to substantial competition law.

¹¹⁰ See Gerber (n 17) 137.

¹¹¹ For an in-depth description of the variables, see Kim (n 56).

Table 1. Items describing the process of sector-specific liberalization

Item	Label	Outcomes
Competence to grant exclusive right under Article 106	COMPET	COMPET = 0 Absolute Sovereignty Approach. COMPET = 1 Limited Sovereignty Approach. COMPET = 2 Limited Competition Approach. COMPET = 3 Absolute Competition Approach. COMPET = –999 (na) The case does not concern the grant of exclusive rights.
Causal link of attribution	CAUS	CAUS = 0 Strict standard of attribution. CAUS = 1 Weak standard of attribution. CAUS = –999 (na) No explicit discussion or case does not concern Article 106(1).
Classification as Service of General Economic Interest	SGEI1	SGEI1 = 0 No scrutiny of state's classification as SGEI. SGEI1 = 1 Scrutiny of state's classification as SGEI using a manifest error test. SGEI1 = 2 Application of EU law criteria to scrutinize the state's classification. SGEI1 = –999 (na) Case does not concern a state's classification as SGEI; undertaking does not fall under this category (no legal act of entrustment); case does not concern Article 106(2).
Derogation of Article 106(2)	SGEI2	SGEI2 = 0 Derogation of Article 106(2) granted. SGEI2 = 1 Derogation of Article 106(2) rejected. SGEI2 = –999 (na) No final decision reached; no attempt at benefiting from derogation; no state measure under scrutiny; case dismissed on procedural grounds (inadmissible).
Classification as undertaking	UND	UND = 0 Entity (public or private) not qualified as undertaking, reference to exercise of sovereign powers. UND = 1 Entity (public or private) not qualified as undertaking, reference to principle of solidarity. UND = 2 Qualification of (public or private) entity as undertaking after discussion. UND = –999 (na) The case does not concern the classification as an undertaking; case is unproblematic, and there is no discussion at all.
Positive Integration Article 106(3)	POSINT	POSINT = 0 Actor upholds the Commission's directive in its entirety. POSINT = 1 Actor partly upholds/partly annuls the Commission's directive. POSINT = 2 Actor annuls the Commission's directive in its entirety. POSINT = –999 (na) Case does not concern the Commission's power to issue directives under Article 106(3) TFEU (even if there is mention of a Commission directive in the reasoning).

as put forward by Judge David Edward.¹¹² The *Absolute Sovereignty Approach* (COMPET = 0) applies to all cases in which the judicial actor recognizes the sovereignty and exclusive competence of the Member States in regulating their domestic markets by granting exclusive rights to undertakings. This is the conventional approach which was taken in the early case law on

¹¹² David Edward, 'Article 90 EC Treaty and the deregulation, liberalization and privatization of public enterprises and public monopolies' (1996) Zentrum für Europäisches Wirtschaftsrecht, Vorträge und Berichte No 60, 8 ff; Mark Hoskins and David Edward, 'Article 90: Deregulation and EC Law. Reflections Arising from the XVI FIDE Conference' (1995) 32 CMLR 157.

Article 106(1) and signals to the Member States that the EU abstains from interfering with their competences and grants them full discretion. Most of the Court's early case law will fall under this category.

The *Limited Sovereignty Approach* (COMPET = 1) marks the first departure from the *Absolute Sovereignty Approach*. It rests on the premise that, as a matter of principle, the Member States have the liberty to grant special or exclusive rights to undertakings. Only where the operation of the legal monopoly causes injury to the rules of the EC Treaty, the grant of exclusive rights should not be permitted. Older cases in which this stance was taken are *Höfner and Elser v Macrotron GmbH*,¹¹³ *La Crespelle*,¹¹⁴ or *Banchero*.¹¹⁵ Even with increasing liberalization, the *Limited Sovereignty Approach* continued to be adopted as newer cases like *Servizi Ausiliari Dottori Commercialisti Srl*,¹¹⁶ *Raso*,¹¹⁷ *Ambulanz Glöckner*,¹¹⁸ and *MOTOE*¹¹⁹ show. The wording in these decisions is the same, pointing out that 'the mere creation of a dominant position through the grant of special or exclusive rights within the meaning of Article 86(1) EC is *not in itself* incompatible with Article 82 EC (emphasis added)' and that the finding of an infringement of competition is merited '*only if* the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses' (emphasis added).¹²⁰

The *Limited Competition Approach* (COMPET = 2) captures those instances in which a Member State may create legal monopolies *only if* it can be justified. The logic is reversed now as illegality is presumed, and the onus is on the Member State to prove that the measure fulfils the requirements of Article 106(2). The test presupposes the existence of a legitimate national objective, such as the protection of national security or ensuring the universal supply of water or electricity. Moreover, the restriction of competition that will arise from the creation of legal monopolies must be confined to what is necessary to achieve that objective. The Court's judgments in *Giuseppe Sacchi*¹²¹ would belong to this category. In this case, the Court alluded to considerations of public interest as the possible rationale behind the decision to allow Member States to grant exclusive or special rights to undertakings.¹²² The Court's legal analysis distanced itself from an approach that took the absolute sovereignty of the states as the premise and turned towards one that did not rule out challenges to the state's authority to organize its domestic industries, even if they chose to do so through public undertakings.

The last outcome of this variable pertains to the *Absolute Competition Approach* (COMPET = 3). This approach describes instances in which the judicial actor suggests that the mere creation of a legal monopoly is anticompetitive. It is the most radical position and constitutes a complete turnaround from the position initially envisioned by the Treaty of Rome. There is no room for derogations as the act of granting special or exclusive rights *as such* is considered contrary to Article 106(1). The reasoning adopted by the Court in *ERT* exemplifies this outcome. The Court prohibited the 'granting of an exclusive right to retransmit television broadcasts to an undertaking which has an exclusive right to transmit broadcasts, where those rights are liable

¹¹³ Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, para. 29.

¹¹⁴ Case C-323/93 *La Crespelle* [1994] ECR I-5077, para. 18.

¹¹⁵ Case C-387/93 *Criminal Proceedings against Giorgio Banchero* [1995] ECR I-4663, para. 51.

¹¹⁶ Case C-451/03 *Servizi Ausiliari Dottori Commercialisti Srl* [2006] ECR I-2941, para. 23.

¹¹⁷ Case C-163/96 *Criminal Proceedings against Silvano Raso* [1998] ECR I-0533, paras. 27–29.

¹¹⁸ Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, para. 39.

¹¹⁹ Case C-49/07 *Motosykletistiki Omospondia Elladnos NPID (MOTOE) v Elliniki Dimosio* [2008] (published in the electronic Reports of Cases), paras. 48–49.

¹²⁰ *Ibid.*, citing *Höfner and Elser v Macrotron GmbH*, *ERT* and *La Crespelle*.

¹²¹ Case 155–73 *Giuseppe Sacchi* [1974] ECR I-409, para. 14.

¹²² *Ibid.*, para. 17.

to create a situation in which that undertaking is led to infringe Article 86 of the Treaty by virtue of a discriminatory broadcasting policy' (emphasis added).¹²³ Thus, the act of granting these rights itself constitutes a breach of Article 106 as it is seen to enable abusive practices in the first place.

Whereas the process of sector-specific liberalization appears to have lapsed¹²⁴ with the abolition of a host of exclusive rights granted by the state across the EU, the MEA is seemingly still ongoing. Following the same format, the items in Table 2 map possible outcomes to items embodying the main doctrinal shifts under the MEA. Here, the RATIO variable serves as an example. It relates to the choice of rationale to legitimize intervention. Whereas a plethora of goals can be found in the case law of the Court, a line can be drawn between economic objectives and consumer welfare on the one hand and broader objectives stemming from considerations based on freedom and fairness on the other. Actors seeking to promote the MEA will only cite the consumer welfare standard, measured 'in terms of price, output, quality and levels of innovation'¹²⁵ (see RATIO = 1 and 2), whereas actors resisting change are expected to invoke noneconomic objectives (RATIO = 0). A judgment embodying a traditional understanding is the Court's case in *TeliaSonera Sverige*¹²⁶ where the Court stated that '[t]he function of [competition] rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union'.¹²⁷ This judgment was coded as RATIO = 0.

An example of Outcome 1 can be found in the Opinion of AG Mazák in *France Telecom SA v Commission*. The AG explicitly attributed special importance to the protection of consumer welfare, purporting that 'the primary purpose of Article [82 EC] is to prevent distortion of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors'.¹²⁸ In contrast to that, the ECJ adhered to the traditional view that would fall under Outcome 0, stating that 'Article 82 EC refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure'.¹²⁹

Lastly, the Opinion of AG Wahl in *Intel* serves as an instance where consumer welfare is considered the only viable objective (RATIO = 2). Referring to the fact that competition law is an area of law that is inherently economic in character, the AG concludes that its aim must be the enhancement of efficiency.¹³⁰ The AG continues that 'only behaviour which constitutes an expression of market power to the detriment of competition and, thus, to consumers is prohibited and accordingly sanctioned as an abuse of dominance'.¹³¹ The ECJ was swayed this time, holding that 'not every exclusionary effect is necessarily detrimental to competition' and that '[c]ompetition on the merits may, by definition, lead to the departure from the market or

¹²³ Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (ERT)* [1991] ECR I-2925, para. 37.

¹²⁴ The starting and end points of reform processes are rarely clear, and their effects can linger long after they are over. AG Rantos still refers to the 'gradual liberalization of the market for retail supply of electricity in Italy', see Case C-377/20 *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* [2021] (published in the electronic Reports of Cases), Opinion of AG Rantos, para. 8.

¹²⁵ Witt (n 16) 265. This notion of consumer welfare is different from the objective of protecting consumers as found in earlier case law, which does not understand it in strictly price-theoretical terms.

¹²⁶ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527.

¹²⁷ *Ibid.*, para. 22.

¹²⁸ Case C-202/07 P *France Telecom SA v Commission* [2008] ECR I-02369, Opinion of AG Mazák, para. 74.

¹²⁹ Case C-202/07 P *France Telecom SA v Commission* [2009] ECR I-02369, para. 105.

¹³⁰ Case C-413/14 P *Intel Corporation v European Commission* [2016] (published in the electronic Reports of Cases), Opinion of AG Wahl, para. 41: 'From the outset, EU competition rules have aimed to put in place a system of undistorted competition, as part of the internal market established by the EU. In that regard, it cannot be overemphasised that protection under EU competition rules is afforded to the competitive process as such, and not, for example, to competitors [...]. This is because, given its economic character, competition law aims, in the final analysis, to enhance efficiency'.

¹³¹ *Ibid.*

Table 2. Items describing changes introduced by the MEA

Item	Label	Outcomes
Choice of Rationale	RATIO	RATIO = 0 Objectives other than the consumer welfare standard cited; or consumer welfare standard mentioned alongside other objectives; or explicit statement that consumer welfare is not the primary goal. RATIO = 1 Several objectives cited but special weight attached to consumer welfare (explicit statement or placing it up front). RATIO = 2 Only consumer welfare standard cited. RATIO = –999 (na) No reference to objectives of competition law at all.
Concept of Competitive Harm	HARM	HARM = 0 Conduct considered restrictive as it impedes process of market integration and curtails cross-border trade. HARM = 1 Conduct restricts parties’ commercial freedom; their individual opportunity to enter market; or is discriminatory (fairness-based concept). HARM = 2 Conduct restricts competition, but type of harm not specified. HARM = 3 Conduct not only restricts competition as such, but also results in reduction of consumer welfare (CW standard). HARM = –999 (na) No engagement with substance of case, e.g., case dismissed on procedural grounds (e.g., inadmissibility).
Choice of Legal Test	LTEST	LTEST = 0 Form-based approach (presumption of restrictive effects). LTEST = 1 Effects-based approach (case-by-case analysis of restrictive effects; evidence of actual restrictive effects). LTEST = 2 Impossible to determine whether actor endorses a form-based or effects-based approach. LTEST = –999 (na) No engagement with substance of case, e.g., case dismissed on procedural grounds (e.g., inadmissibility).
Commission’s Choice of Legal Test	ECLTEST	ECLTEST = 0 The actor mentions that the EC endorsed a form-based approach. ECLTEST = 1 The actor mentions that the EC endorsed an effects-based approach. ECLTEST = 2 It is impossible to determine whether the EC endorsed a form-based or effects-based approach. ECLTEST = –999 (na) There is no explicit mention of the test endorsed by the EC; no engagement with substance of case, e.g., case dismissed on procedural grounds (e.g., inadmissibility).
Actual or Potential Effects (Threshold)	ACTPOT	ACTPOT = 0 Conduct must be capable of restricting competition (potential effects). ACTPOT = 1 Conduct must be likely to restrict competition. ACTPOT = 2 Conduct must restrict competition with certainty (actual effects). ACTPOT = 3 (Mixed) Impossible to determine (actor uses formulas interchangeably or on an unprincipled basis). ACTPOT = –999 (na) No discussion of the type of effects required to establish anticompetitiveness; case dismissed on procedural grounds (e.g., inadmissibility).
Classification of Conduct	CLASS	CLASS = 0 Classification of conduct as falling into previously established category. CLASS = 1 Classification of conduct as falling into previously established category by analogy. CLASS = 2 The AG/Court establishes that conduct is anticompetitive (or not) without reference to established categories. CLASS = –999 (na) No engagement with substance of case, e.g., case dismissed on procedural grounds (e.g., inadmissibility).

(continued)

Table 2. Continued.

Item	Label	Outcomes
Choice of Methodology	ECON	ECON = 0 The AG/Court does not engage with economics. ECON = 1 The AG/Court uses/engages with economic or quantitative methods. ECON = –999 (na) No reference to methodology used.
Choice of Review Standard	JREV	JREV = 0 The AG/Court employs a deferential standard of review. JREV = 1 The AG/Court employs a nondeferential standard of review or carries out full review. JREV = –999 (na) No reference to the standard of review or no engagement with substance of case (inadmissible cases).
Exemption under Article 101(3)	EXEMP	EXEMP = 0 The possible exemption of the measure is discussed with reference to social or public policy considerations. EXEMP = 1 The possible exemption of the measure is discussed with reference to direct or indirect economic benefits. EXEMP = –999 (na) No discussion of Article 101(3) TFEU; no business conduct/measure under scrutiny; case dismissed on procedural grounds (e.g., inadmissibility).
Exemption Outcome	EXOUT	EXOUT = 0 The exemption of Article 101(3) TFEU is not granted. EXOUT = 1 The exemption of Article 101(3) TFEU is granted. EXOUT = –999 (na) No discussion of Article 101(3) TFEU; no business conduct/measure under scrutiny; case dismissed on procedural grounds (e.g., inadmissibility).
Counter-vailing Effects: Justification of Restriction	JUST	JUST = 0 <i>Competition on the merits</i> . Reference to objective legitimacy of business behaviour in question. JUST = 1 <i>Objective justification</i> . Reference to legitimate (public interest) objectives. JUST = 2 <i>Efficiency justification</i> . Reference to efficiency considerations (aka ‘efficiencies defence’: the conduct leads to a net gain in CW). JUST = 3 <i>Mixed</i> . Reference to several objectives, rendering a categorization under one of the above-mentioned outcomes impossible. JUST = 4 <i>Other grounds</i> . Reference to other grounds of justification. JUST = –999 (na) No attempt at justifying business behaviour/measure; no business conduct/measure under scrutiny; case dismissed on procedural grounds (e.g., inadmissibility).
Counter-vailing Effects: Justification Outcome	JUSTOUT	JUSTOUT = 0 Business conduct/measure is not justified (Article 106: derogation rejected). JUSTOUT = 1 Business conduct/measure is justified (Article 106: derogation upheld). JUSTOUT = –999 (na) No attempt at justifying business behaviour/measure; no business conduct/measure under scrutiny; case dismissed on procedural grounds (e.g., inadmissibility).

the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality, or innovation’.¹³²

C. Scale Construction Using the Automated Item Selection Procedure

While deduced from competition law literature, what still remains unclear is whether the items presented in the above tables are truly measuring change in the sense of the modernization process they were assigned to. Theoretically, items that are of a more general nature such as the one pertaining to the rationale behind intervention (RATIO), the legal test adopted (LTEST), or

¹³² Case C-413/14 P *Intel Corporation v European Commission* [2017] (published in the electronic Reports of Cases), para. 134.

	COMPET	CAUS	UND	SGE1	SGE2	POSINT	RATIO	HARM	CLASS	LTEST	ECLTEST	ECON	JREV	ACTPOT	EXEMP	EXEMPOT	JUST	JUSTOUT
COMPET	1.00	0.63	0.41	0.68	0.50	0.15	-0.10	-0.32	-0.58	-0.49	-0.24	-0.10	-0.03	-0.27	-0.21	-0.27	0.01	-0.08
CAUS	0.63	1.00	0.20	0.52	0.66	-0.04	-0.03	-0.26	-0.46	-0.33	-0.19	-0.02	-0.05	-0.18	-0.15	-0.21	0.21	0.08
UND	0.41	0.20	1.00	0.44	0.35	0.09	-0.16	-0.22	-0.42	-0.33	-0.15	-0.04	-0.01	-0.19	-0.12	-0.18	-0.03	-0.12
SGE1	0.68	0.52	0.44	1.00	0.58	-0.05	-0.13	-0.17	-0.45	-0.42	-0.22	-0.07	-0.06	-0.21	-0.19	-0.22	0.00	-0.11
SGE2	0.50	0.66	0.35	0.58	1.00	-0.04	-0.09	-0.21	-0.36	-0.28	-0.18	0.06	-0.03	-0.14	-0.10	-0.14	0.21	0.05
POSINT	0.15	-0.04	0.09	-0.05	-0.04	1.00	0.10	-0.10	-0.19	-0.20	-0.09	-0.06	0.07	-0.06	-0.08	-0.10	0.01	-0.03
RATIO	-0.10	-0.03	-0.16	-0.13	-0.09	0.10	1.00	0.28	0.18	0.25	0.29	0.13	0.11	0.20	0.12	0.16	0.17	0.18
HARM	-0.32	-0.26	-0.22	-0.17	-0.21	-0.10	0.28	1.00	0.40	0.38	0.39	0.13	0.05	0.14	0.02	0.09	0.08	0.16
CLASS	-0.58	-0.46	-0.42	-0.45	-0.36	-0.19	0.18	0.40	1.00	0.63	0.31	0.02	0.04	0.25	0.25	0.37	0.05	0.11
LTEST	-0.49	-0.33	-0.33	-0.42	-0.28	-0.20	0.25	0.38	0.63	1.00	0.37	0.19	0.05	0.25	0.21	0.31	0.07	0.14
ECLTEST	-0.24	-0.19	-0.15	-0.22	-0.18	-0.09	0.29	0.39	0.31	0.37	1.00	0.15	0.23	0.31	0.10	0.09	0.13	0.20
ECON	-0.10	-0.02	-0.04	-0.07	0.06	-0.06	0.13	0.13	0.02	0.19	0.15	1.00	0.12	0.08	0.12	0.15	0.18	0.21
JREV	-0.03	-0.05	-0.01	-0.06	-0.03	0.07	0.11	0.05	0.04	0.05	0.23	0.12	1.00	0.21	0.24	0.05	-0.01	-0.05
ACTPOT	-0.27	-0.18	-0.19	-0.21	-0.14	-0.06	0.20	0.14	0.25	0.25	0.31	0.08	0.21	1.00	0.05	0.16	0.02	0.10
EXEMP	-0.21	-0.15	-0.12	-0.19	-0.10	-0.08	0.12	0.02	0.25	0.21	0.10	0.12	0.24	0.05	1.00	0.69	-0.06	-0.05
EXEMPOT	-0.27	-0.21	-0.18	-0.22	-0.14	-0.10	0.16	0.09	0.37	0.31	0.09	0.15	0.05	0.16	0.69	1.00	-0.03	0.01
JUST	0.01	0.21	-0.03	0.00	0.21	0.01	0.17	0.08	0.05	0.07	0.13	0.18	-0.01	0.02	-0.06	-0.03	1.00	0.92
JUSTOUT	-0.08	0.08	-0.12	-0.11	0.05	-0.03	0.18	0.16	0.11	0.14	0.20	0.21	-0.05	0.10	-0.05	0.01	0.92	1.00

Figure 3. Correlation matrix using conditional formatting in Microsoft Excel to visualize the strength of association between variables in two dimensions. Removed missing values, as otherwise, it is not possible to compute Pearson’s correlation coefficient. The items are polytomous, rescaled from 0 to 1.

the choice of review standard (JREV) could serve as proxies for both modernization processes. MSA disentangles the data to see which items work in the same direction. The technique allows selecting those items that are concrete manifestations of a latent concept and combining them into a single summary measure. For this purpose, MSA conceptualizes each individual item as an error-laden realization of a latent trait called ‘propensity to change’, which describes the willingness of a judicial actor to endorse reform, either in the sense of liberalization or the MEA.

Central to MSA and other models belonging to the family of IRT models is the concept of *scalability*, which assesses whether the proposed items have enough in common for the data to be explained by one underlying, latent trait, hereinafter denoted θ .¹³³ Only items fulfilling specific conditions will be retained: on the one hand, items must be similar enough to be considered components making up the content of the same concept, but on the other hand, they need to be diverse enough to capture nuanced aspects of the concept. Mathematically, this presupposes that the covariances between the item pairs are always positive. Potential items should vary jointly and positively, meaning that as the values in one item increase, the values in the other item must increase as well. This also applies to the correlation coefficient, which essentially is the normalized measurement of the covariance and thus presumes a linear relationship. Therefore, the first step of the empirical analysis is to explore the structure of the data using correlation analysis. For each item, the response categories were ordered from 0 to 1, with higher scores corresponding to a higher position on the attribute scale.

The results displayed by the correlation matrix (Figure 3) strongly suggest that sector-specific liberalization and the MEA may constitute two clearly distinguishable change processes. Even though each variable was coded across all observations in the dataset, only the variables conceptualized as belonging to the process of sector-specific liberalization are strongly positively correlated with one another, as the areas shaded in green indicate. On the contrary, their association with those conceptualized as belonging to the MEA is predominantly negative, shaded in red. What emerges is the image of two contained systems operating according to different, if not opposing, logics. The result points to the internal consistency of the data and suggests that there indeed may be two distinct dimensions.

Next, the automated item selection procedure (AISP) is employed to see if the items can be combined into a continuous scale that measures θ . The AISP will select as many items as possible

¹³³ Klaas Sijsma and Ivo Molenaar, *Introduction to Nonparametric Item Response Theory* (SAGE 2002) 60.

Table 3. Items selected by the AISP

Liberalization Scale	MEA Scale
<ul style="list-style-type: none"> ■ Competence to Grant Exclusive Rights (COMPET) ■ Standard of Attribution (CAUS) ■ MS' Classification as SGEI (SGEI1) ■ Derogation of Art. 106(2) TFEU (SGEI2) ■ Classification as Undertaking (UND) 	<ul style="list-style-type: none"> ■ Choice of Rationale (RATIO) ■ Choice of Legal Test (LTEST) ■ Commission's Choice of Legal Test (ECLTEST) ■ Choice of Methodology (ECON) ■ Classification of Conduct (CLASS) ■ Theory of Harm (HARM) ■ Justification (JUST)

into a scale as long as inter-item correlations are positive and discrimination power, that is, the ability of a scale to differentiate significantly between categorical responses, is sufficient.¹³⁴ Based on the covariances between item pairs, the AISP will calculate the so-called *H* coefficient, also known as *Loevinger's H*.¹³⁵

The procedure showed that almost all items formulated to describe the shift from secluding traditionally state-owned markets to liberalization and de-monopolization are 'ingredients' of the first dimension (Table 3). The *H* coefficient for the first scale is 0.6, indicating an excellent scale ($\alpha = 0.71$, $MS = 0.73$, $SE = 0.06$). It is not surprising that the AISP did not include the POSINT item that showed negative correlations with some of the other items (see Figure 3). This is attributable to the fact that the entire dataset only contains four observations for this variable, reflecting the European Union's preference for negative over positive integration.¹³⁶ Article 106(3) vested the Commission with extensive powers of implementation, enabling it to adopt individual decisions and unilaterally pass directives to open up new markets with immediate effect.¹³⁷ The Commission made extensive use of this possibility in the telecommunications sector, adopting directives on financial transparency of financial relations between Member States and public undertakings,¹³⁸ on terminal equipment,¹³⁹ value-added services,¹⁴⁰ and, ultimately, demanding the elimination of exclusive or special rights in this sector altogether.¹⁴¹ Many of the Commission's legislative

¹³⁴ See Letty Koopman, Bonne Zijstra and L. A. Van der Ark, 'Evaluating Model Fit in Two-Level Mokken Scale Analysis' (2023) 5 Psych 847, 852.

¹³⁵ Jane Loevinger, 'A systematic approach to the construction and evaluation of tests of ability' (1974) 61 Psychological Monographs. The default is $H < 0.3$. If $0.3 \leq H < 0.4$, the scale is considered 'weak', if $0.4 \leq H < 0.5$, 'medium' scale, and if $0.5 \leq H$, 'strong' scale. Mokken suggested using Loevinger's *H* to build a Mokken scale, named after him.

¹³⁶ See Fritz Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in Gary Marks, Fritz Scharpf, Philippe Schmitter and Wolfgang Streeck (eds), *Governance in the European Union* (SAGE 1996).

¹³⁷ Conant (n 12) 101.

¹³⁸ Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings [1980] OJ L 195; later amended by Commission Directive 85/413/EEC of 24 July 1985 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings [1985] OJ L 229.

¹³⁹ Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment [1988] OJ L 131.

¹⁴⁰ Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services [1990] OJ L 192.

¹⁴¹ See e.g., Commission Directive 94/46/EC of 13 October 1994 amending Commission Directives 88/301/EEC and 90/388/EEC in particular with regard to satellite communications [1994] OJ L 268; Commission Directive 95/51/EC

actions based on Article 106(3) were largely upheld by the Court.¹⁴² Despite the potential reach of positive integration, the Commission was increasingly met with resistance from the European Parliament and the Council that objected to its power to act unilaterally and therefore condemned the Commission's legislative instruments as neglecting democratic legitimacy.¹⁴³ Thus, the Commission never replicated its success in the telecommunications sector in other areas such as postal services or energy.

As for the items belonging to the shift towards the MEA, the AISP again identified the majority of variables as manifestations of the latent trait. These items have enough in common to be considered components of the same overarching reform process. The EXEMP, EXEMPOUT, JUSTOUT, JREV, and ACTPOT items were excluded by the AISP due to insufficient response patterns. For the MEA Scale, the H coefficient is weaker with 0.42 but still decent as it surpasses the default threshold of 0.3 ($\alpha = 0.75$, $MS = 0.75$, $SE = 0.05$).

Aside from calculating scalability coefficients, MSA is concerned with goodness of fit. According to Sijtsma and Molenaar, the Mokken scaling model of double monotone homogeneity for polytomous item scores rests on four fundamental assumptions: *unidimensionality* (i), *local independence* (ii), *monotonicity* (iii), and *invariant item ordering* (iv).¹⁴⁴ For the Liberalization Scale, the analysis showed that the model fulfils all model assumptions but local independence if the SGEI1 item is retained. As the SGEI1 item showed a negative correlation with the overall Liberalization Scale (not to be confused with inter-item correlations), better reasons spoke in favour of removing the item (for more details, see Appendix A2). Cronbach's alpha was recalculated to ascertain whether the scale is still reliable, which is the case with an alpha of 0.71, even after removing SGEI1.¹⁴⁵

The MEA Scale met all model assumptions without further ado. For the second scale, alpha was 0.75, and thus, the developed scales are valid and reliable measurement instruments, effectively capturing propensity to change.

Figure 4 shows that the distribution of the predicted factor scores for both dimensions is unimodal and heavily skewed to the right, indicating that the majority of judicial actors exhibit reticent attitudes when it comes to change. Actors promoting change more readily locate very low on both dimensions. The standard error SE is very small for both scales, meaning that the dispersion of the sample mean estimations is close to the true population mean. As Cronbach's alpha is sufficiently high for both dimensions, the scale construction is reliable enough to permit making generalizable predictions based on the experimental data in the sample, which can then be transferred to a larger universe of cases. Consequently, the obtained scales constitute two parsimonious variables that accurately measure judicial attitudes towards change and can, therefore, serve as dependent variables in regression analysis.

of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services [1995] OJ L 256.

¹⁴² Conant (n 12) 104. Some provisions were annulled, but mostly, they did not concern the Commission's power to adopt directives under Article 106(3) TFEU. See e.g., the operative part of Case C-202/88 *France v Commission* [1991] ECR I-01223 largely upholding Commission Directive 88/301/EEC and Joined Cases C-271/90, C-281/90 and C-289/90 *Kingdom of Spain and Others v Commission* [1992] ECR I-05833 upholding Commission Directive 90/388/EEC.

¹⁴³ Perhaps, this political conflict was captured most memorably by the response of a MEP in opposition to the second telecommunications directive who asserted: 'Vous avez juridiquement raison, mais politiquement tort', Debates of the European Parliament, Official Journal of the European Communities, Annex n. 3–381, 115, as cited in Conant (n 12) 102.

¹⁴⁴ Robert Mokken, *A theory and procedure of scale analysis* (De Gruyter 1971).

¹⁴⁵ Even if Cronbach's alpha is not without problems, it is widely used in literature. If alpha is ≥ 0.7 , the scale is reliable enough for inferential statistics. If alpha does not meet the threshold, scales only lend themselves to exploratory analysis. To respond to the shortcomings of Cronbach's alpha, Molenaar and Sijtsma introduced the Molenaar–Sijtsma statistic, here reported as MS . The MS Statistics for both scales indicate reliability.

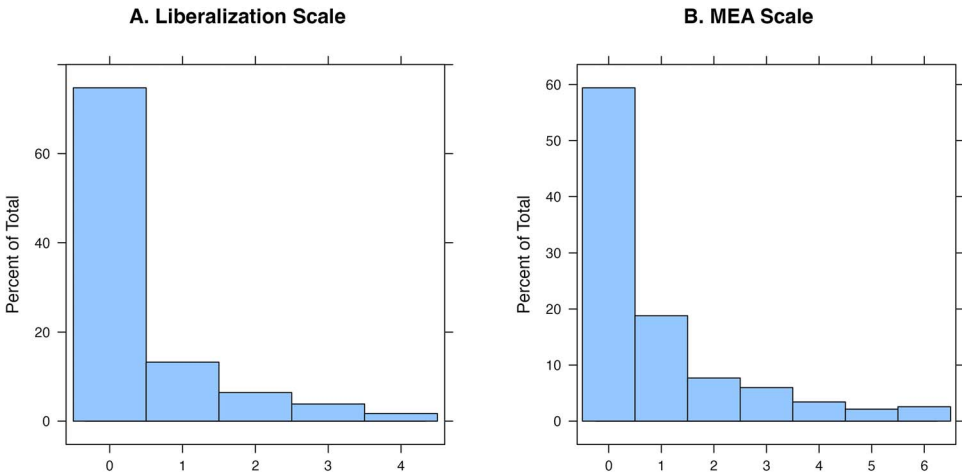


Figure 4. The figure displays histograms of the estimated dimensions measuring judicial attitudes towards sector-specific liberalization and the more economics-based approach to competition law, ordered from no change to more change.

V. THE DETERMINANTS OF SUBSTANTIVE MODERNIZATION

OLS regression is a tool that is apt for establishing whether a sufficiently strong relationship exists between two variables by the proportion of variability in the dependent variable that is explained by an independent variable. MSA is a technique that turns categorical observations into a composite, rank-ordered variable. As the MEA Scale ranges from 0 to 7 and the Liberalization Scale from 0 to 5, it was deemed appropriate to use OLS regression.¹⁴⁶ Stepwise inclusion of predictor variables is used to see whether the results are robust, irrespective of alternative model specifications (Table 4). All model specifications control for year-fixed effects to rule out that the results are driven by temporal trends.

The first three model specifications take the Liberalization Scale as the dependent variable. On the whole, the result of the final specification (Model 3) indicated that there was a collectively significant effect between the type of case, the number of Member State observations, the type of proceeding, as well as positive mentions about European integration where applicable ($F = 6.343$, $p < 2.2 \times 10^{-16}$, $R^2 = .706$). The F-statistic shows that the group of variables included in the model is jointly significant. The p -value is $p < 2.2 \times 10^{-16}$ and is, therefore, below all conventional significance thresholds, implying that the results are unlikely to be driven by some other omitted variable. Moreover, the high value for the R-squared statistic reflects that the model accurately predicts approximately 71 percent of the variation in the dependent variable. Overall, the results are statistically significant (for robustness checks, see Appendix A4).

The marginal effects plots (Figure 5) show the predicted estimates for each of the variables in relation to the values of the Liberalization Scale. One of the variables that was strongly related to change was the ‘Type of Case’ variable ($t = 6.13$, $p = 6.12 \times 10^{-9}$). This composite variable was created by applying principal component analysis (PCA) to two highly correlated predictors: the ‘Area of Competition Law’ and the ‘Nature of the Applicant’ variables. Expectedly, this

¹⁴⁶ See Alexander Robitzsch, ‘Why Ordinal Variables Can (Almost) Always be Treated as Continuous Variables: Clarifying Assumptions of Robust Continuous and Ordinal Factor Analysis Estimation Methods’ (2020) 5 *Frontiers in Education*, doi: 10.3389/educ.2020.589965.

Table 4. Additive OLS models predicting substantive change

	Dependent variable:					
	Liberalization Scale			MEA Scale		
	(1)	(2)	(3)	(4)	(5)	(6)
Fairness and equality	0.01 (0.01)	0.02 (0.01)	0.02 (0.02)	−0.04** (0.02)	−0.05*** (0.02)	−0.07** (0.03)
Type of case	0.44*** (0.06)	0.43*** (0.07)	0.43*** (0.07)			0.03 (0.14)
EU positive	−0.08** (0.04)	−0.09** (0.04)	−0.10** (0.04)			0.07 (0.08)
Right-left	−0.002 (0.005)	−0.002 (0.005)	−0.002 (0.01)		−0.02* (0.01)	−0.02* (0.01)
MS observations		−0.07* (0.04)	−0.07* (0.04)		−0.09 (0.08)	−0.09 (0.08)
Proceeding		0.23* (0.13)	0.24* (0.13)		−0.10 (0.23)	−0.13 (0.24)
Chamber size		0.26 (0.24)	0.26 (0.24)		0.07 (0.42)	0.004 (0.44)
Academia			0.06 (0.14)	0.66** (0.26)	0.63** (0.26)	0.61** (0.26)
AG citation			−0.20 (0.13)	0.66*** (0.23)	0.62*** (0.23)	0.66*** (0.23)
U.S. law			0.02 (0.16)	1.23*** (0.28)	1.25*** (0.28)	1.19*** (0.29)
Business profile			−0.004 (0.17)	0.93*** (0.28)	0.84*** (0.29)	0.86*** (0.29)
Constant	0.52 (0.32)	0.19 (0.39)	0.23 (0.41)	−0.89 (0.62)	−0.82 (0.71)	−0.72 (0.75)
Year-fixed effects	Yes	Yes	Yes	Yes	Yes	Yes
Observations	234	234	234	234	234	234
R ²	0.69	0.70	0.71	0.57	0.58	0.59

Note: Robust standard errors in parentheses. **p* > 0.1; ***p* > 0.05; ****p* > 0.01

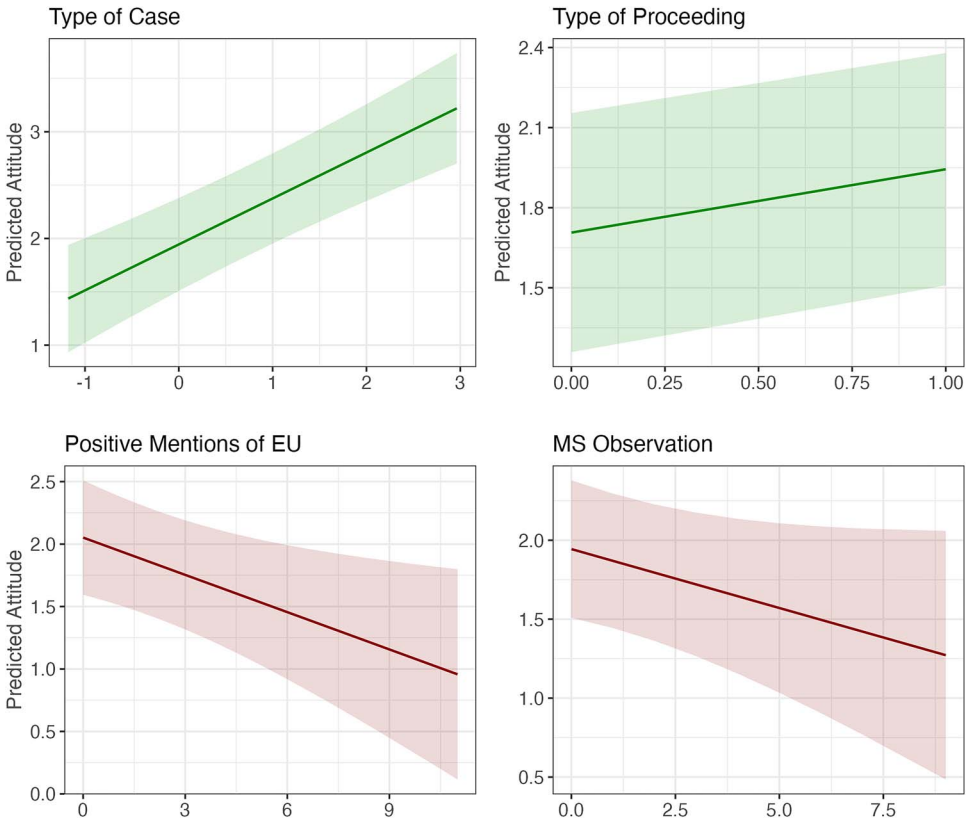


Figure 5. Predicted attitudes about sector-specific liberalization across the range of each statistically significant independent variable. Control variables held at their mean value. Shaded regions represent 90 percent confidence intervals.

result indicates that the process of extending the application of competition law to state-owned enterprises is tied to the identity of the applicant as a Member State. As is also known, the process of sector-specific liberalization was limited to cases that touched upon Article 106 TFEU, either in conjunction with Article 101, Article 102 TFEU, or both. Only cases with a linkage to the State or involving public undertakings held space for change as measured by the Liberalization Scale. The fact that this variable emerges as statistically significant lends face validity to the analysis.

The variable ‘Positive Mentions of EU’ ($t = -2.44$, $p = 0.015548$) also yielded a statistically significant result in the expected direction. The negative relationship between ‘Positive Mentions of EU’ and the Liberalization Scale shows that change in the sense of liberalization is more likely in instances where the election programme of the political party that eventually amassed the highest absolute number of seats in the national parliament made fewer favourable mentions of the EU and European integration.

In conjunction with this, the result for the variable ‘Member State Observations’ ($t = -1.76$, $p = 0.080405$) indicates that each additional Member State involved is associated with a 0.07 unit *decrease* in the propensity to change, holding all else constant. As more Member States get involved by submitting observations in a given case, the propensity of judicial actors to endorse change in the sense of sector-specific liberalization tends to decline slightly.

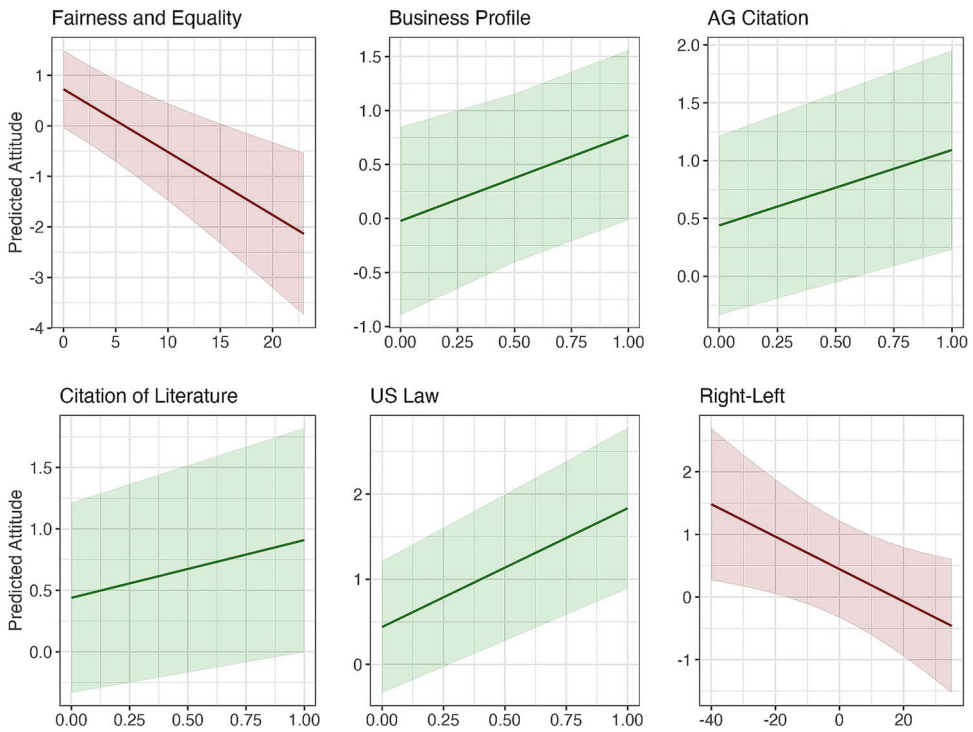


Figure 6. Predicted attitudes about the more economics-based approach to competition law across the range of each statistically significant independent variable. Control variables held at their mean value. Shaded regions represent 90 percent confidence intervals.

The three remaining model specifications pertain to the MEA. The final model specification (Model 6) discloses that the citation of U.S. Law, the citation of academic literature, references to other AGs, the fact that the governing party of the applicant Member State advocates fairness and equality and was left-leaning, as well as the business profile constitute the most important determinants of change ($F = 3.744$, $p = 4.36 \times 10^{-12}$, $R^2 = .586$). This group of predictors is jointly significant, as indicated by the F-statistic. Again, the p -value is below conventional significance thresholds with $p = 4.36 \times 10^{-12}$, and the R -squared statistic expresses that the model accurately predicts approximately 59 percent of the variation in the dependent variable. Therefore, the results of the regression carried out to predict the values of the MEA Scale are statistically significant and allow the conclusion that this modernization process, too, was most likely driven by the contextual factors accounted for.

The marginal effects plots (Figure 6) display the direction of the associations between each predictor and the values of the MEA Scale. Among those predictors that merit closer attention are three that describe the relationship between change actors and the broader antitrust community. In line with hypothesis H5, the profile of the business mattered, given the positive, statistically significant relationship between higher values of change and the ‘Business Profile’ variable ($t = 2.97$, $p = 0.00339$). The same applies to the ‘Citation of U.S. Law’ variable ($t = 4.17$, $p = 4.8 \times 10^{-5}$), which shows a strong positive relationship with higher values of change (H4). The result provides support for the hypothesis that the fact that a judicial actor cites U.S. law is related to higher values of change as ordered on the MEA Scale.

Actors willing to promote change seem to be responsive towards the broader academic discourse. Model specification 6 also predicts a statistically significant effect for the 'Citation of Academic Literature' variable ($t = 2.37$, $p = 0.019124$), as stated by hypothesis H3. The regression models show that whenever an actor sought to push for change, she would be more likely to refer to academic scholarship. As expected, there is also a statistically significant and positive relationship between the MEA Scale and the 'AG Citation' variable ($t = 2.85$, $p = 0.004952$). In line with hypothesis H2, the probability that a judicial actor will push for change in the sense of the MEA was higher when there was a direct reference to an AG opinion.

The first predictor negatively associated with change in the sense of the MEA is 'Fairness and Equality' ($t = -2.2$, $p = 0.028874$), providing further proof for hypothesis H1. The regression analysis shows that change was more likely when the case involved a Member State in which the party programme of the governing party does not promote fairness and equality in society and, therefore, does not seek the expansion of the welfare state. The second predictor showing a negative association is the 'Right-Left' variable ($t = -1.79$, $p = 0.076084$), which accounts for the right-left position of the governing party, considering its policy tendencies over the entire party programme. The variable considers a party's stance on a plethora of topics, including freedom, law and order, human rights, free enterprise, democracy, or nationalization. It computes the difference between the total sums of percentages of 'right emphases' and of 'left emphases' found in a party's manifesto.¹⁴⁷ The coefficient is negative, meaning that whenever the governing party was left-leaning, the judicial actor was more likely to endorse change in the sense of the MEA. While the effect is very weak, the result is consistent with the effect of the 'Fairness and Equality' variable.

To account for alternative explanations, the analysis controls for court-related factors like chamber size and the possible effect of the type of proceeding. For the MEA Scale, none of these control variables was significant, meaning that the effect of the identified predictor variables will persist even after accounting for these additional characteristics.

For the Liberalization Scale in Models 2 and 3, the statistical significance of the 'Type of Proceeding' variable ($t = 1.83$, $p = 0.068366$) is consistent with the underlying dynamics of the liberalization process. In Model 3, direct action cases (TYPROC = 1) are associated with a 0.24-unit higher propensity to change, on average, compared to preliminary references (TYPROC = 0), holding all else constant. To put it in other words, the fact that the case being reviewed is a direct action is positively associated with change in the sense of liberalization, but the effect is small in size. Overall, the statistical analysis affirms that employing the two scales as dependent variables improves predictability and explanatory power by a large margin.¹⁴⁸

VI. IMPLICATIONS

While existing accounts in competition law have discussed change—both radical and incremental—in relation to the institutional design of enforcement agencies around the world,¹⁴⁹ the conditions under which *substantive law* changes have remained underexplored. The essential reason for this is the fact that there has never been an attempt at quantifying these change processes. Adopting an interdisciplinary lens, this empirical study harnesses the potential of

¹⁴⁷ Martin Elff, 'The RiLe Index of Party Ideology—A Reductio' (Polmeth Europe Conference, Hamburg 2022) <<https://www.elff.eu/pdf/Elff-RiLe-Reductio-PolmethEurope-2022.pdf>> accessed 7 August 2025.

¹⁴⁸ Studies predicting human behaviour rarely have *R*-squared values above 25 percent, see The Pennsylvania State University, 'STAT 501: The Coefficient of Determination, *R*²' (2022) <<https://online.stat.psu.edu/stat501/lesson/1/1.5>> accessed 7 August 2025; Jim Frost, 'How to Interpret *R*-squared in Regression Analysis' (*Statistics by Jim*, 16 April 2017) <<https://statisticsbyjim.com/regression/interpret-r-squared-regression/>> accessed 7 August 2025.

¹⁴⁹ Fox (n 91) 477.

quantitative methods to bridge the gap between theory and practice. The findings complement existing accounts in the literature by demonstrating that both substantive reforms constituted self-contained processes driven by diverse factors.

A. Two Self-Contained Processes with Distinct Causes

The question of what goals EU competition law is and should be protecting is much disputed. Rather recently, former Executive Vice President Margrethe Vestager stated that ‘EU competition policy can pursue multiple goals, such as fairness and level-playing field, market integration, preserving competitive processes, consumer welfare, efficiency and innovation, and ultimately plurality and democracy’.¹⁵⁰ This statement affirms what scholars of competition law have long asserted, calling attention to the fact that competition law has the potential to serve a multiplicity of goals—a quality ‘intrinsic to the fabric of competition enforcement’.¹⁵¹ The findings of this study do not question competition law’s *ability* to accommodate a vast range of goals¹⁵²—sometimes mutually reinforcing and dovetailed with each other, sometimes contrary.

The point the present article wishes to make is a different one. Rather than making any value judgment, it asks how different enforcement priorities have *manifested* themselves in the decisional practice of the ECJ and the opinions submitted by the AGs. It seeks to direct attention to the ability of judicial actors to exploit the analytical space that ambiguous competition law provisions provide to interpret them in ways that had not been foreseen initially or to pursue distinct goals.¹⁵³ Competition law’s flexibility thus becomes an instrument for achieving particular policy outcomes. The empirical findings paint the portrait of a mesmerizing discipline that seemingly offers vast possibilities but, in practice, establishes a clear hierarchy of goals.

The findings of the present study show that it is necessary to qualify statements made by existing scholarship. The multiplicity of goals has received much attention recently, with empirically-minded scholars launching a large-scale inquiry into the decisional practice of EU institutions.¹⁵⁴ Tracking the frequency with which each of the various identified goals appears on a year-by-year basis, the authors conclude that ‘no goal has ever been predominant’ and that competition law ‘prioritises the process of competition rather than directly the achievement of a desirable outcome’.¹⁵⁵ Summarizing the most relevant micro-shifts that occurred under each reform process, this study provides novel insights into the relative importance of certain goals in shaping distinct developmental trajectories.

The first substantive reform describes the process of extending the application of EU competition law to public service sectors. The provision of universal services such as energy, telecommunication, and postal services used to be the typical preserve of the State, but with the entry into force of the SEA in 1987, opening up traditionally state-owned markets became a focal point of the Union’s programme to advance market integration. Apart from the nature of the applicant and the area of competition law, which constitute defining case features (see **NATUR** and **ANTIT** variables in Appendix A3), the models predicting change in the sense of sector-specific liberalization identify positive mentions of European integration (**per108** variable) and the number of Member State observations (**MS_OBS** variable) as predictors of change. Thus,

¹⁵⁰ Commission, ‘A Dynamic and Workable Effects-based Approach to Abuse of Dominance’ Competition Policy Brief 1/2023, 1 <https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf> accessed 7 August 2025.

¹⁵¹ Ezrachi (n 8) 59.

¹⁵² For instance, Odudu observes that the consumer welfare standard and the goal of greater market integration concur in most cases, see Okeoghene Odudu, ‘The Wider Concerns of Competition Law’ (2010) 30 OJLS 599–613. In a similar vein, Ibáñez Colomo and Kalintiri suggest understanding the objective of driving market integration as an overarching ‘roof spanning across all areas of EU law’, which does not contradict the consumer welfare aim, see Ibáñez Colomo and Kalintiri (n 7) 331.

¹⁵³ Mahoney and Thelen (n 97) 24.

¹⁵⁴ Stylianou and Iacovides (n 14).

¹⁵⁵ *Ibid.*, 623.

it is possible to conclude that the goal of market integration indeed formed the core of the first substantive modernization.

Once the Single Market had been deemed completed in 1992, history took a turn, and the goal of market integration slowly drifted out of focus.¹⁵⁶ A new era was dawning in the competition law landscape. It is striking that none of the predictor variables that were statistically significant for the first modernization process mattered for the second, and vice versa. Unlike the process of sector-specific liberalization, the MEA was not associated with the variables on positive references to the European Union and on the number of Member State observations. The absence of effects for these predictors shows that the Member State's stance on EU integration had less bearing on a judicial actor's readiness to push for the MEA. Instead, change in the sense of the MEA was mainly associated with references to external sources of authority, such as the citation of U.S. law (**USCIT** variable) and the citation of academic literature (**ACADCIT** variable), as well as references to AG opinions (**AGCIT** variable). Moreover, judicial attitudes towards change were influenced by the fact that the governing party of the applicant Member State advocates fairness and equality (**welfare** variable) and is left-leaning (**rile** variable), as well as the level of diversification in business applicants (**BUSPROF** variable).

While this study accepts that market integration deserves a special place in the EU context, it argues that this popular narrative merits some nuance. Even if there is a possibility of contextual forces spilling over upon future change processes, the statistical results suggest that market integration played a marginal role for the MEA, notwithstanding its general significance for the European Union. Given that the two substantive modernization processes have been propelled by different factors, it is possible to conclude that they indeed constitute two distinct processes. The unambiguous results of the empirical analysis affirm that changing political and economic realities can entail an abrupt shift in focus and call for a reorientation in terms of goals.

B. The Power of Judicial Actors to Advance Selective Goals

Even if the wording of its provisions has remained unchanged, EU competition law has undergone tremendous paradigm shifts over the past decades. The findings of the empirical study advance a deeper understanding of the *strategies* actors can employ to steer the course of the law in inconspicuous ways, moulding it to serve certain purposes over others. Change requires distinct choices regarding which goals to pursue, but most of the time, their political nature escapes our notice.

This is because law harbours an inherent tension between continuity and change visible with regard to both the nature of law and the self-understanding of the judiciary. Law naturally tends to evolve in a path-dependent way, meaning that it has the inherent quality of perpetuating existing doctrines, even after the original conditions that caused them have disappeared.¹⁵⁷ As legal certainty requires judicial actors to move within the confines imposed on them by pre-existing cases to derive their outward legitimacy from it,¹⁵⁸ adhering to established doctrines gives judges a nimbus of objectivity. Judicial activism, on the other hand, is viewed with unease. It has been claimed that '[j]udges are usually incompetent as law-makers, and their inventiveness is incompatible with the values of certainty and predictability'.¹⁵⁹ Any type of modification, no

¹⁵⁶ Gerber (n 13).

¹⁵⁷ Oona Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2000) 86 Iowa Law Review 601. See also Eun Hye Kim, 'The Role of Empirical Legal Research in Competition Law Scholarship' (forthcoming) in Elias Deutscher, Stavros Makris and Justin Lindeboom (eds), *Cambridge Handbook on the Theoretical Foundations of Antitrust and Competition Law*.

¹⁵⁸ See Thomas Hansford and James Spriggs, *The Politics of Precedent on the U.S. Supreme Court* (PUP 2006) 19. For a discussion in legal literature, Justin Lindeboom, 'Rules, Discretion, and Reasoning According to Law: A Dynamic-Positivist Perspective on Google Shopping' (2022) 13 JECLAP 63, 71.

¹⁵⁹ Federico Mancini, 'The Making of A Constitution For Europe' (1989) 26 CMLR 595, 612.

matter how slight, constitutes an adulteration endangering the consistency of the law.¹⁶⁰ This in-built inclination towards stability in the law and the general aversion to judicial inventiveness stand in the way of change. Consequently, judicial actors will calibrate their reasoning in a manner that lets their innovations appear as if they were mere recognitions of the dynamics that had already been present in the case law. And sometimes, they will let actions take the place of words.

The empirical analysis of both modernization processes illustrates these points, uncovering the impact of certain contextual factors whose invisible yet constraining presence informed attitudes towards change. In the case of sector-specific liberalization, higher values on the MEA Scale could be observed whenever the governing party of the applicant Member State exhibited a negative stance on EU integration (**per108** variable). If the governing party's election programme only contained a few positive mentions of the EU or none at all, its score on the EU integration scale was low or negative. This result may suggest that judicial actors sought to promote change, especially when they perceived the government of the applicant Member State to be hostile towards the common integration project, provided that not too many Member States had submitted observations (**MS_OBS** variable). What attracts attention is that by reading the text of their decisions and submissions alone, these hidden dynamics would go unnoticed. As the prospect of extending the reach of competition law to cover state-owned markets was a highly contentious matter, judicial actors could not afford to be too blunt. Even if market integration provided a solid justification for sector-specific liberalization, judicial actors would not risk attracting the sharp eye of critics.

A similar dynamic is revealed for the second modernization process, albeit for different reasons. Critics from the ranks of the broader business and legal community advocated for the MEA because they perceived the EU competition system to be 'by nature of its design, too political'.¹⁶¹ The adoption of the consumer welfare standard represented an opportunity for competition law to assume objectivity only science can provide. The consumer welfare standard offered a homogenous benchmark that made it obligatory to consider economic effects. The name may suggest otherwise, but the MEA is more than just a gradualist increase in harnessing economic theories and methods for antitrust analysis. The MEA brought about a wholesale reconfiguration of the antitrust landscape, with neoclassical economics themselves serving as the goals of EU antitrust law to guide norm design and application.¹⁶² Proponents praised it for bringing the 'right' kind of economics by showing awareness of the actual effects the practice in question has on consumers.¹⁶³ Instead of relying on economic common sense, as was the practice in the first 40 years of its existence, competition analysis now relies on quantitative analysis more extensively, and references to expert economic theory have become commonplace.¹⁶⁴ Moreover, the nature of the evidence required has changed, as most cases now mainly rely on empirical evidence. Synonymous with incorporating scientific knowledge into competition law, the MEA held the promise of increased objectivity, purity, and rigour.¹⁶⁵

The exact opposite impression is evoked when public policy interests feature in competition analysis, as any element normally associated with the exercise of state power will be identified as 'political' and, therefore, corrupting the nature of law. In the EU context, however, this prevailing idea is anything but self-evident. The development of the European competition

¹⁶⁰ See Bruno Latour, *The Making of Law* (Polity 2009) 208.

¹⁶¹ Fox (n 91) 473–488.

¹⁶² Gerber (n 17) 193.

¹⁶³ Lars-Hendrik Röller, 'Economic Analysis and Competition Policy Enforcement in Europe' in Peter Van Bergeijk and Erik Kloosterhuis (eds), *Modelling European Mergers: Theory, Competition Policy and Case Studies* (Edward Elgar 2006) 13–26.

¹⁶⁴ Witt (n 16) 231.

¹⁶⁵ Latour (n 160) 208.

law system was an immediate response to the atrocities of the Second World War and had its philosophical roots in German ordoliberalism.¹⁶⁶ Lessons from history showed that the *laissez-faire* liberalism of the Weimar Republic did not provide sufficient control mechanisms to counter the concentration of economic strength in the hands of a few, which eventually led to the surge of Nazi Germany with its centrally planned economy.¹⁶⁷ Ordoliberalism called for an active role for the government in shaping market processes and found in competition law the most direct means for warding off suppression caused by excessive economic concentration.¹⁶⁸ Not without reason, ordoliberalism emphasizes individual freedom and allows a multitude of goals for competition law alongside economic efficiency. Adding broader societal values to the mix firmly anchors economic decision-making in the sphere of the State.¹⁶⁹

Against this historical background, the results of the empirical analysis are noteworthy. Remarkably, judicial actors have advocated for the remodelling of competition law to reflect mainstream economic thinking, in particular in cases involving Member States where the governing party embraced a socio-economic conception of welfare (**welfare** variable) that takes into account wealth inequalities, labour protection, and fairness.¹⁷⁰ This could be interpreted as a conscious effort to delink and alienate competition law from societal issues. A sanguine view is that such a radical approach helped endow the consumer welfare standard with a clear meaning and framework for principled application, ensuring the uniform application of competition law in the transnational legal system of the EU. More sinister is the view that qualifies these judicial choices as strategic interventions entailing a 'Europeanization' far beyond granting the Commission jurisdiction where there is a Union dimension (or inter-state effect) or requiring national authorities and courts to interpret their domestic laws in light of EU competition law.

It becomes evident that the perceived continuity in the legal framework, the impression of courts being apolitical actors, and the seemingly unassailable cloak of objectivity that economic analysis claims for itself act together to provide the perfect camouflage concealing the strategic nature of the choices judicial actors make. It is, therefore, easy to lose sight of the fact that competition law has always been and continues to be part of a wider political agenda.

C. The Dialectical Relationship between Actors and Context

The analysis also sheds light on the dialectical relationship between context and actors. On the one hand, cross-pressures arising from the institutional set-up as well as third-party actors will shape judicial actors' perceptions of the current context. On the other hand, judicial actors can alter the rules of the game by expanding their own discretion. Put succinctly, context shapes actors, but actors shape context, too. For the first substantive modernization process, the findings of the statistical investigation attest to the politicized nature and sensitivity pertaining to the prospect of regulating sovereign states. The number of Member State observations (**MS_OBS** variable), the nature of the applicant as a Member State, and the fact that a case touched upon Article 106 TFEU (**NATUR** and **ANTIT** variables) had a discernible influence on their responses. For instance, in the context of the liberalization of the telecommunications sector, several Member States had opposed the adoption of a further directive in addition to Directive 88/301/EEC, which the Commission had issued on the legal basis of Article 106(3) TFEU.

¹⁶⁶ Gerber (n 17) 232–236. For a contrasting view see Pinar Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (2009) 29 OJLS 267.

¹⁶⁷ Elias Deutscher and Stavros Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) 11 CLR 181, 186–188.

¹⁶⁸ Gerber (n 17) 168.

¹⁶⁹ *Ibid.*, 177.

¹⁷⁰ Sandra Marco Colino, 'The Antitrust F Word: Fairness Considerations in Antitrust' (2019) Journal of Business Law 329; Eric Posner, *How Antitrust Failed Workers* (OUP 2021).

According to AG Tesauro in *France v Commission*, Directive 88/301/EEC had ‘achieved a certain amount of notoriety’¹⁷¹ as it had given rise to a joint action against the Commission by France, Italy, and the United Kingdom. Regarding the proceedings in *France v Commission*, the AG further noted the ‘Member States’ unwillingness to sit back’ as Belgium, Greece, Italy, and Germany appeared as interveners.¹⁷² In *Albany*, AG Jacobs spoke of a ‘fundamental dilemma’, pointing out that the grant of exclusive rights by the State is structurally geared towards facilitating anticompetitive behaviour.¹⁷³ At the same time, he noted that the wording of the provision, as well as the intention of those who drafted it, does not seem to imply a presumption of illegality. What transpires is that ensuring undistorted competition while paying due respect to the sovereignty of the Member States was no easy feat. In the words of AG Maduro, one is ‘entering dangerous territory’¹⁷⁴ when attempting to strike the right balance.

The centrality of the issue for the project of creating the Single Market and the anxiousness of Member State governments made the AG wary of proposing new directions when the Court had yet to make its intentions known. Following deviant lines would have gone amiss: at around the same time, the internal decision-making process at the EU level had come under fierce criticism¹⁷⁵ and forming a closed unit to protect the new supranational legal order was a priority. Thus, the highly sensitive nature of the subject of state sovereignty explains why the goal of achieving the internal market had to occupy a place of prominence. By invoking this common interest, the Court made certain of its position on the moral high ground, which, in turn, allowed it to hold the reins. The confluence of these particular features seems to have made a lasting impression on the AG.

Where external circumstances and inner-institutional arrangements permit, however, actors of change will be more likely to take the initiative. Exemplary of this capacity is the second modernization process, which describes the shift away from formalistic categories towards more effects-based criteria of assessment. In contrast to the process of opening up state-regulated markets, the introduction of the MEA was marked by diffuse interests. With the achievement of a workable single market, EU competition law was thrust into an ‘identity crisis’¹⁷⁶ and the Court could no longer claim that competition law was primarily an instrument for attaining market integration. Furthermore, the ever-increasing economization of competition law¹⁷⁷ substantially altered the power configurations between the Court and the Commission. The absence of doctrinal guidance from the Court left a vacuum and thus contributed to the AG’s greater willingness to steer the law in the desired direction.

This manifested itself most notably in a significant difference between both substantive modernization processes regarding judicial actors’ willingness to quote external sources of authority. While the MEA was marked by extensive references to AG opinions (**AGCIT** variable), this factor showed no statistically significant effect for the Liberalization Scale. Examples abound to show that references to AG opinions have served the purpose of defending a certain position against opposing views. AG Wathelet, for instance, lengthily recalled previous arguments made by AG Mazák and AG Wahl in *Orange Polska* when he tried to persuade the Court to adopt an effects-based approach to the review of fines.¹⁷⁸ Likewise, the case law on the interpretation

¹⁷¹ Case C-202/88 *France v. Commission* [1991] ECR I-1223, Opinion of AG Tesauro, para. 22.

¹⁷² *Ibid.*

¹⁷³ Case C-67/96 *Albany* [1999] ECR I-5751, Opinion of AG Jacobs, para. 389.

¹⁷⁴ Case C-205/03 P *FENIN* [2005] ECR I-6295, Opinion of AG Maduro, para. 26.

¹⁷⁵ Angus Charles Johnston and Guy Block, *EU Energy Law* (OUP 2012) 10.

¹⁷⁶ Gerber (n 17) 143.

¹⁷⁷ Ezrachi (n 8) 59.

¹⁷⁸ Case C-123/16 P *Orange Polska* [2018] not yet reported, Opinion of AG Wathelet, paras. 98 to 101.

of the by-object category in Article 101 TFEU cases has been a matter of controversy. Before pleading for a strict approach to the concept of anticompetitive object in his submissions in *Cartes Bancaires*, AG Wahl outlined the previous Opinions given on the subject matter by AG Cruz Villalón in *Allianz Hungária* and AG Kokott in *T-Mobile Netherlands*. While AG Cruz Villalón had adopted a restrictive approach which sought to confine findings of restriction of competition by object to the most egregious practices in which a capacity for harmful effects is inherent, AG Kokott had declared herself in favour of a middle-way, stating that the concept should be subject to an interpretation that was neither too broad nor too narrow. In the eyes of AG Wahl, the latter amounted to a 'less clear-cut approach'.¹⁷⁹

Especially the AG stands out as an actor who is highly attuned to her surroundings. She will gauge the political and intellectual mood in search of support for her ideas. In particular, AGs trying to refashion EU competition law along the lines of the U.S. model (**USCIT** variable), which sought to minimize¹⁸⁰ the role of noneconomic aspects (**welfare** variable), made extensive references to academic literature (**ACADCIT** variable). This tendency is also borne out by the discussions surrounding the question of whether a recoupment rule should be accommodated under Article 102 TFEU, as is done in U.S. antitrust. The ECJ eventually decided against it in *France Télécom SA*¹⁸¹ and did not follow AG Mazák, who wrote the Opinion in this case. The AG had cited Korah to shore up his argument that proof of the possibility of recoupment is necessary for the finding of predation.¹⁸² AG Fennelly had undertaken a first foray into this argument in *Compagnie Maritime Belge*, where he reasoned that predatory price-cutting should be prohibited only if the predator can prove the possibility of recoupment.¹⁸³ Interestingly, AG Fennelly, too, had cited Korah.¹⁸⁴

Previous contributions noted that external factors, such as academic writings discussing the goals of competition law, do not seem to exert consistent influence on future cases.¹⁸⁵ In contrast, a closer examination of jurisprudential developments from a psychometric angle using MSA adduced robust evidence pointing towards the special relationship between actors of change and the broader academic community in the context of the MEA. The results also indicate that actors of change thrive under doctrinal uncertainty resulting from a lack of consensus in the academic discourse. Conscious references to similar views expressed in the academic community might give them the necessary space for arguing in favour of change. In the case of the AG, it could even be that she is constantly on the lookout for 'unfinished business'¹⁸⁶ to take care of. Where questions are unsettled and debate is underway, the AG might feel invited to step up as an actor of change by contributing to the debate with an authoritative voice.

VII. CONCLUSION

This article has examined five empirical claims: the claim that the goal of market integration was of particular importance for sector-specific liberalization but not so much for the MEA

¹⁷⁹ Case C-67/13 P *Groupeement des Cartes Bancaires* [2014] (published in the electronic Reports of Cases), Opinion of AG Wahl, para. 65, with reference to footnote 34.

¹⁸⁰ Ezrachi (n 8), 55.

¹⁸¹ Case C-202/07 P *France Télécom SA v Commission of the European Communities* [2009] ECR I-2369, para. 110.

¹⁸² Case C-202/07 P *France Télécom SA v Commission of the European Communities* [2009] ECR I-2369, Opinion of AG Mazák, para. 70.

¹⁸³ Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge* [1998] ECR I-1365, Opinion of AG Fennelly, para. 136.

¹⁸⁴ *Ibid.*, para. 132. Another economically inclined AG who cited Korah is AG Wahl, see Case C-177/16 *Biedriba Autortiesību un komunikācijas konsultāciju aģentūra—Latvijas Autoru apvienība* [2017] (published in the electronic Reports of Cases), Opinion of AG Wahl, para. 127.

¹⁸⁵ See Stylianou and Iacovides (n 14) 638.

¹⁸⁶ This expression is borrowed from Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice Unfinished Business* (CUP 2014).

(H1); the claim that the MEA went hand in hand with explicit references to AG opinions (H2); citations of academic literature (H3); references to U.S. law (H4); and the fact that the conduct under scrutiny was committed by a large and highly diversified business (H5). These contextual factors were hypothesized to have little prominence for the process of sector-specific liberalization. There is significant empirical support for all propositions. Both reforms constituted two self-contained processes linked to a set of distinct contextual factors. The goal of furthering market integration only took centre stage for the process of sector-specific liberalization, whereas the nature of the applicant as a Member State and the Member State's stance on EU integration did not emerge as relevant factors for the MEA. Here, the analysis indeed revealed that references were made significantly more frequently to academic literature and U.S. law, as well as AG opinions. Moreover, the business profile and the fact that the governing party of the applicant Member State advocated fairness and equality mattered. The cumulative effect of these factors had a profound effect on the attitude of judicial actors towards inspiring major reforms.

The findings are valid, reliable, and, most importantly, firmly grounded in existing theoretical work. It is hoped that these novel empirical insights will enrich and refocus the debate on the goals of EU competition law. This discussion is far from being settled, and in the light of newer developments, a host of pressing questions await testing. For instance, it remains open whether the decisional practice of the Commission will change in the future to pursue a multitude of goals simultaneously and to the same extent; whether the Neo-Brandeisian antitrust movement in the United States will also have repercussions for the EU context, causing the pendulum to swing back towards formalism; or whether sustainability concerns will soon rise in prominence in response to the necessity of combatting climate change. What these questions have in common is that they are all of an empirical nature. In this vein, the present study extends an invitation to attend more closely to the institutional conditions under which judicial actors operate when addressing these questions.

Lastly, the empirical methodology employed in this article could assist the Commission in its efforts to draft enforcement documents like guidelines that codify the case law, as well as in its wider enforcement practice. Wholesale change and paradigmatic shifts often require legislators and regulators to adopt a multipronged approach that tackles various issues at the same time. The recent adoption of the Digital Markets Act, the Digital Services Act, the Data Act, the Data Governance Act, and the Artificial Intelligence Act is exemplary of this point. The EU's digital package is expected to transform the analysis of competition law infringements¹⁸⁷ and leaves enforcers with unprecedented levels of regulatory complexity to wade through. The multifaceted nature of jurisprudential change processes makes it difficult to grasp their actual reach and impact. As a dimensionality reduction method, MSA summarizes the information contained in multiple items into a single metric measuring a latent concept. This allows unpacking the dynamics and determinants of jurisprudential change. Translated into a policy tool, modern psychometric scaling methods like MSA would provide the Commission with the opportunity to assess past change experiences when focusing on the present, enhancing its ability to manage the resources it allocates to change without compromising the long-term viability of its policies.

¹⁸⁷ See Thibault Schrepel, *Decoding the AI Act: Implications for Competition Law and Market Dynamics* (2025) [advance online publication] JCLE 1, <<https://doi.org/10.1093/joclec/nha007>>.

APPENDIX

A1. Averages of variables pertaining to the MEA by year



Note: Scatterplots for all items describing the MEA. The plots take the average of all AG opinions (blue dots) issued in the same year. The same applies to ECJ judgments (orange dots). For all variables, missing values (–999) have been removed. Where only one AG opinion or ECJ judgment was rendered in a given year, the dots represent single opinions or judgments and no average values.

A2. Checking Model Fit: Assumptions Underlying the Double Monotonicity Model

The following points reflect on the properties of the model and some measures of model fit.

1. Unidimensionality. The first assumption of unidimensionality requires that all items in a scale measure the same latent trait, denoted as the random variable Θ with realization θ .¹⁸⁸ The responses of all items in the scale must only depend on that latent trait (in this case, “propensity to advocate change” in the sense of a) the process of sector-specific liberalisation and b) the MEA). *Loevinger’s H* coefficient was calculated for each item. For each of the items in the Liberalisation Scale, the item scalability coefficient is greater than 0.4, which indicates strong unidimensionality. For the MEA Scale, the RATIO, LTEST, HARM and JUST items have coefficients indicating strong scalability, whereas the coefficients for the remaining items are weaker, but still above the 0.3 threshold (Table 4). The unidimensionality assumption thus holds.

2. Local Independence. The second assumption of local independence is satisfied when responses to two or more items by the same subject are influenced only by θ , that is, the scale

¹⁸⁸ Sijtsma and Molenaar (n 133).

value of the subject on the latent trait and not by any other aspect of the subject or other test items. Statistically, local independence can be expressed as:

$$P(X_1 = x_1, \dots, X_J = x_J | \theta) = \prod_{j=1}^J P(X_j = x_j | \theta) \quad (\text{A.1})$$

Local independence was assessed using the `check.ca()` method, which estimates the conditional associations among items by computing three indices, namely, W_1 , W_2 , and W_3 .¹⁸⁹ The `check.ca()` method flags the problematic items and item pairs, showing an increased likelihood of violating the local independence assumption.

For the Liberalisation Scale (five items), the conditional association procedure (CAP) flagged three among the ten item pairs to be locally dependent. Specifically, the W_1 index identified positive local dependencies between SGEI1 and CAUS as well as SGEI1 and UND. The W_3 index suggested negative local dependencies between SGEI1 and SGEI2. No local dependence was detected by the W_2 index. This result suggests that after controlling for the effect of θ , there may be other factors influencing judicial actors' responses. The share of problematic item pairs amounts to approximately 30%, which is not negligible. As all flags pertain to the SGEI1 item, which also happens to be the only item negatively correlated with the overall Liberalisation Scale, stronger arguments spoke in favour of removing it.¹⁹⁰ Without the SGEI1 item, the CAP flagged none of the item pairs. For the MEA Scale (seven items), the CAP flagged none of the item pairs to be locally dependent. Thus, the CAP proved effective in producing locally independent seven-item MEA and four-item Liberalisation Scales.

3. Monotonicity. The item step response functions (ISRFs) are monotonically non-decreasing. This means that as θ increases, the probability of scoring at least h on item i increases, or is constant, but cannot decrease in θ . Formally, this assumption is defined as:

$$P_{ih}(\theta) = P(X_i \geq h | \theta), i = 1, \dots, k; \text{ and } h = 0, \dots, m. \quad (\text{A.2})$$

The computations for the investigation of monotonicity were implemented using the `command.summary(check.monotonicity())`, which renders a matrix displaying a summary of the checks of manifest monotonicity. The data analysis supports monotonicity across all items in both scales. Thus, it was possible to confirm non-decreasing patterns over increasing values of the latent trait score for each item. The function also provided Z tests¹⁹¹ results for detecting significant violations of the monotonicity assumption for each item. The number of violations was reported through the function. Results from the ISRFs of the Liberalisation and MEA items revealed no violations of monotonicity in reference to the Z test results. Inspection of the ISRFs showed monotonically non-decreasing patterns in ISRFs of all items on each scale. Thus, the relative ordering of judicial actors in terms of their propensity to promote change as measured on the Liberalisation and MEA Scales in each item was consistent across all the Liberalisation and MEA items.

¹⁸⁹ J. Hendrik Straat, L. A. Van der Ark and Klaas Sijtsma, 'Using Conditional Association to Identify Locally Independent Item Sets' (2016) 12 *Methodology* 117-123. Paul Holland and Paul Rosenbaum, 'Conditional Association and Unidimensionality in Monotone Latent Variable Models' (1986) 14 *Ann. Stat.* 1523-1543.

¹⁹⁰ As local independence is only one out of four assumptions, further advances are needed to appraise the severity of a violation of this assumption for the overall scale construction. It is the researcher's choice whether an item showing local dependence should be retained. See Koopman, Zijstra and Van der Ark (n 134) 852.

¹⁹¹ Sijtsma and Molenaar (n 133).

4. Invariant Item Ordering. This implies that irrespective of the level of the latent trait a test subject exhibits, the probability of her answering a “difficult” item correctly is lower than the probability of her answering an “easier” item correctly. If the assumption of IIO is fulfilled, it can be assumed that a judicial actor with a higher propensity to change is unlikely to opt for an “easier” outcome that denotes no change or is neutral. Likewise, an actor with a resistant attitude will typically not endorse a more “difficult” response that requires her to channel her resources into pushing for change but one that keeps the law as it is.

If for a fixed value θ_0 ,

$$P(X_i \geq x|\theta_0) \geq P(X_j \geq y|\theta_0) \quad (\text{A.3})$$

then

$$P(X_i \geq x|\theta) \geq P(X_j \geq y|\theta) \text{ for all } \theta. \quad (\text{A.4})$$

The rest score method was implemented to test any intersection between any pair of ISRFs and to test for the assumption of IIO.¹⁹² In addition to the item-scalability H_i values and standard errors, Table 4 presents the results from the IIO analyses reporting the number of significant violations. None of the items showed violations, meaning that none of the item pairs of ISRFs intersect. Moreover, standard errors for the scalability coefficients were small, indicating that the estimates are highly accurate.

Table A1. Scales, item scalability coefficients (H_i), standard errors (SE), and invariant item ordering (IIO) for items on the Liberalisation and MEA Scales

	Liberalisation Scale				MEA Scale		
	Item H_i	SE	IIO		Item H_i	SE	IIO
COMPET	.71	.07	0	RATIO	.58	.06	0
CAUS	.61	.08	0	LTEST	.49	.06	0
SGEI2	.62	.09	0	ECON	.34	.07	0
UND	.49	.09	0	CLASS	.31	.07	0
				HARM	.48	.06	0
				JUST	.44	.07	0
				ECLTEST	.31	.06	0

5. Guttman Errors. To validate the two dimensions and assess the response quality, the study also accounts for so-called *Guttman errors*, which occur when a respondent with a higher propensity to advocate change answers an “easy” item wrongly but a “difficult” item correctly. Such errors are deviations from the deterministic *Guttman scalogram*, which is a hypothesis regarding the structure of the data as it assumes that the data is free of errors. IRT models can thus be viewed an extension of the Guttman scalogram, adjusting it to a probabilistic framework and leaving room for measurement error.¹⁹³ With 87% responses for the Liberalisation Scale and 65% for the MEA Scale showing no error, it is possible to conclude that for both scales, the modal value is 0.

¹⁹² Ibid., 91–98.

¹⁹³ Louis Guttman, ‘The basis for Scalogram analysis’ in Samuel Stouffer et al. (eds), *Measurement and Prediction, The American Soldier: Studies in Social Psychology in World War II, Vol IV* (Wiley 1950). See also Wijbrandt Van Schuur, ‘Mokken Scale Analysis: Between the Guttman Scale and Parametric Item Response Theory’ (2003) 11 *Political Analysis* 139.

A3. List of Predictor Variables¹⁹⁴ Used in the OLS Regression

Table A2. List of predictor variables used in the regression models with descriptions

Predictor	Label	Outcomes
Nature of the Applicant	NATUR	NATUR = 0 A private body (undertaking) or trade association; there is no mention of the nature of the applicant. NATUR = 0.25 A natural person; association protecting interests of natural persons (authors, musicians etc.). NATUR = 0.5 One/several public bodies; or there are several applicants and at least one of them is a public body; or entities engaged in public-private partnerships. NATUR = 1 Member State government or institution.
Area of Law	ANTIT	ANTIT = 0 The case primarily touches upon Article 101 TFEU. ANTIT = 1 The case primarily touches upon Article 102 TFEU. ANTIT = 2 The case deals with both Article 101 and 102 TFEU. ANTIT = 3 The case deals with Article 102 in conjunction with Article 106 TFEU. ANTIT = 4 The case deals with Article 101, 102 and Article 106 TFEU. ANTIT = -999 (na) The case is not an antitrust case.
Business Profile	BUSPROF	BUSPROF = 0 It is impossible to determine the profile of the business involved; or the applicant is not a business (e.g., trade association, NGOs etc.). BUSPROF = 0.5 The business is not highly diversified and thus, unlikely to be a repeat offender. BUSPROF = 1 The business is a highly diversified, multi-product firm and thus, likely to be a serial colluder and repeat offender.
Type of Proceeding	TYPROC	TYPROC = 0 Direct Action (Annulment Proceedings against EC decisions, GC judgments, Actions against MS etc.). TYPROC = 1 Preliminary Reference Proceeding.
Chamber Size	CHAMB	CHAMB = 0 The chamber size is impossible to determine (e.g., the document/information is unavailable). CHAMB = 0.5 The case is assigned to a smaller chamber. CHAMB = 1 The case is assigned to the Grand Chamber; or the Court decides to sit in full (plenary session).
AG Citation	AGCIT	AGCIT = 0 The AG makes no reference to other AsG; the Court makes no reference to AG submissions. AGCIT = 1 The AG refers to other AsG; the Court refers to AG submissions.
Citation of Literature	ACADCIT	ACADCIT = 0 The AG/Court makes no reference to academic contributions (default). ACADCIT = 1 The AG/Court refers to academic contributions.
US Law	USCIT	USCIT = 0 The AG/Court makes no reference to U.S. law (default) or explicitly argues that US law should not be considered. USCIT = 1 The AG/Court refers to U.S. law.
EU Positive*	per108	European Community/Union: Positive Favourable mentions of European Community/Union in general. May include the: • Desirability of the manifesto country joining (or remaining a member); • Desirability of expanding the European Community/Union; • Desirability of increasing the ECs/EUs competences; • Desirability of expanding the competences of the European Parliament

Continued

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¹⁹⁴ Note: For an in-depth description of the first eight variables, see Kim (n 56).

Table A2. Continued

Predictor	Label	Outcomes
Right–Left*	rile	Right–left position of party: policy tendencies over entire party programme see Michael Laver and Ian Budge (eds), <i>Party Policy and Government Coalitions</i> (The MacMillan Press 1992). (per104 + per201 + per203 + per305 + per401 + per402 + per407 + per414 + per505 + per601 + per603 + per605 + per606)–(per103 + per105 + per106 + per107 + per403 + per404 + per406 + per412 + per413 + per504 + per506 + per701 + per202).. Missing information (e.g., if progtype = 99) per503 + per504. Missing information/not applicable (e.g., if progtype = 99)
Fairness and Equality*	welfare	Equality: Positive (per503) Concept of social justice and the need for fair treatment of all people. This may include: <ul style="list-style-type: none">• Special protection for underprivileged social groups;• Removal of class barriers;• Need for fair distribution of resources;• The end of discrimination (e.g. racial or sexual discrimination). Welfare State Expansion (per504) Favourable mentions of need to introduce, maintain or expand any public social service or social security scheme. This includes, for example, government funding of: <ul style="list-style-type: none">• Health care• Childcare• Elder care and pensions• Social housing <i>Note: This category excludes education.</i>
Member State Observations**	MS_OBS	MS_Observations (positive integer).

*Adopted from the Manifesto Project Dataset 2024a. For the codebook and variable descriptions, see Andrea Volkens et al., *The Manifesto Data Collection*. Manifesto Project (MRG/CMP/MARPOR). Version 2024a. Berlin: Wissenschaftszentrum Berlin für Sozialforschung (WZB)/Göttingen: Institut für Demokratieforschung (IfDem). https://manifesto-project.wzb.eu/download/data/2024a/codebooks/codebook_MPDataset_MPDS2024a.pdf **Based on data made available by the IUROPA Project, see Fjelstul, Joshua, Daniel Naurin, Stein Arne Brekke, and Silje Synnøve Lyder Hermansen. 2024. ‘The IUROPA CJEU Database Platform (v2.00.00)’, The Court of Justice of the European Union (CJEU) Database, IUROPA, <https://www.iuropa.pol.gu.se/>.

A4. Robustness Check: Regression Results

Robustness can be defined in various ways. Neumayer and Plümper define robustness as stability of effects for the quantities of interest from the baseline to robustness models (see Eric Neumayer and Thomas Plümper, *Robustness Tests for Quantitative Research* (CUP 2017) 36). To assess the robustness of the regression results, the np_robust() function in the DAMisc¹⁹⁵ package was used.

Table A3. Robustness test results

Liberalisation Scale		MEA Scale	
Variable Name	Robustness Score	Variable Name	Robustness Score
Type of Case	0.933386	Right–Left	0.934667
MS Observations	0.944080	Fairness and Equality	0.501772
EU Positive	0.924136	Academia	0.948398
Type of Proceeding	0.948404	AG Citation	0.945679
		Business Profile	0.933162
		US Law	0.943822

¹⁹⁵ David Armstrong, ‘DAMisc: Dave Armstrong’s Miscellaneous Functions’ (2024) R package version 1.9. available at <<https://github.com/davidaarmstrong/damisc>> accessed 7 August 2025.

For the Liberalisation Scale model, specifications 1 and 3 were compared, and for the MEA Scale model, specifications 4 and 6 were compared. Except for “Fairness and Equality”, all predictor variables show very high robustness scores. The results for this predictor are therefore more sensitive to error. Nonetheless, the results are still robust according to Leamer and Leonard (see Edward Leamer and Herman Leonard, ‘Reporting the Fragility of Regression Estimates’ (1983) 65 *The Review of Economics and Statistics* 306-317) as the regression coefficient estimates for both variables have the same sign and significance across a wide range of alternative models. This indicates that the models do not suffer from misspecification. Furthermore, all model specifications report robust standard errors to account for the effect of possible outliers in the data. The removal of outliers had no discernible effect.